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UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior ------ Bruce Babbitt

Office of Hearings and Appeals - Barry Hill

Office of the Solicitor ----- John D. Leshy

INDEX-DIGEST

JANUARY 1990 - DECEMBER 1994

This index-digest covers all published and unpublished decisions and opinions, by their headnotes and legal cites, of the Department of the Interior from January 1, 1990 to December 31, 1994, rendered in the Office of Hearings and Appeals (OHA), Arlington, VA, and in the Office of the Solicitor, Interior Building, 18th and C Streets, N.W., Washington, D.C. 20240.

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Editor: Rachael Cubbage

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SYMBOLS

AIRFA	----	American Indian Religious Freedom Act of 1978
ALJ	----	Administrative Law Judge
ANCSA	----	Alaska Native Claims Settlement Act
ANCAB	----	Alaska Native Claims Appeal Board
ANILCA	----	Alaska National Interest Lands Conservation Act
APA	----	Administrative Procedure Act
BIA	----	Bureau of Indian Affairs
BLM	----	Bureau of Land Management
CFR	----	Code of Federal Regulations
DOI	----	Department of the Interior
EA	----	Environmental Assessment
EAJA	----	Equal Access to Justice Act
EIS	----	Environmental Impact Statement
EPA	----	Environmental Protection Agency
ESA	----	Endangered Species Act
ESC	----	Endangered Species Committee
FAR	----	Federal Acquisition Regulation
FLPMA	----	Federal Land Policy and Management Act of 1976
FONSI	----	Finding of No Significant Impact
(US)FS	----	United States Forest Service
FWS	----	Fish and Wildlife Service
IBCA	----	Interior Board of Contract Appeals
IBIA	----	Interior Board of Indian Appeals
IBLA	----	Interior Board of Land Appeals
IBMA	----	Interior Board of Mine Operations Appeals
IBSMA	----	Interior Board of Surface Mining and Reclamation Appeals
IIM	----	Individual Indian Money
IMLA	----	Indian Mineral Leasing Act of 1938
IRA	----	Indian Reorganization Act
M	----	Solicitor's Opinion
MMS	----	Mineral Management Service
NPS	----	National Park Service
OHA	----	Office of Hearings and Appeals
OSM(RE)	----	Office of Surface Mining Reclamation and Enforcement
SEC	----	Office of the Secretary
SMCRA	----	Surface Mining Control and Reclamation Act of 1977
U.S.C.	----	United States Code

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On page 126, the first column, second headnote, Bolling Construction Co. & Bob Bolling, 125 IBLA 303 (Mar. 16, 1993) groups with the first column, third headnote, Anadarko Petroleum Corp., 122 IBLA 141 (Feb. 3, 1992) on page 125.

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Hiko Bell Mining & Oil Co., 93 IBLA 143 (1986); sustained as modified, (On Recon.), 100 IBLA 371, 95 I.D. 1 (1988).

Holbeck, Halvor F., A-30376 (Dec. 2, 1965); overruled, 79 I.D. 416 (1972).

Hulsman, Lorinda L., 32 IBLA 280 (1977); overruled, James R. Hensher, 85 IBLA 343, 92 I.D. 140 (1985).

Hunt, Emily B., 23 IBLA 205 (1976); vacated, (On Recon.), 64 IBLA 304 (1982).

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Keating Gold Mining Co., 52 L.D. 671 (1929); overruled in part, Arizona Public Service Co., 5 IBLA 137, 79 I.D. 67 (1972).

Keller, Herman A., 14 IBLA 188, 81 I.D. 26 (1974); distinguished, Robert E. Belknap, 55 IBLA 200 (1981).

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Kern County Land Co. (On Recon.), IA-0168748, IA-0170927, & IA-0170928; approved by Under Secretary Carver, Oct. 25, 1965; not followed to extent inconsistent with this opinion.

Kerr-McGee Nuclear Corp., 41 IBLA 197 (1979); rev'd, (On Recon.), 43 IBLA 348 (1979).

Kight, W. Verne, 47 IBLA 351 (1980); rev'd in part, (On Recon.), 61 IBLA 216 (1982).

Konukpeok, Nora E., 23 IBLA 86 (1975); vacated, (On Recon.), 60 IBLA 394 (1981).

L. A. Melka Marine Construction & Diving Co., Inc., IBCA-1511-9-81, 90 I.D. 322 (1983); vacated & appeal dismissed, (On Recon.), IBCA-1511-9-81, 90 I.D. 491 (1983).

Land Classification State of California, A-31022 (Aug. 14, 1968 & Jan. 23, 1969); overruled to extent inconsistent, A-31022 (Oct. 14, 1969); as amended, Oct. 27, 1969.

Layne & Bowler Export Corp., IBCA-245, 68 I.D. 33 (1961); overruled insofar as it conflicts, Schweigert, Inc. v. U.S., Ct. Cl. No. 26-66 (Dec. 15, 1967), & Galland-Henning Mfg. Co., IBCA-34-12-65 (Mar. 29, 1968).

Liability of Indian Tribes for State Taxes Imposed on Royalty Received From Oil & Gas Leases, 58 I.D. 535 (1943); superseded to extent inconsistent, Solicitor's Opinion, M-36896, 84 I.D. 905 (1977).

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Liss, Merwin E., 67 I.D. 385 (1960); overruled, Arthur E. Meinhart, 11 IBLA 139, 80 I.D. 395 (1973).

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Luke, Louise, 22 IBLA 388 (1975); vacated, (On Recon.), 60 IBLA 399 (1981).

Luse, Jeanette L., 61 I.D. 103 (1953); distinguished, Richfield Oil Corp., 71 I.D. 243 (1964).

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Marathon Oil Co., 94 IBLA 78 (1986); vacated in part, (On Recon.), 103 IBLA 138 (1988).

Martin, Wilbur, Sr., A-25862 (May 31, 1950); overruled to extent inconsistent, U.S. v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981).

McMurtrie, Nancy, 73 IBLA 247 (1983); overruled to extent inconsistent, Shaw Resources, Inc., 79 IBLA 153, 91 I.D. 122 (1984).

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Merritt-Chapman & Scott Corp., IBCA-257 (June 22, 1961); distinguished, IBCA-274 (Sept. 15, 1961).

Mertz, Dennis J., 43 IBLA 302 (1979); overruled to extent inconsistent, Harvey A. Clifton, 60 IBLA 29 (1981).

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Miller, Duncan, 6 IBLA 283 (1972); overruled to extent inconsistent, Jones-O'Brien, Inc., 85 I.D. 89 (1978).

Mingo Oil Producers, 94 IBLA 384 (1986); vacated, (On Recon.), 98 IBLA 133 (1987).

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Nat'l Livestock Co., I.G.D. 55 (1938); overruled, U.S. v. Maher, 5 IBLA 209, 79 I.D. 109 (1972).

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Opinion of Assoc. Solicitor for Indian Affairs, M-36756 (Oct. 8, 1968); vacated as to conflict, Solicitor's Opinion, M-36756 (Supp.) (Nov. 18, 1971).

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Opinion of Deputy Ass't Secy (Dec. 2, 1966); superseded to extent inconsistent, Solicitor's Opinon, M-36896, 84 I.D. 905 (1977).

Opinion of Secy, M-36733, 75 I.D. 147 (1968); vacated, Solicitor's Opinion, M-36733 (Supp.), 76 I.D. 69 (1969).

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Opinion of Solicitor, M-27690 (June 15, 1934); overruled to extent of conflict, Solicitor's Opinion, M-36936, 88 I.D. 586 (1981).

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Opinion of Solicitor, M-34326, 59 I.D. 147 (1945); overruled in part, Solicitor's Opinion, M-36887, 84 I.D. 72 (1977).

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Opinion of Solicitor, M-36241 (Sept. 22, 1954); overruled as far as inconsistent, Solicitor's Opinion, M-36907, 85 I.D. 433 (1978).

Opinion of Solicitor, M-36410 (Feb. 11, 1957); overruled to extent of conflict, Solicitor's Opinion, M-36936, 88 I.D. 586 (1981).

Opinion of Solicitor, M-36429, 64 I.D. 393 (1957); no longer followed, B. E. Burnaugh, A-28340 (Supp.), 67 I.D. 366 (1960).

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Opinion of Solicitor, M-36456, 64 I.D. 435 (1957); not followed to extent it conflicts with these views, Solicitor's Opinion, M-36456 (Supp.), 76 I.D. 14 (1969).

Opinion of Solicitor, M-36463, 64 I.D. 351 (1957); overruled, Solicitor's Opinion, M-36706, 74 I.D. 165 (1967).

Opinion of Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, Emily K. Connell, A-29176, 70 I.D. 159 (1963).

Opinion of Solicitor, M-36531 (Oct. 27, 1958) & M-36531 (Supp.) (July 20, 1959); overruled, Solicitor's Opinion, M-36629, 69 I.D. 110 (1962).

Opinion of Deputy Solicitor, M-36562 (Aug. 21, 1959); overruled, Solicitor's Opinion, M-36911, 86 I.D. 151 (1979).

Opinion of Solicitor, M-36613, 68 I.D. 433 (1961); distinguished & limited, Solicitor's Opinion, M-36666, 72 I.D. 245 (1965).

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Opinion of Solicitor, M-36886, 84 I.D. 1 (1977); overruled, Solicitor's Opinion, M-36908, 86 I.D. 3 (1979).

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Phebus, Clayton, 48 L.D. 128 (1921); overruled so far as in conflict, 50 L.D. 281 (1924); overruled to extent inconsistent, Emily K. Connell, A-29176, 70 I.D. 159 (1963).

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3413	----------	115 IBLA 304 (Aug. 7, 1990)
3414	----------	117 IBLA 230 (Dec. 21, 1990)

TITLE 16:

sec.	6	----------	123 IBLA 27, 99 I.D. 55 (1992)
	90c-1(b)	----------	112 IBLA 312 (Jan. 10, 1990)
	251	----------	20 IBIA 143 (July 17, 1991)
	410hh-5	----------	125 IBLA 335 (Mar. 29, 1993)
			M-36972, 100 I.D. 163 (1993)
	410hh(7)	----------	117 IBLA 247 (Jan. 9, 1991)
			118 IBLA 204 (Mar. 6, 1991)
			125 IBLA 335 (Mar. 29, 1993)
	410hh(10)	----------	125 IBLA 235 (Feb. 11, 1993)
	431	----------	M-36972, 100 I.D. 163 (1993)
	460aa	----------	131 IBLA 48, 101 I.D. 321 (1994)
	460aa-9	----------	131 IBLA 48, 101 I.D. 321 (1994)
	460dd-2(a)	----------	112 IBLA 312 (Jan. 10, 1990)
	460ff	----------	10 OHA 1 (Apr. 27, 1993)
			10 OHA 20 (May 18, 1993)
	460l-4-11	----------	M-36974, 100 I.D. 195 (1993)
	460l-6a(c)	----------	127 IBLA 145 (Aug. 25, 1993)
	460l-8	----------	M-36974, 100 I.D. 195 (1993)
	460l-18(a)	----------	M-36967, 97 I.D. 32 (1989)
	460mm-1(a)	----------	129 IBLA 158 (Apr. 20, 1994)
	460mm-1(b)	----------	114 IBLA 216 (Apr. 25, 1990)
	460mm-4(b)	----------	112 IBLA 312 (Jan. 10, 1990)
	460mm(a)	----------	114 IBLA 216 (Apr. 25, 1990)
	460q-5	----------	112 IBLA 312 (Jan. 10, 1990)
	460uu-41	----------	129 IBLA 158 (Apr. 20, 1994)
			129 IBLA 351 (June 6, 1994)
	460v-4	----------	112 IBLA 312 (Jan. 10, 1990)
			128 IBLA 99 (Dec. 20, 1993)
	460 1-6a	----------	124 IBLA 67 (Sept. 2, 1992)
	469-469c-2	----------	118 IBLA 381 (Mar. 15, 1991)
	470	----------	129 IBLA 158 (Apr. 20, 1994)
	470aa	----------	129 IBLA 158 (Apr. 20, 1994)
	470aa-470mm	--------	26 IBIA 249 (Sept. 28, 1994)
	470f	----------	129 IBLA 1 (Mar. 14, 1994)
	470aa	----------	127 IBLA 145 (Aug. 25, 1993)
	470aa-470ll	--------	114 IBLA 308 (May 14, 1990)
	470f	----------	118 IBLA 381 (Mar. 15, 1991)
			124 IBLA 267 (Nov. 3, 1992)
			128 IBLA 126 (Dec. 22, 1993)
	470ii	----------	114 IBLA 308 (May 14, 1990)
	485	----------	120 IBLA 187 (July 29, 1991)
			124 IBLA 104 (Sept. 17, 1992)
	520	----------	121 IBLA 174 (Oct. 31, 1991)
	528-531	----------	125 IBLA 170 (Feb. 5, 1993)

544-544p ---------- 119 IBLA 367 (June 21, 1991)
544g(d) ---------- 119 IBLA 367 (June 21, 1991)
544g(d)(5) --------- 119 IBLA 367 (June 21, 1991)
577 ---------- 125 IBLA 247 (Feb. 11, 1993)
583 ---------- 20 IBIA 143 (July 17, 1991)
583-583i ---------- 20 IBIA 143 (July 17, 1991)
583b ---------- 20 IBIA 143 (July 17, 1991)
583f ---------- 20 IBIA 143 (July 17, 1991)
607a ---------- M-36911 (Supp. I), 100 I.D. 103 (1993)
615a ---------- M-36911 (Supp. I), 100 I.D. 103 (1993)
618(a)(1) ---------- 115 IBLA 359 (Aug. 14, 1990)
618(a)(5)(A) ------- 115 IBLA 359 (Aug. 14, 1990)
661 et seq. -------- M-36967, 97 I.D. 32 (1989)
668-668d ---------- 126 IBLA 48 (Apr. 14, 1993)
M-36967, 97 I.D. 32 (1989)
668dd ---------- M-36967, 97 I.D. 32 (1989)
668dd(a) ---------- 114 IBLA 284 (May 9, 1990)
670 ---------- 119 IBLA 332 (June 18, 1991)
670 et seq. -------- 124 IBLA 67 (Sept. 2, 1992)
670g ---------- 119 IBLA 332 (June 18, 1991)
125 IBLA 15 (Dec. 17, 1992)
670h ---------- 125 IBLA 15 (Dec. 17, 1992)
703 ---------- 116 IBLA 355 (Nov. 5, 1990)
126 IBLA 48 (Apr. 14, 1993)
703-708 ---------- M-36967, 97 I.D. 32 (1989)
709a-711 ---------- M-36967, 97 I.D. 32 (1989)
715 et seq. -------- M-36974, 100 I.D. 195 (1993)
715d ---------- M-36967, 97 I.D. 32 (1989)
715s ---------- 114 IBLA 284 (May 9, 1990)
742f(a)(4) --------- M-36967, 97 I.D. 32 (1989)
792-828 ---------- 9 OHA 134 (Mar. 19, 1992)
810 ---------- M-36969, 97 I.D. 54 (1989)
818 ---------- 112 IBLA 273 (Jan. 4, 1990)
115 IBLA 301 (Aug. 6, 1990)
119 IBLA 301 (June 11, 1991)
123 IBLA 109 (May 18, 1992)
125 IBLA 104 (Jan. 12, 1993)
130 IBLA 338 (Sept. 13, 1994)
131 IBLA 44 (Oct. 12, 1994)
825 ---------- M-36969, 97 I.D. 54 (1989)
1006 ---------- 118 IBLA 83, 98 I.D. 38 (1991)
1131-1136 ---------- 124 IBLA 7 (Aug. 13, 1992)
1131-1140 ---------- 131 IBLA 138 (Oct. 31, 1994)
1131(c) ---------- 123 IBLA 68 (May 11, 1992)
125 IBLA 175, 100 I.D. 14 (1993)
1131(d) ---------- 125 IBLA 175, 100 I.D. 14 (1993)
1132(a) ---------- 122 IBLA 297 (Mar. 9, 1992)
1133 ---------- 131 IBLA 48, 101 I.D. 321 (1994)
1133(b) ---------- 124 IBLA 7 (Aug. 13, 1992)
1133(b)(2)(B) ------- 131 IBLA 7 (Sept. 22, 1994)

	131 IBLA 138 (Oct. 31, 1994)
1133(c) ----------	131 IBLA 7 (Sept. 22, 1994)
	131 IBLA 138 (Oct. 31, 1994)
1133(d)(3) ----------	115 IBLA 4 (May 30, 1990)
	122 IBLA 177 (Feb. 10, 1992)
	122 IBLA 297 (Mar. 9, 1992)
	124 IBLA 374 (Dec. 10, 1992)
	128 IBLA 266 (Mar. 10, 1994)
1133(d)(4) ----------	116 IBLA 230 (Oct. 16, 1990)
1134(a) ----------	124 IBLA 7 (Aug. 13, 1992)
1134(b) ----------	128 IBLA 266 (Mar. 10, 1994)
1241 ----------	124 IBLA 67 (Sept. 2, 1992)
1244(e)-(f) ---------	129 IBLA 158 (Apr. 20, 1994)
1246(h)(2) ----------	116 IBLA 317 (Oct. 29, 1990)
1271 ----------	124 IBLA 38 (Aug. 26, 1992)
1273 ----------	123 IBLA 96 (May 12, 1992)
1273(b)(1) ----------	114 IBLA 8, 97 I.D. 125 (1990)
1274 ----------	123 IBLA 96 (May 12, 1992)
1274(a) ----------	119 IBLA 388 (July 3, 1991)
	123 IBLA 96 (May 12, 1992)
1274(a)(1) ----------	123 IBLA 96 (May 12, 1992)
1274(a)(13) ---------	123 IBLA 96 (May 12, 1992)
1274(a)(14) ---------	123 IBLA 96 (May 12, 1992)
1274(a)(15) ---------	123 IBLA 96 (May 12, 1992)
1274(a)(21) ---------	114 IBLA 8, 97 I.D. 125 (1990)
1274(a)(95) ---------	131 IBLA 223 (Nov. 17, 1994)
1274(b) ----------	119 IBLA 388 (July 3, 1991)
	123 IBLA 96 (May 12, 1992)
1274(d) ----------	129 IBLA 158 (Apr. 20, 1994)
	129 IBLA 351 (June 6, 1994)
1274(d)(1) ----------	131 IBLA 223 (Nov. 17, 1994)
1276 ----------	123 IBLA 96 (May 12, 1992)
1276(a) ----------	112 IBLA 293 (Jan. 9, 1990)
	124 IBLA 247 (Nov. 2, 1992)
1276(a)(13) ---------	119 IBLA 388 (July 3, 1991)
1276(a)(99) ---------	125 IBLA 250 (Feb. 11, 1993)
1276(d) ----------	128 IBLA 52 (Dec. 2, 1993)
1278 ----------	127 IBLA 211 (Sept. 14, 1993)
1278(a) ----------	131 IBLA 223 (Nov. 17, 1994)
1278(b) ----------	112 IBLA 293 (Jan. 9, 1990)
	124 IBLA 247 (Nov. 2, 1992)
1280 ----------	123 IBLA 96 (May 12, 1992)
1281(a) ----------	114 IBLA 8, 97 I.D. 125 (1990)
	131 IBLA 223 (Nov. 17, 1994)
1281(c) ----------	124 IBLA 67 (Sept. 2, 1992)
1283(a) ----------	112 IBLA 293 (Jan. 9, 1990)
1283(b) ----------	114 IBLA 8, 97 I.D. 125 (1990)
1331-1340 ----------	117 IBLA 142 (Dec. 11, 1990)
	117 IBLA 208 (Dec. 21, 1990)
	121 IBLA 47 (Oct. 22, 1991)
	130 IBLA 45 (July 12, 1994)
1332(b)(2) ----------	124 IBLA 231 (Oct. 28, 1992)

1332(b)(2)(B) -------	126 IBLA 371 (June 30, 1993)
1332(f) ----------	128 IBLA 370 (Mar. 11, 1994)
	131 IBLA 175 (Nov. 2, 1994)
1333 ----------	127 IBLA 325 (Oct. 14, 1993)
1333(a) ----------	128 IBLA 370 (Mar. 11, 1994)
	131 IBLA 175 (Nov. 2, 1994)
1333(b) ----------	128 IBLA 370 (Mar. 11, 1994)
1333(b)(2) ----------	128 IBLA 370 (Mar. 11, 1994)
	131 IBLA 175 (Nov. 2, 1994)
1333(b)(2)(B) -------	130 IBLA 45 (July 12, 1994)
1333(c) ----------	126 IBLA 371 (June 30, 1993)
	130 IBLA 45 (July 12, 1994)
1332(f) ----------	116 IBLA 239 (Oct. 16, 1990)
	117 IBLA 4 (Nov. 20, 1990)
	117 IBLA 208 (Dec. 21, 1990)
	118 IBLA 20 (Feb. 15, 1991)
	118 IBLA 63 (Feb. 22, 1991)
	122 IBLA 290 (Mar. 5, 1992)
	124 IBLA 231 (Oct. 28, 1992)
	128 IBLA 150 (Jan. 13, 1994)
1332(f)(1) ----------	117 IBLA 208 (Dec. 21, 1990)
1332(f)(2) ----------	117 IBLA 208 (Dec. 21, 1990)
1333 ----------	117 IBLA 208 (Dec. 21, 1990)
	118 IBLA 63 (Feb. 22, 1991)
	128 IBLA 150 (Jan. 13, 1994)
1333(a) ----------	128 IBLA 150 (Jan. 13, 1994)
1333(b) ----------	116 IBLA 239 (Oct. 16, 1990)
	117 IBLA 4 (Nov. 20, 1990)
	118 IBLA 20 (Feb. 15, 1991)
	122 IBLA 290 (Mar. 5, 1992)
	124 IBLA 231 (Oct. 28, 1992)
1333(b)(1) ----------	117 IBLA 208 (Dec. 21, 1990)
	118 IBLA 20 (Feb. 15, 1991)
1333(b)(2) ----------	116 IBLA 239 (Oct. 16, 1990)
	117 IBLA 4 (Nov. 20, 1990)
	117 IBLA 208 (Dec. 21, 1990)
	118 IBLA 20 (Feb. 15, 1991)
	118 IBLA 63 (Feb. 22, 1991)
	122 IBLA 290 (Mar. 5, 1992)
	128 IBLA 150 (Jan. 13, 1994)
1333(b)(2)(B) -------	121 IBLA 47 (Oct. 22, 1991)
	126 IBLA 28 (Apr. 13, 1993)
	126 IBLA 158 (May 10, 1993)
	126 IBLA 261 (June 2, 1993)
1333(b)(2)(i) -------	117 IBLA 208 (Dec. 21, 1990)
1333(b)(2)(ii) ------	117 IBLA 208 (Dec. 21, 1990)
1333(b)(2)(iv) ------	117 IBLA 208 (Dec. 21, 1990)
1333(b)(2)(B) -------	114 IBLA 263 (May 9, 1990)
	115 IBLA 59 (June 12, 1990)
	117 IBLA 134 (Dec. 4, 1990)
	121 IBLA 47 (Oct. 22, 1991)
	126 IBLA 28 (Apr. 13, 1993)

1333(c) ---------- 114 IBLA 263 (May 9, 1990)
115 IBLA 59 (June 12, 1990)
117 IBLA 134 (Dec. 4, 1990)
121 IBLA 47 (Oct. 22, 1991)
126 IBLA 28 (Apr. 13, 1993)
126 IBLA 261 (June 2, 1993)
1334 ---------- 117 IBLA 208 (Dec. 21, 1990)
128 IBLA 370 (Mar. 11, 1994)
1338(a)(6) ---------- 126 IBLA 158 (May 10, 1993)
1361-1407 ---------- 23 IBIA 28, 99 I.D. 219 (1992)
1371(b) ---------- 23 IBIA 28, 99 I.D. 219 (1992)
1531 ---------- 120 IBLA 229 (Aug. 8, 1991)
125 IBLA 317 (Mar. 25, 1993)
126 IBLA 251 (June 1, 1993)
9 OHA 125 (Feb. 27, 1992)
1531-1543 ---------- 122 IBLA 53 (Jan. 9, 1992)
122 IBLA 155 (Feb. 4, 1992)
122 IBLA 362 (Mar. 20, 1992)
1531-1544 ---------- 124 IBLA 211 (Oct. 12, 1992)
126 IBLA 142 (May 6, 1993)
1531 et seq. -------- 124 IBLA 67 (Sept. 2, 1992)
M-36976, 100 I.D. 395 (1993)
1531(b) ---------- 126 IBLA 238 (May 28, 1993)
1531(c)(1) ---------- 122 IBLA 362 (Mar. 20, 1992)
1532(3) ---------- 122 IBLA 362 (Mar. 20, 1992)
126 IBLA 93 (Apr. 21, 1993)
1532(19) ---------- 116 IBLA 355 (Nov. 5, 1990)
122 IBLA 362 (Mar. 20, 1992)
1533(b)(3)(B)(iii) -- 125 IBLA 317 (Mar. 25, 1993)
1533(b)(3)(C)(iii) -- 125 IBLA 317 (Mar. 25, 1993)
1533(b)(7) ---------- 125 IBLA 317 (Mar. 25, 1993)
1533(d) ---------- 122 IBLA 362 (Mar. 20, 1992)
1534 ---------- M-36967, 97 I.D. 32 (1989)
1536 ---------- 120 IBLA 374 (Sept. 19, 1991)
122 IBLA 65 (Jan. 9, 1992)
124 IBLA 130 (Sept. 20, 1992)
125 IBLA 24 (Dec. 29, 1992)
125 IBLA 317 (Mar. 25, 1993)
126 IBLA 48 (Apr. 14, 1993)
126 IBLA 238 (May 28, 1993)
127 IBLA 331, 100 I.D. 370 (1993)
128 IBLA 52 (Dec. 2, 1993)
129 IBLA 130 (Apr. 15, 1994)
1536(a)(2) ---------- 116 IBLA 355 (Nov. 5, 1990)
122 IBLA 53 (Jan. 9, 1992)
122 IBLA 165 (Feb. 7, 1992)
122 IBLA 362 (Mar. 20, 1992)
125 IBLA 317 (Mar. 25, 1993)
126 IBLA 142 (May 6, 1993)
126 IBLA 238 (May 28, 1993)
128 IBLA 52 (Dec. 2, 1993)
129 IBLA 1 (Mar. 14, 1994)

	129 IBLA 130 (Apr. 15, 1994)
	M-36976, 100 I.D. 395 (1993)
1536(a)(4) ----------	116 IBLA 355 (Nov. 5, 1990)
	122 IBLA 53 (Jan. 9, 1992)
	125 IBLA 317 (Mar. 25, 1993)
	126 IBLA 48 (Apr. 14, 1993)
1536(b)(4) ----------	122 IBLA 362 (Mar. 20, 1992)
	126 IBLA 238 (May 28, 1993)
1536(c) ----------	126 IBLA 238 (May 28, 1993)
1536(c)(1) ----------	115 IBLA 179 (July 3, 1990)
	116 IBLA 355 (Nov. 5, 1990)
	129 IBLA 130 (Apr. 15, 1994)
1536(e)(3) ----------	M-36976, 100 I.D. 395 (1993)
1536(g)(2)(A) -------	M-36976, 100 I.D. 395 (1993)
1536(g)(3) ----------	M-36976, 100 I.D. 395 (1993)
1536(g)(3)(A)(i) ----	M-36976, 100 I.D. 395 (1993)
1536(g)(5) ----------	M-36976, 100 I.D. 395 (1993)
1536(h) ----------	M-36976, 100 I.D. 395 (1993)
1536(h)(1) ----------	M-36976, 100 I.D. 395 (1993)
1536(i) ----------	M-36976, 100 I.D. 395 (1993)
1536(k) ----------	M-36976, 100 I.D. 395 (1993)
1536(o)(2) ----------	122 IBLA 362 (Mar. 20, 1992)
1536(5)(B) ----------	M-36976, 100 I.D. 395 (1993)
1536(10) ----------	M-36976, 100 I.D. 395 (1993)
1538 ----------	126 IBLA 238 (May 28, 1993)
1538(a) ----------	M-36967, 97 I.D. 32 (1989)
1538(a)(1) ----------	116 IBLA 355 (Nov. 5, 1990)
	122 IBLA 362 (Mar. 20, 1992)
1538(a)(1)(B) -------	126 IBLA 238 (May 28, 1993)
1538(c)(1) ----------	9 OHA 125 (Feb. 27, 1992)
1539 ----------	126 IBLA 238 (May 28, 1993)
1540 ----------	9 OHA 125 (Feb. 27, 1992)
1600-1610 ----------	114 IBLA 366 (May 24, 1990)
1604 ----------	116 IBLA 129 (Sept. 21, 1990)
	126 IBLA 93 (Apr. 21, 1993)
1604(i) ----------	125 IBLA 210 (Feb. 5, 1993)
1620(c) ----------	129 IBLA 386 (June 20, 1994)
1633(b)(2)(B) -------	117 IBLA 142 (Dec. 11, 1990)
1901 ----------	130 IBLA 146 (Aug. 4, 1994)
1902-1912 ----------	128 IBLA 26 (Nov. 16, 1993)
1907 ----------	128 IBLA 26 (Nov. 16, 1993)
	130 IBLA 146 (Aug. 4, 1994)
3102 ----------	M-36972, 100 I.D. 163 (1993)
3102(4) ----------	M-36972, 100 I.D. 163 (1993)
3103 ----------	M-36972, 100 I.D. 163 (1993)
3113 ----------	124 IBLA 294 (Nov. 4, 1992)
3120 ----------	115 IBLA 347 (Aug. 13, 1990)
3120(a) ----------	120 IBLA 166 (July 22, 1991)
3192(h)(2) ----------	M-36972, 100 I.D. 163 (1993)
3210 ----------	124 IBLA 7 (Aug. 13, 1992)
3210(b) ----------	114 IBLA 8, 97 I.D. 125 (1990)
	115 IBLA 347 (Aug. 13, 1990)

124 IBLA 7 (Aug. 13, 1992)
127 IBLA 331, 100 I.D. 370 (1993)
3371 ---------- 9 OHA 125 (Feb. 27, 1992)
3372(a)(2)(A) ------- 9 OHA 125 (Feb. 27, 19920
3373(a) ---------- 9 OHA 125 (Feb. 27, 1992)
3831 ---------- 19 IBIA 144 (Jan. 8, 1991)
4601-6a ---------- 120 IBLA 374 (Sept. 19, 1991)

TITLE 18:

sec. 1001 ---------- 114 IBLA 96, 97 I.D. 137 (1990)
1151 ---------- 18 IBIA 126 (Jan. 31, 1990)
1153 ---------- 18 IBIA 126 (Jan. 31, 1990)

TITLE 23:

sec. 119 ---------- 116 IBLA 203 (Oct. 4, 1990)
317 ---------- 23 IBIA 149 (Jan. 11, 1993)
113 IBLA 19 (Jan. 26, 1990)
124 IBLA 386 (Dec. 10, 1992)
125 IBLA 21 (Dec. 21, 1992)
125 IBLA 291 (Mar. 9, 1993)
127 IBLA 122 (Aug. 23, 1993)
127 IBLA 156 (Aug. 26, 1993)
129 IBLA 35 (Mar. 21, 1994)
129 IBLA 293 (May 24, 1994)
129 IBLA 341 (May 31, 1994)
130 IBLA 50 (July 13, 1994)
131 IBLA 121 (Oct. 25, 1994)
317(a) ---------- 129 IBLA 341 (May 31, 1994)
317(b) ---------- 129 IBLA 341 (May 31, 1994)
317(c) ---------- 129 IBLA 35 (Mar. 21, 1994)

TITLE 25:

sec. 1a ---------- 131 IBLA 32 (Sept. 29, 1994)
2 ---------- 19 IBIA 228 (Feb. 20, 1991)
131 IBLA 32 (Sept. 29, 1994)
13 ---------- 18 IBIA 196 (Mar. 16, 1990)
18 IBIA 263 (Apr. 26, 1990)
13d ---------- 21 IBIA 188 (Feb. 14, 1992)
13d-1 ---------- 21 IBIA 188 (Feb. 14, 1992)
47 ---------- IBCA-2863, 98 I.D. 213 (1991)
25 IBIA 226 (Mar. 9, 1994)
81 ---------- 18 IBIA 105 (Jan. 17, 1990)
18 IBIA 401 (Aug. 21, 1990)
18 IBIA 454 (Sept. 24, 1990)
19 IBIA 123 (Dec. 26, 1990)
20 IBIA 68 (June 10, 1991)
21 IBIA 282, 99 I.D. 39 (1992)

	23 IBIA 216 (Mar. 3, 1993)
	24 IBIA 169 (Aug. 31, 1993)
	25 IBIA 18 (Nov. 12, 1993)
	25 IBIA 248 (Mar. 18, 1994)
82a ----------	24 IBIA 209 (Sept. 23, 1993)
84 ----------	25 IBIA 18 (Nov. 12, 1993)
85 ----------	18 IBIA 454 (Sept. 24, 1990)
162a ----------	24 IBIA 92 (July 8, 1993)
176 ----------	22 IBIA 240 (Aug. 24, 1992)
177 ----------	20 IBIA 68 (June 10, 1991)
	20 IBIA 179 (Aug. 13, 1991)
	21 IBIA 282, 99 I.D. 39 (1992)
	24 IBIA 169 (Aug. 31, 1993)
179 ----------	19 IBIA 72 (Nov. 20, 1990)
232 ----------	26 IBIA 32 (May 27, 1994)
261-264 ----------	25 IBIA 198 (Mar. 4, 1994)
296a-296f ----------	21 IBIA 282, 99 I.D. 39 (1992)
323 ----------	18 IBIA 165 (Feb. 23, 1990)
	19 IBIA 164, 98 I.D. 5 (1991)
323-328 ----------	18 IBIA 165 (Feb. 23, 1990)
	19 IBIA 228 (Feb. 20, 1991)
	116 IBLA 317 (Oct. 29, 1990)
324 ----------	19 IBIA 184 (Feb. 5, 1991)
331 ----------	23 IBIA 248 (Mar. 23, 1993)
334 ----------	18 IBIA 104 (Jan. 9, 1990)
	18 IBIA 131 (Feb. 1, 1990)
	19 IBIA 254 (Mar. 8, 1991)
	25 IBIA 88 (Dec. 17, 1993)
	115 IBLA 40 (June 8, 1990)
	116 IBLA 18 (Aug. 24, 1990)
	125 IBLA 153 (Jan. 21, 1993)
	126 IBLA 344 (June 22, 1993)
336 ----------	18 IBIA 104 (Jan. 9, 1990)
	18 IBIA 131 (Feb. 1, 1990)
	19 IBIA 254 (Mar. 8, 1991)
337 ----------	18 IBIA 335 (July 3, 1990)
348 ----------	19 IBIA 228 (Feb. 20, 1991)
	21 IBIA 188 (Feb. 14, 1992)
	24 IBIA 55 (June 15, 1993)
	24 IBIA 86 (July 8, 1993)
	25 IBIA 88 (Dec. 17, 1993)
	25 IBIA 98 (Jan. 4, 1994)
	25 IBIA 228 (Mar. 14, 1994)
	26 IBIA 220 (Sept. 9, 1994)
	130 IBLA 301 (Aug. 31, 1994)
349 ----------	21 IBLA 282, 99 I.D. 39 (1992)
354 ----------	24 IBIA 115 (July 27, 1993)
357 ----------	24 IBIA 55 (June 15, 1993)
371 ----------	22 IBIA 142 (June 18, 1992)
372 ----------	25 IBIA 1 (Nov. 3, 1993)
	25 IBIA 82 (Dec. 15, 1993)
	25 IBIA 88 (Dec. 17, 1993)

	25 IBIA 98 (Jan. 4, 1994)
	25 IBIA 282 (Apr. 19, 1994)
	26 IBIA 200 (Aug. 19, 1994)
	26 IBIA 220 (Sept. 9, 1994)
372-373 ----------	18 IBIA 153 (Feb. 15, 1990)
	25 IBIA 98 (Jan. 4, 1994)
373 ----------	21 IBIA 222 (Mar. 4, 1992)
	22 IBIA 72 (June 4, 1992)
	22 IBIA 133 (June 18, 1992)
	22 IBIA 290 (Sept. 14, 1992)
	22 IBIA 249, 99 I.D. 186 (1992)
	25 IBIA 1 (Nov. 3, 1993)
	25 IBIA 82 (Dec. 15, 1993)
	25 IBIA 88 (Dec. 17, 1993)
380 ----------	18 IBIA 118 (Jan. 18, 1990)
	19 IBIA 164, 98 I.D. 5 (1991)
	23 IBIA 297 (Apr. 22, 1993)
	24 IBIA 275 (Oct. 21, 1993)
381 ----------	19 IBIA 31 (Oct. 23, 1990)
386 ----------	26 IBIA 90 (July 6, 1994)
386a ----------	22 IBIA 220 (Aug. 14, 1992)
	26 IBIA 90 (July 6, 1994)
389 ----------	26 IBIA 90 (July 6, 1994)
393 ----------	19 IBIA 164, 98 I.D. 5 (1991)
396 ----------	18 IBIA 118 (Jan. 18, 1990)
	20 IBIA 50 (May 29, 1991)
	125 IBLA 28, 99 I.D. 272 (1992)
396a ----------	18 IBIA 315, 97 I.D. 215 (1990)
	131 IBLA 32 (Sept. 29, 1994)
396a-396f ----------	18 IBIA 315, 97 I.D. 215 (1990)
	18 IBIA 380 (July 20, 1990)
	19 IBIA 164, 98 I.D. 5 (1991)
	20 IBIA 131 (July 12, 1991)
	21 IBIA 88, 98 I.D. 419 (1991)
	23 IBIA 163 (Jan. 28, 1993)
396a-396g ----------	20 IBIA 50 (May 29, 1991)
	25 IBIA 65 (Dec. 6, 1993)
396c ----------	131 IBLA 32 (Sept. 29, 1994)
396d ----------	20 IBIA 50 (May 29, 1991)
	21 IBIA 88, 98 I.D. 419 (1991)
	124 IBLA 185 (Oct. 14, 1992)
397 ----------	19 IBIA 164, 98 I.D. 5 (1991)
	21 IBIA 282, 99 I.D. 39 (1992)
398 ----------	19 IBIA 164, 98 I.D. 5 (1991)
	21 IBIA 282, 99 I.D. 39 (1992)
398a-398e ----------	21 IBIA 282, 99 I.D. 39 (1992)
402a ----------	26 IBIA 18 (May 27, 1994)
404 ----------	23 IBIA 248 (Mar. 23, 1993)
405 ----------	23 IBIA 248 (Mar. 23, 1993)
406 ----------	19 IBIA 123 (Dec. 16, 1990)
	19 IBIA 164, 98 I.D. 5 (1991)
406(a) ----------	19 IBIA 164, 98 I.D. 5 (1991)

406(b) ---------- 19 IBIA 164, 98 I.D. 5 (1991)
406(c) ---------- 19 IBIA 164, 98 I.D. 5 (1991)
406(e) ---------- 19 IBIA 164, 98 I.D. 5 (1991)
406(f) ---------- 19 IBIA 164, 98 I.D. 5 (1991)
407 ---------- 19 IBIA 123 (Dec. 26, 1990)
27 IBIA 8 (Nov. 14, 1994)
410 ---------- 20 IBIA 168 (Aug. 13, 1991)
21 IBIA 188 (Feb. 14, 1992)
24 IBIA 115 (July 27, 1993)
24 IBIA 253 (Oct. 20, 1993)
26 IBIA 97 (July 6, 1994)
415 ---------- 18 IBIA 118 (Jan. 18, 1990)
19 IBIA 81 (Nov. 23, 1990)
19 IBIA 164, 98 I.D. 5 (1991)
20 IBIA 179 (Aug. 13, 1991)
23 IBIA 297 (Apr. 22, 1993)
24 IBIA 169 (Aug. 31, 1993)
25 IBIA 31 (Nov. 12, 1993)
25 IBIA 198 (Mar. 4, 1994)
26 IBIA 18 (May 27, 1994)
27 IBIA 29 (Nov. 16, 1994)
415(a) ---------- IBCA-2863, 98 I.D. 213 (1991)
19 IBIA 81 (Nov. 23, 1990)
416 ---------- 19 IBIA 164, 98 I.D. 5 (1991)
416c ---------- 19 IBIA 164, 98 I.D. 5 (1991)
450 ---------- IBCA-2863, 98 I.D. 213 (1991)
IBCA-3037, 100 I.D. 45 (1993)
450-450n ---------- IBCA-3007, 100 I.D. 301 (1993)
18 IBIA 103 (Jan. 4, 1990)
18 IBIA 135 (Feb. 1, 1990)
18 IBIA 192 (Mar. 15, 1990)
18 IBIA 263 (Apr. 26, 1990)
19 IBIA 279, 98 I.D. 200 (1991)
21 IBIA 282, 99 I.D. 39 (1992)
22 IBIA 75 (June 4, 1992)
22 IBIA 199 (Aug. 7, 1992)
22 IBIA 265 (Sept. 8, 1992)
22 IBIA 280 (Sept. 9, 1992)
22 IBIA 249, 99 I.D. 186 (1992)
23 IBIA 155 (Jan. 13, 1993)
24 IBIA 21 (May 26, 1993)
24 IBIA 55 (June 15, 1993)
26 IBIA 214 (Sept. 9, 1994)
26 IBIA 217 (Sept. 9, 1994)
26 IBIA 259 (Oct. 17, 1994)
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27 IBIA 63 (Dec. 8, 1994)
124 IBLA 259 (Nov. 3, 1992)
450-458(e) --------- IBCA-1962, 97 I.D. 181 (1990)
450 et seq. -------- 18 IBIA 263 (Apr. 26, 1990)
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450a ----------	19 IBIA 279, 98 I.D. 200 (1991)
450b ----------	24 IBIA 104 (July 13, 1993)
450b(1) ----------	24 IBIA 104 (July 13, 1993)
	26 IBIA 39 (June 8, 1994)
450b(a) ----------	124 IBLA 259 (Nov. 3, 1992)
450b(e) ----------	26 IBIA 159 (Aug. 3, 1994)
450b(h) ----------	25 IBIA 259 (Apr. 7, 1994)
450b(j) ----------	IBCA-3008 et al., 99 I.D. 248 (1992)
	124 IBLA 259 (Nov. 3, 1992)
450b(l) ----------	26 IBIA 159 (Aug. 3, 1994)
450c(a)(2) ---------	25 IBIA 259 (Apr. 7, 1994)
450f ----------	18 IBIA 263 (Apr. 26, 1990)
	26 IBIA 39 (June 8, 1994)
	IBCA-3008 et al., 99 I.D. 248 (1992)
450f(a) ----------	18 IBIA 263 (Apr. 26, 1990)
	26 IBIA 159 (Aug. 3, 1994)
450f(a)(1) ---------	26 IBIA 214 (Sept. 9, 1994)
	26 IBIA 235 (Sept. 15, 1994)
	124 IBLA 259 (Nov. 3, 1992)
450f(a)(2) ---------	25 IBIA 259 (Apr. 7, 1994)
	26 IBIA 39 (June 8, 1994)
	26 IBIA 262 (Oct. 18, 1994)
	124 IBLA 259 (Nov. 3, 1992)
450f(b) ----------	124 IBLA 259 (Nov. 3, 1992)
450f(b)(3) ---------	124 IBLA 259 (Nov. 3, 1992)
450f(c) ----------	19 IBIA 279, 98 I.D. 200 (1991)
450f(d) ----------	19 IBIA 279, 98 I.D. 200 (1991)
450h ----------	18 IBIA 196 (Mar. 16, 1990)
	24 IBIA 104 (July 13, 1993)
450h(a) ----------	24 IBIA 104 (July 13, 1993)
450h(e) ----------	24 IBIA 104 (July 13, 1993)
450i ----------	18 IBIA 314 (June 18, 1990)
450i(e) ----------	18 IBIA 314 (June 18, 1990)
450j(g) ----------	26 IBIA 262 (Oct. 18, 1994)
450j-1 ----------	24 IBIA 21 (May 26, 1993)
450j-1(a)(1) -------	24 IBIA 21 (May 26, 1993)
450j-1(b)(3) -------	24 IBIA 21 (May 26, 1993)
450j(a) ----------	IBCA-3007, 100 I.D. 301 (1993)
450j(c) ----------	25 IBIA 259 (Apr. 7, 1994)
450k ----------	124 IBLA 259 (Nov. 3, 1992)
450m ----------	19 IBIA 279, 98 I.D. 200 (1991)
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	IBCA-3037, 100 I.D. 45 (1993)
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	19 IBIA 279, 98 I.D. 200 (1991)
450n ----------	26 IBIA 262 (Oct. 18, 1994)
461-479 ----------	18 IBIA 105 (Jan. 17, 1990)
	18 IBIA 454 (Sept. 24, 1990)
	19 IBIA 144 (Jan. 8, 1991)
	19 IBIA 164, 98 I.D. 5 (1991)
	21 IBIA 24 (Oct. 22, 1991)
	25 IBIA 6 (Nov. 12, 1993)
462 ----------	19 IBIA 164, 98 I.D. 5 (1991)
464 ----------	19 IBIA 164, 98 I.D. 5 (1991)
	24 IBIA 55 (June 15, 1993)
	25 IBIA 228 (Mar. 14, 1994)
465 ----------	18 IBIA 131 (Feb. 1, 1990)
	18 IBIA 156 (Feb. 20, 1990)
	19 IBIA 2 (Oct. 10, 1990)
	19 IBIA 164, 98 I.D. 5 (1991)
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	23 IBIA 149 (Jan. 11, 1993)
	24 IBIA 55 (June 15, 1993)
466 ----------	19 IBIA 72 (Nov. 20, 1990)
467 ----------	19 IBIA 164, 98 I.D. 5 (1991)
468 ----------	26 IBIA 262 (Oct. 18, 1994)
473 ----------	19 IBIA 164, 98 I.D. 5 (1991)
	24 IBIA 209 (Sept. 23, 1993)
	M-36978, 100 I.D. 431 (1993)
473a ----------	26 IBIA 159 (Aug. 3, 1994)
476 ----------	18 IBIA 105 (Jan. 17, 1990)
	19 IBIA 164, 98 I.D. 5 (1991)
	24 IBIA 33 (May 28, 1993)
	24 IBIA 55 (June 15, 1993)
	24 IBIA 209 (Sept. 23, 1993)
	26 IBIA 18 (May 27, 1994)
	26 IBIA 69 (June 20, 1994)
	27 IBIA 43 (Nov. 29, 1994)
476(a) ----------	24 IBIA 209 (Sept. 23, 1993)
476(c)(1)(B) -------	26 IBIA 69 (June 20, 1994)
476(d)(1) ----------	24 IBIA 209 (Sept. 23, 1993)
476(e) ----------	23 IBIA 297 (Apr. 22, 1993)
477 ----------	19 IBIA 164, 98 I.D. 5 (1991)
	20 IBIA 93 (June 25, 1991)
	25 IBIA 187 (Feb. 25, 1994)
478 ----------	19 IBIA 164, 98 I.D. 5 (1991)
479 ----------	19 IBIA 164, 98 I.D. 5 (1991)
	24 IBIA 33 (May 28, 1993)
483a ----------	19 IBIA 144 (Jan. 8, 1991)
	22 IBIA 220 (Aug 14, 1992)
495 ----------	127 IBLA 1 (July 12, 1993)
500 ----------	23 IBIA 28, 99 I.D. 219 (1992)
500-500m ----------	120 IBLA 166 (July 22, 1991)
500-500n ----------	23 IBIA 28, 99 I.D. 219 (1992)
500a ----------	23 IBIA 28, 99 I.D. 219 (1992)
500b ----------	23 IBIA 28, 99 I.D. 219 (1992)

500f ---------- 23 IBIA 28, 99 I.D. 219 (1992)
500g ---------- 23 IBIA 28, 99 I.D. 219 (1992)
500i ---------- 23 IBIA 28, 99 I.D. 219 (1992)
500m ---------- 23 IBIA 28, 99 I.D. 219 (1992)
120 IBLA 166 (July 22, 1991)
501 ---------- 19 IBIA 164, 98 I.D. 5 (1991)
19 IBIA 296 (Apr. 17, 1991)
501-509 ---------- 19 IBIA 164, 98 I.D. 5 (1991)
501-510 ---------- 19 IBIA 296 (Apr. 17, 1991)
503 ---------- 22 IBIA 75 (June 4, 1992)
24 IBIA 209 (Sept. 23, 1993)
25 IBIA 4 (Nov. 8, 1993)
26 IBIA 69 (June 20, 1994)
26 IBIA 284 (Oct. 24, 1994)
504 ---------- 19 IBIA 164, 98 I.D. 5 (1991)
566d ---------- 22 IBIA 220 (Aug. 14, 1992)
607 ---------- 23 IBIA 5 (Oct. 16, 1992)
635 ---------- 26 IBIA 18 (May 27, 1994)
640-26(b) ---------- 121 IBLA 197, (98 I.D. 398 (1991)
640d-640d-24 ------- 22 IBIA 10 (Apr. 7, 1992)
640d-640d-28 ------- 20 IBIA 255 (Sept. 23, 1991)
640d-7 ---------- 20 IBIA 248 (Sept. 20, 1991)
20 IBIA 255 (Sept. 23, 1991)
22 IBIA 10 (Apr. 7, 1992)
640d-7(e) ---------- 22 IBIA 10 (Apr. 7, 1992)
24 IBIA 65 (June 22, 1993)
640d-7(f)(3) ------- 24 IBIA 65 (June 22, 1993)
640d-10(a) --------- 121 IBLA 197, 98 I.D. 398 (1991)
640d-13 ---------- 20 IBIA 248 (Sept. 20, 1991)
640d-13(a) --------- 20 IBIA 255 (Sept. 23, 1991)
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640d-27(a) --------- 22 IBIA 10 (Apr. 7, 1992)
24 IBIA 65 (June 22, 1993)
640d-640d-28 ------- 24 IBIA 65 (June 22, 1993)
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20 IBIA 255 (Sept. 23, 1991)
677v ---------- 22 IBIA 130 (June 18, 1992)
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712c ---------- 18 IBIA 411 (Sept. 4, 1990)
18 IBIA 412 (Sept. 4, 1990)
19 IBIA 12 (Oct. 11, 1990)
713f(c)(4) --------- 22 IBIA 220 (Aug. 14, 1992)
715-715g ---------- 27 IBIA 48 (Nov. 30, 1994)
715c ---------- 27 IBIA 48 (Nov. 30, 1994)
715c(a) ---------- 27 IBIA 48 (Nov. 30, 1994)
721-727 ---------- 24 IBIA 33 (May 28, 1993)
741-775 ---------- 24 IBIA 33 (May 28, 1993)
761-768 ---------- 24 IBIA 33 (May 28, 1993)
791-807 ---------- 24 IBIA 33 (May 28, 1993)
821-826 ---------- 24 IBIA 33 (May 28, 1993)
841-853 ---------- 24 IBIA 33 (May 28, 1993)

861-861c ---------- 24 IBIA 33 (May 28, 1993)
891-901 ---------- 24 IBIA 33 (May 28, 1993)
903-903f ---------- 24 IBIA 33 (May 28, 1993)
1300b-11(a) --------- 25 IBIA 6 (Nov. 12, 1993)
1300b-11-1300b-16 --- 25 IBIA 6 (Nov. 12, 1993)
1300b-14(a) --------- 25 IBIA 6 (Nov. 12, 1993)
1300b-14(b) --------- 25 IBIA 6 (Nov. 12, 1993)
1300b-15 ---------- 25 IBIA 6 (Nov. 12, 1993)
1300i ---------- 19 IBIA 182 (Jan. 29, 1991)
1300i-1(e) ---------- 18 IBIA 387 (July 24, 1990)
1300i-8 ---------- 18 IBIA 387 (July 24, 1990)
1300i-10(b) --------- 18 IBIA 207 (Mar. 27, 1990)
1301-1341 ---------- 18 IBIA 459 (Sept. 27, 1990)
19 IBIA 279, 98 I.D. 200 (1991)
1302 ---------- 22 IBIA 75 (June 4, 1992)
22 IBIA 91 (June 10, 1992)
23 IBIA 76 (Nov. 13, 1992)
24 IBIA 209 (Sept. 23, 1993)
24 IBIA 264 (Oct. 20, 1993)
25 IBIA 6 (Nov. 12, (1993)
1302(1) ---------- 24 IBIA 264 (Oct. 20, 1993)
1302(5) ---------- 25 IBIA 6 (Nov. 12, 1993)
1302(8) ---------- 22 IBIA 75 (June 4, 1992)
25 IBIA 6 (Nov. 12, 1993)
1302(9) ---------- 25 IBIA 6 (Nov. 12, 1993)
1303 ---------- 22 IBIA 75 (June 4, 1992)
1322 ---------- 25 IBIA 6 (Nov. 12, 1993)
1401-1408 ---------- 24 IBIA 92 (July 8, 1993)
1401(a) ---------- 24 IBIA 92 (July 8, 1993)
1402 ---------- 24 IBIA 92 (July 8, 1993)
1402-1405 ---------- 24 IBIA 92 (July 8, 1993)
1403 ---------- 24 IBIA 92 (July 8, 1993)
1403-1404 ---------- 24 IBIA 92 (July 8, 1993)
1451-1453 ---------- 20 IBIA 158 (Aug. 5, 1991)
1451-1543 ---------- 20 IBIA 217 (Aug. 27, 1991)
1451 et seq. -------- 20 IBIA 158 (Aug. 5, 1991)
1452 ---------- 20 IBIA 158 (Aug. 5, 1991)
1452(b) ---------- 20 IBIA 158 (Aug. 5, 1991)
1452(e) ---------- 20 IBIA 158 (Aug. 5, 1991)
25 IBIA 212 (Mar. 7, 1994)
1461-1469 ---------- 19 IBIA 109 (Dec. 3, 1990)
20 IBIA 190 (Aug. 16, 1991)
20 IBIA 219 (Aug. 27, 1991)
21 IBIA 254 (Mar. 18, 1992)
23 IBIA 84 (Nov. 16, 1992)
23 IBIA 92 (Nov. 19, 1992)
25 IBIA 212 (Mar. 7, 1994)
26 IBIA 169 (Aug. 9, 1994)
1463 ---------- 18 IBIA 399 (Aug. 21, 1990)
18 IBIA 406 (Aug. 21, 1990)
19 IBIA 69 (Nov. 15, 1990)
19 IBIA 109 (Dec. 3, 1990)

	20 IBIA 176 (Aug. 13, 1991)
	20 IBIA 190 (Aug. 16, 1991)
	20 IBIA 219 (Aug. 27, 1991)
	23 IBIA 92 (Nov. 19, 1992)
	23 IBIA 142 (Jan. 5, 1993)
	25 IBIA 174 (Feb. 15, 1994)
	25 IBIA 212 (Mar. 7, 1994)
	26 IBIA 66 (June 20, 1994)
1466 ----------	18 IBIA 156 (Feb. 20, 1990)
	21 IBIA 53 (Nov. 13, 1991)
	25 IBIA 243 (Mar. 16, 1994)
1481 ----------	18 IBIA 234 (Apr. 11, 1990)
1481-1498 ----------	18 IBIA 234 (Apr. 11, 1990)
	18 IBIA 299 (May 24, 1990)
	18 IBIA 303 (May 24, 1990)
	20 IBIA 158 (Aug. 5, 1991)
	26 IBIA 169 (Aug. 9, 1994)
1484 ----------	18 IBIA 234 (Apr. 11, 1990)
	19 IBIA 14 (Oct. 19, 1990)
1485 ----------	22 IBIA 104 (June 11, 1992)
1493 ----------	22 IBIA 104 (June 11, 1992)
1494 ----------	22 IBIA 104 (June 11, 1992)
1498 ----------	22 IBIA 52 (May 5, 1992)
1521 ----------	18 IBIA 144 (Feb. 14, 1990)
	18 IBIA 272 (May 1, 1990)
	20 IBIA 183 (Aug. 13, 1991)
	21 IBIA 7 (Oct. 8, 1991)
1521-1524 ----------	18 IBIA 144 (Feb. 14, 1990)
	18 IBIA 272 (May 1, 1990)
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1522(a) ----------	18 IBIA 144 (Feb. 14, 1990)
	19 IBIA 312 (Apr. 18, 1991)
	25 IBIA 234 (Mar. 15, 1994)
1541 ----------	26 IBIA 169 (Aug. 9, 1994)
1725(b)(2) ----------	20 IBIA 195 (Aug. 20, 1991)
1725(i) ----------	20 IBIA 195 (Aug. 20, 1991)
1728(b) ----------	20 IBIA 195 (Aug. 20, 1991)
1761(a)(6) ----------	121 IBLA 197, 98 I.D. 398 (1991)
1901-1963 ----------	18 IBIA 131 (Feb. 1, 1990)
	21 IBIA 282, 99 I.D. 39 (1992)
	23 IBIA 20 (Oct. 29, 1992)
1931-1934 ----------	18 IBIA 450 (Sept. 24, 1990)
2001(k) ----------	20 IBIA 242 (Sept. 9, 1991)
2008a ----------	IBCA-3008 et al., 99 I.D 248 (1992)
2008a(a)(1) ---------	IBCA-3008 et al., 99 I.D. 248 (1992)
2019(5) ----------	IBCA-3008 et al., 99 I.D. 248 (1992)
2101-2108 ----------	18 IBIA 315, 97 I.D. 215 (1990)

	21 IBIA 282, 99 I.D. 39 (1992)
	25 IBIA 65 (Dec. 6, 1993)
	125 IBLA 28, 99 I.D. 272 (1992)
	129 IBLA 1 (Mar. 14, 1994)
2102 ----------	21 IBIA 282, 99 I.D. 39 (1992)
2105 ----------	21 IBIA 282, 99 I.D. 39 (1992)
	125 IBLA 28, 99 I.D. 272 (1992)
2201-2211 ----------	18 IBIA 156 (Feb. 20, 1990)
	19 IBIA 144 (Jan. 8, 1991)
2201(4) ----------	19 IBIA 164, 98 I.D. 5 (1991)
2202 ----------	18 IBIA 156 (Feb. 20, 1990)
2203 ----------	18 IBIA 156 (Feb. 20, 1990)
2203(a) ----------	18 IBIA 156 (Feb. 20, 1990)
2205 ----------	22 IBIA 290 (Sept. 14, 1992)
2205(a) ----------	26 IBIA 284 (Oct. 24, 1994)
2206 ----------	19 IBIA 222 (Feb. 12, 1991)
	21 IBIA 244 (Mar. 17, 1992)
	22 IBIA 33 (Apr. 23, 1992)
	22 IBIA 248 (Aug. 25, 1992)
	23 IBIA 147 (Jan. 7, 1993)
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2206(a) ----------	22 IBIA 33 (Apr. 23, 1992)
	24 IBIA 131 (July 28, 1993)
	26 IBIA 279 (Oct. 21, 1994)
2206(b) ----------	22 IBIA 33 (Apr. 23, 1992)
	26 IBIA 145 (Aug. 1, 1994)
2206(c) ----------	22 IBIA 249, 99 I.D. 186 (1992)
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2209 ----------	19 IBIA 164, 98 I.D. 5 (1991)
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2501-2511 ----------	IBCA-3037, 100 I.D. 45 (1993)
2502(d) ----------	IBCA-3037, 100 I.D. 45 (1993)
2503 ----------	19 IBIA 243 (Feb. 26, 1991)
2503(g) ----------	19 IBIA 243 (Feb. 26, 1991)
2508(b) ----------	19 IBIA 243 (Feb. 26, 1991)
2508(e) ----------	IBCA-3008 et al., 99 I.D. 248 (1992)
	IBCA-3037, 100 I.D. 45 (1993)
2514 ----------	IBCA-2319 et al., 98 I.D. 23 (1991)
2701 ----------	25 IBIA 296 (Apr. 28, 1994)
2701-2721 ----------	21 IBIA 151 (Jan. 9, 1992)
	23 IBIA 126 (Dec. 23, 1992)
	23 IBIA 216 (Mar. 3, 1993)
	24 IBIA 55 (June 15, 1993)
2701 et seq. --------	23 IBIA 216 (Mar. 3, 1993)
2701(2) ----------	23 IBIA 216 (Mar. 3, 1993)
2703 ----------	21 IBIA 151 (Jan. 9, 1992)
2703(d) ----------	23 IBIA 216 (Mar. 3, 1993)
2703(9) ----------	23 IBIA 216 (Mar. 3, 1993)
2709 ----------	21 IBIA 151 (Jan. 9, 1992)
	23 IBIA 216 (Mar. 3, 1993)

2710(b) ---------- 21 IBIA 151 (Jan. 9, 1992)
2710(b)(2)(D) ------- 23 IBIA 216 (Mar. 3, 1993)
2710(d) ---------- 21 IBIA 151 (Jan. 9, 1992)
2710(d)(2)(C) ------- 21 IBIA 151 (Jan. 9, 1992)
2710(d)(3) ---------- 21 IBIA 151 (Jan. 9, 1992)
2711 ---------- 23 IBIA 216 (Mar. 3, 1993)
2711(b) ---------- 23 IBIA 216 (Mar. 3, 1993)
2711(c) ---------- 23 IBIA 216 (Mar. 3, 1993)
2711(d) ---------- 23 IBIA 216 (Mar. 3, 1993)
2719 ---------- 27 IBIA 48 (Nov. 30, 1994)
3001-3013 ---------- 125 IBLA 107 (Jan. 14, 1993)
3001-3013 ---------- 125 IBLA 107 (Jan. 14, 1993)
3002 ---------- 125 IBLA 107 (Jan. 14, 1993)

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4491(a) ---------- 128 IBLA 168 (Feb. 3, 1994)
4986-4998 ---------- 128 IBLA 168 (Feb. 3, 1994)
4995(a) ---------- 128 IBLA 168 (Feb. 3, 1994)
4995(b) ---------- 128 IBLA 168 (Feb. 3, 1994)
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1360 ---------- 25 IBIA 6 (Nov. 12, 1993)
1491 ---------- 131 IBLA 1 (Sept. 16, 1994)
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115 IBLA 317 (Aug. 7, 1990)
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2412 ---------- 19 IBIA 318 (Apr. 18, 1991)
2412(d)(1)(B) ------- 19 IBIA 318 (Apr. 18, 1991)
2415 ---------- 20 IBIA 168 (Aug. 13, 1991)
112 IBLA 373, 97 I.D. 1 (1990)
119 IBLA 76, 98 I.D. 207 (1991)
119 IBLA 345 (June 18, 1991)
117 IBLA 303 (Jan. 17, 1991)
122 IBLA 36 (Jan. 7, 1992)
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123 IBLA 278 (June 18, 1992)
123 IBLA 341, 99 I.D. 115 (1992)
127 IBLA 96 (July 27, 1993)
128 IBLA 168 (Feb. 3, 1994)
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2415(a) ---------- 114 IBLA 42 (Apr. 3, 1990)
119 IBLA 345 (June 18, 1991)
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124 IBLA 185 (Oct. 14, 1992)
126 IBLA 174 (May 11, 1993)
127 IBLA 291 (Oct. 7, 1993)
129 IBLA 46 (Mar. 23, 1994)
129 IBLA 151 (Apr. 19, 1994)
131 IBLA 299 (Dec. 2, 1994)
2415(b) ---------- 125 IBLA 303 (Mar. 16, 1993)
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2415(i) ---------- 122 IBLA 141 (Feb. 3, 1992)
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21-54 ---------- 128 IBLA 257 (Mar. 4, 1994)
131 IBLA 1 (Sept. 16, 1994)
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114 IBLA 209 (Apr. 25, 1990)
115 IBLA 277 (July 26, 1990)
115 IBLA 398 (Aug. 22, 1990)
117 IBLA 10 (Nov. 21, 1990)
122 IBLA 297 (Mar. 9, 1992)
123 IBLA 96 (May 12, 1992)
123 IBLA 51, 99 I.D. 64 (1992)
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126 IBLA 72 (Apr. 19, 1993)
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128 IBLA 249 (Mar. 2, 1994)
128 IBLA 266 (Mar. 10, 1994)
129 IBLA 64 (Mar. 25, 1994)
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129 IBLA 64 (Mar. 25, 1994)
129 IBLA 386 (June 20, 1994)
23 ---------- 127 IBLA 181 (Sept. 7, 1993)
26 ---------- 119 IBLA 370 (June 26, 1991)
27 ---------- 115 IBLA 336 (Aug. 9, 1990)
28 ---------- 112 IBLA 261 (Jan. 4, 1990)
115 IBLA 102 (June 26, 1990)
115 IBLA 336 (Aug. 9, 1990)
119 IBLA 383 (July 3, 1991)
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124 IBLA 97 (Sept. 16, 1992)
128 IBLA 26 (Nov. 16, 1993)
128 IBLA 165 (Jan. 21, 1994)
130 IBLA 314 (Sept. 8, 1994)
130 IBLA 349, 101 I.D. 311 (1994)
131 IBLA 1 (Sept. 16, 1994)
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130 IBLA 87 (July 29, 1994)
130 IBLA 314 (Sept 8, 1994)
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	131 IBLA 1 (Sept. 16, 1994)
	131 IBLA 39 (Oct. 12, 1994)
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28b ----------	112 IBLA 261 (Jan. 4, 1990)
	115 IBLA 336 (Aug. 9, 1990)
	117 IBLA 377 (Feb. 12, 1991)
	119 IBLA 383 (July 3, 1991)
	120 IBLA 395 (Oct. 3, 1991)
28b-28e ----------	117 IBLA 377 (Feb. 12, 1991)
	119 IBLA 252 (May 16, 1991)
	128 IBLA 165 (Jan. 21, 1994)
28e ----------	117 IBLA 377 (Feb. 12, 1991)
28-1 ----------	130 IBLA 349, 101 I.D. 311 (1994)
29 ----------	113 IBLA 299, 97 I.D. 109 (1990)
	123 IBLA 156 (May 28, 1992)
	124 IBLA 97 (Sept. 16, 1992)
	128 IBLA 266 (Mar. 10, 1994)
	130 IBLA 349, 101 I.D. 311 (1994)
30 ----------	113 IBLA 299, 97 I.D. 109 (1990)
	123 IBLA 156 (May 28, 1992)
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	124 IBLA 97 (Sept. 16, 1992)
35 ----------	112 IBLA 273 (Jan. 4, 1990)
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36 ----------	112 IBLA 273 (Jan. 4, 1990)
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38 ----------	112 IBLA 326 (Jan. 12, 1990)
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40 ----------	113 IBLA 1 (Jan. 25, 1990)
42 ----------	112 IBLA 326 (Jan. 12, 1990)
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	129 IBLA 267 (May 16, 1994)
42(a) ----------	112 IBLA 326 (Jan. 12, 1990)
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42(b) ----------	121 IBLA 260 (Nov. 15, 1991)
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51 ----------	117 IBLA 10 (Nov. 21, 1990)
54 ----------	122 IBLA 68 (Jan. 10, 1992)
	123 IBLA 51, 99 I.D. 64 (1992)
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121 ---------- 115 IBLA 164 (June 28, 1990)
122 IBLA 344 (Mar. 11, 1992)
121-123 ---------- M-36969, 97 I.D. 54 (1989)
121-125 ---------- 122 IBLA 344 (Mar. 11, 1992)
123 ---------- 124 IBLA 196 (Oct. 20, 1992)
181 ---------- 113 IBLA 47 (Jan. 30, 1990)
114 IBLA 246 (May 8, 1990)
116 IBLA 345 (Oct. 30, 1990)
117 IBLA 54 (Nov. 27, 1990)
120 IBLA 201 (Aug. 5, 1991)
120 IBLA 271 (Aug. 22, 1991)
121 IBLA 188 (Nov. 7, 1991)
125 IBLA 28, 99 I.D. 272 (1992)
127 IBLA 279 (Oct. 5, 1993)
M-36969, 97 I.D. 54 (1989)
181-263 ---------- 115 IBLA 366 (Aug. 15, 1990)
120 IBLA 374 (Sept. 19, 1991)
181-287 ---------- 117 IBLA 96 (Dec. 3, 1990)
121 IBLA 373, 98 I.D. 429 (1991)
122 IBLA 36 (Jan. 7, 1992)
122 IBLA 224, 99 I.D. 20 (1992)
125 IBLA 210 (Feb. 5, 1993)
126 IBLA 124 (Apr. 29, 1993)
129 IBLA 285 (May 20, 1994)
130 IBLA 386 (June 20, 1994)
M-36969, 97 I.D. 54 (1989)
181 et seq. -------- M-36911 (Supp. I), 100 I.D. 103 (1993)
184 ---------- 116 IBLA 391 (Nov. 13, 1990)
116 IBLA 398 (Nov. 14, 1990)
184(h)(1) ---------- 114 IBLA 96, 97 I.D. 137 (1990)
184(h)(2) ---------- 116 IBLA 391 (Nov. 13, 1990)
118 IBLA 372 (Mar. 14, 1991)
184(i) ---------- 116 IBLA 391 (Nov. 6, 1990)
185 ---------- 112 IBLA 394 (Jan. 23, 1990)
114 IBLA 252 (May 9, 1990)
115 IBLA 164 (June 28, 1990)
116 IBLA 225 (Oct. 12, 1990)
124 IBLA 162 (Oct. 1, 1992)
127 IBLA 282 (Oct. 7, 1993)
9 OHA 143, 99 I.D. 31 (1992)
185(a) ---------- 122 IBLA 224, 99 I.D. 20 (1992)
185(c)(2) ---------- 125 IBLA 210 (Feb. 5, 1993)
185(r) ---------- 120 IBLA 290 (Sept. 6, 1991)
185(r)(1) ---------- 112 IBLA 394 (Jan. 23, 1990)
187 ---------- 115 IBLA 343 (Aug. 9, 1990)
116 IBLA 391 (Nov. 13, 1990)
119 IBLA 272 (May 30, 1991)
119 IBLA 338 (June 18, 1991)
123 IBLA 369 (July 23, 1992)
131 IBLA 195 (Nov. 9, 1994)
187a ---------- 114 IBLA 1 (Mar. 29, 1990)

	115 IBLA 343 (Aug. 9, 1990)
	116 IBLA 73 (Sept. 5, 1990)
	116 IBLA 391 (Nov. 13, 1990)
	116 IBLA 398 (Nov. 14, 1990)
	119 IBLA 338 (June 18, 1991)
	120 IBLA 177 (July 26, 1991)
	124 IBLA 16 (Aug. 19, 1992)
	129 IBLA 94 (Apr. 5, 1994)
187b ----------	116 IBLA 391 (Nov. 13, 1990)
	116 IBLA 398 (Nov. 14, 1990)
188 ----------	115 IBLA 373 (Aug. 16, 1990)
	116 IBLA 41 (Aug. 28, 1990)
188(a) ----------	123 IBLA 369 (July 23, 1992)
	124 IBLA 16 (Aug. 19, 1992)
	124 IBLA 318 (Nov. 4, 1992)
188(b) ----------	113 IBLA 174 (Feb. 14, 1990)
	114 IBLA 76 (Apr. 10, 1990)
	115 IBLA 143 (June 28, 1990)
	116 IBLA 73 (Sept. 5, 1990)
	116 IBLA 275 (Oct. 22, 1990)
	116 IBLA 279 (Oct. 22, 1990)
	116 IBLA 398 (Nov. 14, 1990)
	117 IBLA 267 (Jan. 15, 1991)
	117 IBLA 271 (Jan. 15, 1991)
	118 IBLA 372 (Mar. 14, 1991)
	120 IBLA 163 (July 18, 1991)
	120 IBLA 193 (July 30, 1991)
	120 IBLA 391 (Sept. 30, 1991)
	122 IBLA 325 (Mar. 11, 1992)
	123 IBLA 138 (May 22, 1992)
	123 IBLA 310 (June 26, 1992)
	124 IBLA 16 (Aug. 19, 1992)
	124 IBLA 318 (Nov. 4, 1992)
	125 IBLA 150 (Jan. 21, 1993)
	126 IBLA 111 (Apr. 29, 1993)
	129 IBLA 216 (Apr. 28, 1994)
	130 IBLA 324 (Sept. 12, 1994)
188(b)(1)(A) -------	120 IBLA 271 (Aug. 22, 1991)
188(c) ----------	113 IBLA 174 (Feb. 14, 1990)
	114 IBLA 76 (Apr. 10, 1990)
	115 IBLA 143 (June 28, 1990)
	116 IBLA 73 (Sept. 5, 1990)
	116 IBLA 279 (Oct. 22, 1990)
	120 IBLA 163 (July 18, 1991)
	120 IBLA 391 (Sept. 30, 1991)
	122 IBLA 325 (Mar. 11, 1992)
	123 IBLA 138 (May 22, 1992)
	124 IBLA 318 (Nov. 4, 1992)
	125 IBLA 150 (Jan. 21, 1993)
	126 IBLA 117 (Apr. 19, 1993)
	129 IBLA 216 (Apr. 28, 1994)
	130 IBLA 324 (Sept. 12, 1994)

188(d) ---------- 114 IBLA 76 (Apr. 10, 1990)
115 IBLA 143 (June 28, 1990)
116 IBLA 73 (Sept. 5, 1990)
116 IBLA 279 (Oct. 22, 1990)
122 IBLA 325 (Mar. 11, 1992)
123 IBLA 138 (May 22, 1992)
124 IBLA 318 (Nov. 4, 1992)
125 IBLA 150 (Jan. 21, 1993)
126 IBLA 111 (Apr. 29, 1993)
130 IBLA 324 (Sept. 12, 1994)
188(d)(1) ---------- 114 IBLA 76 (Apr. 10, 1990)
188(d)(2)(B) ------- 114 IBLA 76 (Apr. 10, 1990)
188(e) ---------- 114 IBLA 76 (Apr. 10, 1990)
122 IBLA 325 (Mar. 11, 1992)
123 IBLA 138 (May 22, 1992)
124 IBLA 318 (Nov. 4, 1992)
125 IBLA 150 (Jan. 21, 1993)
188(e)(2) ---------- 114 IBLA 76 (Apr. 10, 1990)
188(e)(3)(B) ------- 114 IBLA 76 (Apr. 10, 1990)
188(g) ---------- 126 IBLA 111 (Apr. 29, 1993)
189 ---------- 112 IBLA 373, 97 I.D. 1 (1990)
113 IBLA 243 (Mar. 7, 1990)
116 IBLA 152 (Sept. 24, 1990)
118 IBLA 338 (Mar. 12, 1991)
127 IBLA 163 (Aug. 27, 1993)
191 ---------- 22 IBIA 240 (Aug. 24, 1992)
115 IBLA 62 (June 14, 1990)
117 IBLA 316 (Jan. 24, 1991)
128 IBLA 94 (Dec. 13, 1993)
M-36969, 97 I.D. 54 (1989)
201 ---------- 124 IBLA 238 (Oct. 30, 1992)
201-209 ---------- 129 IBLA 386 (June 20, 1994)
201(a)(1) ---------- 124 IBLA 83 (Sept. 15, 1992)
201(b) ---------- 126 IBLA 357 (June 29, 1993)
129 IBLA 386 (June 20, 1994)
202a ---------- 131 IBLA 324 (Dec. 14, 1994)
202a(3) ---------- 123 IBLA 169, 99 I.D. 87 (1992)
203 ---------- 114 IBLA 246 (May 8, 1990)
207 ---------- 117 IBLA 271 (Jan. 15, 1991)
118 IBLA 364 (Mar. 14, 1991)
124 IBLA 238 (Oct. 30, 1992)
127 IBLA 297 (Oct. 7, 1993)
129 IBLA 386 (June 20, 1994)
207(a) ---------- 117 IBLA 271 (Jan. 15, 1991)
118 IBLA 364 (Mar. 14, 1991)
121 IBLA 373, 98 I.D. 429 (1991)
123 IBLA 169, 99 I.D. 87 (1992)
123 IBLA 194A (Feb. 9, 1993)
127 IBLA 297 (Oct. 7, 1993)
127 IBLA 331, 100 I.D. 370 (1993)
129 IBLA 386 (June 20, 1994)
207(b) ---------- 117 IBLA 271 (Jan. 15, 1991)

	123 IBLA 169, 99 I.D. 87 (1992)
	123 IBLA 194A (Feb. 9, 1993)
	127 IBLA 297 (Oct. 7, 1993)
	131 IBLA 195 (Nov. 9, 1994)
207(c) ----------	131 IBLA 324 (Dec. 14, 1994)
209 ----------	116 IBLA 1 (Aug. 23, 1990)
	117 IBLA 316 (Jan. 24, 1991)
	119 IBLA 231 (May 14, 1991)
	119 IBLA 359 (June 21, 1991)
	120 IBLA 47 (July 12, 1991)
	121 IBLA 373, 98 I.D. 429 (1991)
	122 IBLA 325 (Mar. 11, 1992)
	123 IBLA 169, 99 I.D. 87 (1992)
	123 IBLA 194A (Feb. 9, 1993)
	124 IBLA 238 (Oct. 30, 1992)
	125 IBLA 223 (Feb. 5, 1993)
	130 IBLA 18 (July 8, 1994)
	M-36911 (Supp. I), 100 I.D. 103 (1993)
223 ----------	116 IBLA 279 (Oct. 22, 1990)
	126 IBLA 117 (Apr. 29, 1993)
225 ----------	122 IBLA 190 (Feb. 10, 1992)
226 ----------	23 IBIA 228 (Mar. 8, 1993)
	114 IBLA 284 (May 9, 1990)
	115 IBLA 373 (Aug. 16, 1990)
	116 IBLA 279 (Oct. 22, 1990)
	116 IBLA 345 (Oct. 30, 1990)
	117 IBLA 1 (Nov. 16, 1990)
	119 IBLA 45 (Mar. 25, 1991)
	120 IBLA 47 (July 12, 1991)
	122 IBLA 36 (Jan. 7, 1992)
	124 IBLA 119 (Sept. 23, 1992)
	125 IBLA 210 (Feb. 5, 1993)
	125 IBLA 287 (Feb. 26, 1993)
	127 IBLA 125 (Aug. 24, 1993)
	127 IBLA 163 (Aug. 27, 1993)
	131 IBLA 357, 101 I.D. (1994)
226-2 ----------	9 OHA 68, 98 I.D. 248 (1991)
226-3(a) ----------	114 IBLA 326 (May 22, 1990)
	122 IBLA 17 (Jan. 2, 1992)
226-3(a)(2) --------	127 IBLA 392 (Oct. 29, 1993)
226-3(b) ----------	114 IBLA 326 (May 22, 1990)
226(b) ----------	112 IBLA 373, 97 I.D. 1 (1990)
	113 IBLA 76 (Feb. 9, 1990)
	113 IBLA 99 (Feb. 14, 1990)
	113 IBLA 177 (Feb. 14, 1990)
	115 IBLA 164 (June 28, 1990)
	116 IBLA 341 (Oct. 29, 1990)
	117 IBLA 392 (Feb. 13, 1991)
	119 IBLA 7 (Mar. 15, 1991)
	121 IBLA 188 (Nov. 7, 1991)
	123 IBLA 300 (June 25, 1992)

	124 IBLA 185 (Oct. 14, 1992)
	126 IBLA 111 (Apr. 29, 1993)
	126 IBLA 332 (June 16, 1993)
	128 IBLA 192 (Feb. 10, 1994)
	M-36911 (Supp. I), 100 I.D. 103 (1993)
226(b)(1) ----------	113 IBLA 177 (Feb. 14, 1990)
	114 IBLA 194 (Apr. 24, 1990)
	115 IBLA 230 (July 12, 1990)
	115 IBLA 373 (Aug. 16, 1990)
	129 IBLA 144 (Apr. 18, 1994)
226(b)(1)(A) -------	117 IBLA 1 (Nov. 16, 1990)
	117 IBLA 390 (Feb. 13, 1991)
	122 IBLA 17 (Jan. 2, 1992)
	124 IBLA 119 (Sept. 23, 1992)
226(b)(3)(B) -------	129 IBLA 144 (Apr. 18, 1994)
226(c) ----------	113 IBLA 47 (Jan. 30, 1990)
	113 IBLA 99 (Feb. 14, 1990)
	115 IBLA 164 (June 28, 1990)
	117 IBLA 1 (Nov. 16, 1990)
	117 IBLA 54 (Nov. 27, 1990)
	121 IBLA 188 (Nov. 7, 1991)
	122 IBLA 17 (Jan. 2, 1992)
	122 IBLA 267 (Mar. 3, 1992)
	124 IBLA 119 (Sept. 23, 1992)
	126 IBLA 111 (Apr. 29, 1993)
	127 IBLA 70 (July 20, 1993)
226(e) ----------	114 IBLA 1 (Mar. 29, 1990)
	124 IBLA 16 (Aug. 19, 1992)
	126 IBLA 101 (Apr. 21, 1993)
226(f) ----------	114 IBLA 1 (Mar. 29, 1990)
	114 IBLA 225 (Apr. 26, 1990)
	117 IBLA 130 (Dec. 3, 1990)
	131 IBLA 32 (Sept. 29, 1994)
	21 IBIA 88, 98 I.D. 419 (1991)
226(g) ----------	125 IBLA 210 (Feb. 5, 1993)
	130 IBLA 61 (July 22, 1994)
226(h) ----------	118 IBLA 214 (Mar. 7, 1991)
	125 IBLA 210 (Feb. 5, 1993)
226(i) ----------	18 IBIA 315, 97 I.D. 215 (1990)
	114 IBLA 1 (Mar. 29, 1990)
	124 IBLA 16 (Aug. 19, 1992)
226(j) ----------	113 IBLA 190 (Feb. 21, 1990)
	118 IBLA 8 (Feb. 14, 1991)
	21 IBIA 88, 98 I.D. 419 (1991)
226(m) ----------	120 IBLA 47 (July 12, 1991)
	120 IBLA 229 (Aug. 8, 1991)
	127 IBLA 331, 100 I.D. 370 (1993)
261 ----------	128 IBLA 36 (Nov. 16, 1993)
262 ----------	113 IBLA 106 (Feb. 14, 1990)
	128 IBLA 36 (Nov. 16, 1993)
	128 IBLA 99 (Dec. 20, 1993)

281 ---------- 114 IBLA 66 (Apr. 6, 1990)
282 ---------- 123 IBLA 369 (July 23, 1992)
283 ---------- 114 IBLA 66 (Apr. 6, 1990)
123 IBLA 369 (July 23, 1992)
351-359 ---------- 115 IBLA 369 (Aug. 15, 1990)
115 IBLA 373 (Aug. 16, 1990)
115 IBLA 386 (Aug. 16, 1990)
116 IBLA 341 (Oct. 29, 1990)
117 IBLA 96 (Dec. 3, 1990)
125 IBLA 210 (Feb. 5, 1993)
126 IBLA 124 (Apr. 29, 1993)
128 IBLA 192 (Feb. 10, 1994)
129 IBLA 144 (Apr. 18, 1994)
M-36969, 97 I.D. 54 (1989)
351 et seq. -------- M-36969, 97 I.D. 54 (1989)
352 ---------- 113 IBLA 271 (Mar. 9, 1990)
115 IBLA 369 (Aug. 15, 1990)
115 IBLA 373 (Aug. 16, 1990)
117 IBLA 54 (Nov. 27, 1990)
117 IBLA 392 (Feb. 13, 1991)
120 IBLA 245 (Aug. 9, 1991)
125 IBLA 210 (Feb. 5, 1993)
127 IBLA 279 (Oct. 5, 1993)
128 IBLA 192 (Feb. 10, 1994)
M-36969, 97 I.D. 54 (1989)
354 ---------- 116 IBLA 341 (Oct. 29, 1990)
117 IBLA 392 (Feb. 13, 1991)
355 ---------- M-36969, 97 I.D. 54 (1989)
359 ---------- 113 IBLA 243 (Mar. 7, 1990)
118 IBLA 338 (Mar. 12, 1991)
521-524 ---------- M-36911 (Supp. I), 100 I.D. 103 (1993)
521-531 ---------- M-36911 (Supp. I), 100 I.D. 103 (1993)
601 ---------- 120 IBLA 76A (July 15, 1991)
123 IBLA 122 (May 21, 1992)
127 IBLA 73 (July 20, 1993)
601-603 ---------- 125 IBLA 353 (Mar. 30, 1993
601-604 ---------- 123 IBLA 122 (May 21, 1992)
124 IBLA 310 (Nov. 4, 1992)
126 IBLA 134 (May 4, 1993)
129 IBLA 316 (May 27, 1994)
130 IBLA 311 (Sept. 2, 1994)
601-615 ---------- 119 IBLA 367 (June 21, 1991)
601 et seq. -------- 126 IBLA 269 (June 3, 1993)
611 ---------- 115 IBLA 277 (July 26, 1990)
115 IBLA 398 (Aug. 22, 1990)
119 IBLA 319 (June 18, 1991)
120 IBLA 63 (July 15, 1991)
612 ---------- 113 IBLA 235 (Feb. 28, 1990)
119 IBLA 367 (June 21, 1991)
123 IBLA 96 (May 12, 1992)

	125 IBLA 296 (Mar. 16, 1993)
612(a) ----------	113 IBLA 396 (Mar. 28, 1990)
	120 IBLA 274 (Aug. 28, 1991)
	122 IBLA 24 (Jan. 3, 1992)
	125 IBLA 296 (Mar. 16, 1993)
613 ----------	113 IBLA 235 (Feb. 28, 1990)
	119 IBLA 12 (Mar. 18, 1991)
	126 IBLA 162 (May 10, 1993)
	126 IBLA 162 (May 10, 1993)
	128 IBLA 266 (Mar. 10, 1994)
621 ----------	112 IBLA 273 (Jan. 4, 1990)
	113 IBLA 280 (Mar. 12, 1990)
	124 IBLA 247 (Nov. 2, 1992)
	125 IBLA 104 (Jan. 12, 1993)
	127 IBLA 211 (Sept. 14, 1993)
	129 IBLA 99 (Apr. 7, 1994)
	130 IBLA 338 (Sept. 13, 1994)
621-625 ----------	124 IBLA 247 (Nov. 2, 1992)
	125 IBLA 104 (Jan. 12, 1993)
	131 IBLA 44 (Oct. 12, 1994)
621 et seq. --------	129 IBLA 99 (Apr. 7, 1994)
621(a) ----------	112 IBLA 273 (Jan. 4, 1990)
	116 IBLA 105 (Sept. 17, 1990)
	124 IBLA 247 (Nov. 2, 1992)
	125 IBLA 72 (Jan. 6, 1993)
	125 IBLA 104 (Jan. 12, 1993)
	131 IBLA 44 (Oct. 12, 1994)
621(b) ----------	113 IBLA 280 (Mar. 12, 1990)
	116 IBLA 105 (Sept. 17, 1990)
	124 IBLA 247 (Nov. 2, 1992)
	129 IBLA 99 (Apr. 7, 1994)
	131 IBLA 48, 101 I.D. 321 (1994)
623 ----------	113 IBLA 280 (Mar. 12, 1990)
	124 IBLA 247 (Nov. 2, 1992)
	127 IBLA 211 (Sept. 14, 1993)
1001-1025 ----------	130 IBLA 79 (July 26, 1994)
1001-1027 ----------	124 IBLA 171 (Oct. 2, 1992)
1002 ----------	126 IBLA 142 (May 6, 1993)
1004(c) ----------	130 IBLA 79 (July 26, 1994)
1011 ----------	124 IBLA 171 (Oct. 2, 1992)
1014 ----------	130 IBLA 79 (July 26, 1994)
1201 ----------	114 IBLA 353 (May 23, 1990)
	123 IBLA 129 (May 21, 1992)
1201 et seq. --------	114 IBLA 353 (May 23, 1990)
1201-1328 ----------	113 IBLA 352 (Mar. 22, 1990)
	114 IBLA 291 (May 10, 1990)
	117 IBLA 221 (Dec. 21, 1990)
	119 IBLA 219 (May 14, 1991)
	120 IBLA 279 (Aug. 30, 1991)
	123 IBLA 195 (June 5, 1992)
	123 IBLA 169, 99 I.D. 87 (1992)
	125 IBLA 107 (Jan. 14, 1993)

	126 IBLA 191 (May 13, 1993)
	128 IBLA 1 (Nov. 2, 1993)
	129 IBLA 148 (Apr. 19, 1994)
1201(b) ----------	M-36971, 100 I.D. 85 (1993)
1202 ----------	118 IBLA 83, 98 I.D. 38 (1991)
1202(a) ----------	123 IBLA 129 (May 21, 1992)
1202(b) ----------	120 IBLA 1, 98 I.D. 231 (1991)
	125 IBLA 271 (Feb. 19, 1993)
1202(k) ----------	M-36971, 100 I.D. 85 (1993)
1211 ----------	112 IBLA 266 (Jan. 4, 1990)
1211(C)(1) ----------	128 IBLA 266 (Mar. 10, 1994)
1251 ----------	123 IBLA 129 (May 21, 1992)
1252 ----------	115 IBLA 49 (June 12, 1990)
	122 IBLA 90 (Jan. 4, 1992)
1252(a) ----------	115 IBLA 49 (June 12, 1990)
1252(b) ----------	114 IBLA 353 (May 23, 1990)
1252(c) ----------	114 IBLA 291 (May 10, 1990)
1252(e) ----------	114 IBLA 291 (May 10, 1990)
1253 ----------	119 IBLA 296 (June 11, 1991)
	121 IBLA 142 (Oct. 28, 1991)
	124 IBLA 72 (Sept. 2, 1992)
	126 IBLA 310 (June 15, 1993)
1253(a)(4) ----------	120 IBLA 1, 98 I.D. 231 (1991)
1254 ----------	121 IBLA 142 (Oct. 28, 1991)
1254(b) ----------	130 IBLA 228 (Aug. 5, 1994)
1256(a) ----------	123 IBLA 253, 99 I.D. 100 (1992)
	123 IBLA 334 (July 14, 1992)
	126 IBLA 310 (June 15, 1993)
	126 IBLA 320 (June 16, 1993)
1257(b) ----------	112 IBLA 266 (Jan. 4, 1990)
1257(b)(4) ----------	112 IBLA 266 (Jan. 4, 1990)
1257(b)(9) ----------	120 IBLA 1, 98 I.D. 231 (1991)
	125 IBLA 271 (Feb. 19, 1993)
1257(b)(13) ---------	125 IBLA 107 (Jan. 14, 1993)
1258(a)(13) ---------	123 IBLA 195 (June 5, 1992)
1258(a)(13)(B) ------	123 IBLA 195 (June 4, 1992)
1259(a) ----------	119 IBLA 296 (June 11, 1991)
1260(b) ----------	125 IBLA 107 (Jan. 14, 1993)
	125 IBLA 271 (Feb. 19, 1993)
1260(b)(1) ----------	125 IBLA 107 (Jan. 14, 1993)
1260(b)(4) ----------	125 IBLA 107 (Jan. 14, 1993)
1260(b)(6) ----------	125 IBLA 271 (Feb. 19, 1993)
1260(c) ----------	112 IBLA 266 (Jan. 4, 1990)
	123 IBLA 253, 99 I.D. 100 (1992)
1261(a)(2) ----------	113 IBLA 384 (Mar. 28, 1990)
1263 ----------	112 IBLA 266 (Jan. 4, 1990)
1264(c) ----------	112 IBLA 266 (Jan. 4, 1990)
1265 ----------	125 IBLA 369, 100 I.D. 63 (1993)
1265(b) ----------	118 IBLA 83, 98 I.D. 38 (1991)
1265(b)(3) ----------	118 IBLA 83, 98 I.D. 38 (1991)
	119 IBLA 219 (May 14, 1991)
	121 IBLA 142 (Oct. 28, 1991)

	123 IBLA 253, 99 I.D. 100 (1992)
	126 IBLA 310 (June 16, 1993)
	126 IBLA 320 (June 16, 1993)
1265(b)(4) ----------	M-36971, 100 I.D. 85 (1993)
1265(b)(8) ----------	118 IBLA 83, 98 I.D. 38 (1991)
1265(b)(8)(A)-(F) ---	118 IBLA 83, 98 I.D. 38 (1991)
1265(b)(8)(E) -------	118 IBLA 83, 98 I.D. 38 (1991)
1265(b)(8)(F) -------	123 IBLA 195 (June 5, 1992)
1265(b)(10) ---------	123 IBLA 195 (June 5, 1992)
	130 IBLA 268 (Aug. 18, 1994)
1265(b)(10)(B)(1) ---	114 IBLA 232 (Apr. 27, 1990)
1265(b)(10)(G) ------	123 IBLA 195 (June 5, 1992)
1265(b)(22) ---------	118 IBLA 83, 98 I.D. 38 (1991)
1265(b)(22)(G) ------	118 IBLA 83, 98 I.D. 38 (1991)
1265(b)(24) ---------	114 IBLA 232 (Apr. 27, 1990)
1265(b)(28) ---------	118 IBLA 83, 98 I.D. 38 (1991)
1265(c) ----------	118 IBLA 83, 98 I.D. 38 (1991)
1265(d)(2) ----------	118 IBLA 83, 98 I.D. 38 (1991)
1265(e)(1) ----------	118 IBLA 83, 98 I.D. 38 (1991)
1266 ----------	M-36971, 100 I.D. 85 (1993)
1266(a) ----------	M-36971, 100 I.D. 85 (1993)
1266(b)(1) ----------	123 IBLA 129 (May 21, 1992)
	M-36971, 100 I.D. 85 (1993)
1266(b)(10) ---------	123 IBLA 129 (May 21, 1992)
	M-36971, 100 I.D. 85 (1993)
1266(d) ----------	M-36971, 100 I.D. 85 (1993)
1268(a) ----------	117 IBLA 350 (Jan. 31, 1991)
	118 IBLA 14 (Feb. 14, 1991)
1268(c) ----------	114 IBLA 291 (May 10, 1990)
1269(c) ----------	117 IBLA 380 (Feb. 13, 1991)
1269(c)(2) ----------	117 IBLA 380 (Feb. 13, 1991)
1270(f) ----------	120 IBLA 1, 98 I.D. 231 (1991)
1271 ----------	117 IBLA 350 (Jan. 31, 1991)
	119 IBLA 296 (June 11, 1991)
	121 IBLA 142 (Oct. 28, 1991)
	125 IBLA 369, 100 I.D. 63 (1993)
	129 IBLA 22 (Mar. 18, 1994)
1271(a) ----------	120 IBLA 1, 98 I.D. 231 (1991)
	122 IBLA 316 (Mar. 11, 1992)
	123 IBLA 129 (May 21, 1992)
	123 IBLA 253, 99 I.D. 100 (1992)
	123 IBLA 334 (July 14, 1992)
	123 IBLA 361 (July 21, 1992)
	123 IBLA 395 (Aug. 7, 1992)
	130 IBLA 41 (July 12, 1994)
	130 IBLA 228 (Aug. 5, 1994)
	131 IBLA 117 (Oct. 21, 1994)
1271(a)(1) ----------	115 IBLA 8 (June 4, 1990)
	116 IBLA 262 (Oct. 18, 1990)
	119 IBLA 219 (May 14, 1991)
	120 IBLA 1, 98 I.D. 231 (1991)
	121 IBLA 142 (Oct. 28, 1991)

	123 IBLA 129 (May 21, 1992)
	123 IBLA 253, 99 I.D. 100 (1992)
	125 IBLA 271 (Feb. 19, 1993)
	126 IBLA 310 (June 15, 1993)
	126 IBLA 320 (June 16, 1993)
	127 IBLA 192 (Sept. 14, 1993)
	128 IBLA 1 (Nov. 2, 1993)
	129 IBLA 22 (Mar. 18, 1994)
	129 IBLA 112 (Apr. 11, 1994)
	130 IBLA 228 (Aug. 5, 1994)
	130 IBLA 260 (Aug. 17, 1994)
1271(a)(2) ----------	114 IBLA 353 (May 23, 1990)
	115 IBLA 8 (June 4, 1990)
	121 IBLA 142 (Oct. 28, 1991)
	126 IBLA 310 (June 15, 1993)
1271(a)(3) ----------	114 IBLA 291 (May 10, 1990)
	117 IBLA 350 (Jan. 31, 1991)
	127 IBLA 245 (Sept. 28, 1993)
	128 IBLA 1 (Nov. 2, 1993)
	130 IBLA 228 (Aug. 5, 1994)
1271(a)(5) ----------	123 IBLA 334 (July 14, 1992)
1271(b) ----------	125 IBLA 369, 100 I.D. 63 (1993)
	130 IBLA 228 (Aug. 5, 1994)
1271(e) ----------	122 IBLA 316 (Mar. 11, 1992)
1271(e)(5) ----------	130 IBLA 260 (Aug. 17, 1994)
1272 ----------	125 IBLA 107 (Jan. 14, 1993)
1272(a) ----------	125 IBLA 107 (Jan. 14, 1993)
1272(b) ----------	125 IBLA 107 (Jan. 14, 1993)
1272(e) ----------	130 IBLA 228 (Aug. 5, 1994)
	M-36971, 100 I.D. 85 (1993)
1272(e)(3) ----------	117 IBLA 221 (Dec. 21, 1990)
1272(e)(4) ----------	131 IBLA 212 (Nov. 15, 1994)
1272(e)(5) ----------	125 IBLA 107 (Jan. 14, 1993)
	131 IBLA 212 (Nov. 15, 1994)
1273 ----------	112 IBLA 266 (Jan. 4, 1990)
	131 IBLA 27 (Sept. 28, 1994)
1273(a) ----------	131 IBLA 27 (Sept. 28, 1994)
1273(c) ----------	131 IBLA 27 (Sept. 28, 1994)
1275 ----------	126 IBLA 310 (June 15, 1993)
	129 IBLA 22 (Mar. 18, 1994)
	131 IBLA 117 (Oct. 21, 1994)
1275(a)(1) ----------	131 IBLA 27 (Sept. 28, 1994)
1275(c) ----------	127 IBLA 245 (Sept. 28, 1993)
	129 IBLA 22 (Mar. 18, 1994)
	131 IBLA 27 (Sept. 28, 1994)
	131 IBLA 117 (Oct. 21, 1994)
1275(c)(3) ----------	125 IBLA 369, 100 I.D. 63 (1993)
1275(e) ----------	127 IBLA 245 (Sept. 28, 1993)
	131 IBLA 212 (Nov. 15, 1994)
1276(a) ----------	114 IBLA 232 (Apr. 27, 1990)
	114 IBLA 291 (May 10, 1990)
	125 IBLA 369, 100 I.D. 63 (1993)

1276(a)(1) ----------	112 IBLA 266 (Jan. 4, 1990)
1278 ----------	122 IBLA 90 (Jan. 14, 1992)
1278(2) ----------	114 IBLA 353 (May 23, 1990)
	120 IBLA 279 (Aug. 30, 1991)
	122 IBLA 90 (Jan. 14, 1992)
	126 IBLA 191 (May 13, 1993)
	126 IBLA 320 (June 16, 1993)
	127 IBLA 86 (July 23, 1993)
1291(2) ----------	118 IBLA 83, 98 I.D. 38 (1991)
	119 IBLA 219 (May 14, 1991)
1291(4) ----------	112 IBLA 266 (Jan. 4, 1990)
	115 IBLA 148 (June 28, 1990)
1291(8) ----------	115 IBLA 8 (June 4, 1990)
1291(9) ----------	115 IBLA 148 (June 28, 1990)
1291(27) ----------	126 IBLA 320 (June 16, 1993)
1291(28) ----------	126 IBLA 320 (June 16, 1993)
	128 IBLA 1 (Nov. 2, 1993)
	M-36971, 100 I.D. 85 (1993)
1291(28)(A) ---------	123 IBLA 253, 99 I.D. 100 (1992)
	M-36971, 100 I.D. 85 (1993)
1291(28)(B) ---------	126 IBLA 131 (May 13, 1993)
1300(h) ----------	115 IBLA 148 (June 28, 1990)
1307 ----------	123 IBLA 159 (June 5, 1992)
	M-36971, 100 I.D. 85 (1993)
1307(a) ----------	123 IBLA 195 (June 5, 1992)
	129 IBLA 112 (Apr. 11, 1994)
1307(b) ----------	123 IBLA 195 (June 5, 1992)
	129 IBLA 112 (Apr. 11, 1994)
1311(a) ----------	131 IBLA 169 (Nov. 2, 1994)
1339(a) ----------	123 IBLA 229 (June 8, 1992)
1375 ----------	131 IBLA 299 (Dec. 2, 1994)
1602(e) ----------	113 IBLA 334 (Mar. 20, 1990)
1701 ----------	18 IBIA 315, 97 I.D. 215 (1990)
1701-1757 ----------	113 IBLA 30, 97 I.D. 11 (1990)
	115 IBLA 62 (June 14, 1990)
	116 IBLA 384 (Nov. 8, 1990)
	119 IBLA 76, 98 I.D. 207 (1991)
	125 IBLA 313 (Mar. 23, 1993)
	21 IBIA 88, 98 I.D. 419 (1991)
1701(a)(4) ----------	27 IBIA 65 (Dec. 12, 1994)
	125 IBLA 28, 99 I.D. 272 (1992)
1701(b) ----------	113 IBLA 30, 97 I.D. 11 (1990)
	113 IBLA 243 (Mar. 7, 1990)
1701(b)(2) ----------	123 IBLA 278 (June 18, 1992)
1701(b)(4) ----------	125 IBLA 28, 99 I.D. 272 (1992)
1702(7) ----------	113 IBLA 30, 97 I.D. 11 (1990)
	125 IBLA 28, 99 I.D. 272 (1992)
1702(12) ----------	127 IBLA 265 (Sept. 28, 1993)
1702(14) ----------	115 IBLA 386 (Aug. 16, 1990)
	125 IBLA 28, 99 I.D. 272 (1992)
1711(a) ----------	123 IBLA 278 (June 18, 1992)
	125 IBLA 28, 99 I.D. 272 (1992)

1711(c)(1) ---------- 123 IBLA 278 (June 18, 1992)
124 IBLA 185 (Oct. 14, 1992)
1711(c)(2) ---------- 123 IBLA 278 (June 18, 1992)
1712(a) ---------- 113 IBLA 30, 97 I.D. 11 (1990)
125 IBLA 28, 99 I.D. 272 (1992)
1712(a)(2) ---------- 125 IBLA 28, 99 I.D. 272 (1992)
1713 ---------- 123 IBLA 278 (June 18, 1992)
1713(a) ---------- 123 IBLA 278 (June 18, 1992)
124 IBLA 185 (Oct. 14, 1992)
130 IBLA 93 (Aug. 1, 1994)
1713(b) ---------- 119 IBLA 345 (June 18, 1991)
122 IBLA 141 (Feb. 3, 1992)
129 IBLA 46 (Mar. 23, 1994)
129 IBLA 151 (Apr. 19, 1994)
131 IBLA 299 (Dec. 2, 1994)
1714 ---------- 22 IBIA 240 (Aug. 24, 1992)
123 IBLA 45 (May 6, 1992)
1715(a) ---------- 123 IBLA 45 (May 6, 1992)
1717(a) ---------- 124 IBLA 185 (Oct. 14, 1992)
1717(a)(1) ---------- 123 IBLA 278 (June 18, 1992)
1719 ---------- 113 IBLA 243 (Mar. 7, 1990)
115 IBLA 62 (June 14, 1990)
115 IBLA 76 (June 18, 1990)
116 IBLA 152 (Sept. 24, 1990)
117 IBLA 255 (Jan. 10, 1991)
118 IBLA 338 (Mar. 12, 1991)
121 IBLA 1, 98 I.D. 267 (1991)
122 IBLA 283 (Mar. 5, 1992)
123 IBLA 45 (May 6, 1992)
1719(c) ---------- 128 IBLA 94 (Dec. 13, 1993)
1721 ---------- 115 IBLA 205 (July 3, 1990)
125 IBLA 308 (Mar. 18, 1993)
1721(a) ---------- 113 IBLA 226, 97 I.D. 74 (1990)
115 IBLA 62 (June 14, 1990)
115 IBLA 81 (June 19, 1990)
117 IBLA 153 (Dec. 13, 1990)
117 IBLA 199 (Dec. 21, 1990)
123 IBLA 383 (Aug. 5, 1992)
125 IBLA 313 (Mar. 23, 1993)
125 IBLA 318 (Mar. 23, 1993)
1721(b) ---------- 113 IBLA 243 (Mar. 7, 1990)
115 IBLA 62 (June 14, 1990)
1735 ---------- 112 IBLA 373, 97 I.D. 1 (1990)
115 IBLA 386 (Aug. 16, 1990)
119 IBLA 345 (June 18, 1991)
121 IBLA 188 (Nov. 7, 1991)
122 IBLA 50 (Jan. 7, 1992)
122 IBLA 267 (Mar. 3, 1992)
126 IBLA 124 (Apr. 30, 1993)
127 IBLA 125 (Aug. 24, 1993)
127 IBLA 163 (Aug. 27, 1993)
129 IBLA 46 (Mar. 23, 1994)

130 IBLA 93 (Aug. 1, 1994)
1735(d) ---------- 123 IBLA 278 (June 18, 1992)
1753(a) ---------- 113 IBLA 243 (Mar. 7, 1990)
118 IBLA 338 (Mar. 12, 1991)
1755 ---------- 119 IBLA 345 (June 18, 1991)
122 IBLA 141 (Feb. 3, 1992)
129 IBLA 151 (Apr. 19, 1994)
131 IBLA 299 (Dec. 2, 1994)

TITLE 31:

sec. 203 ---------- IBCA-2777 et al., 98 I.D. 281 (1991)
1301(d) ---------- M-36969, 97 I.D. 54 (1989)
1304 ---------- IBCA-2262 (Nov. 26, 1990)
3127 ---------- IBCA-2777 et al., 98 I.D. 281 (1991)
3512 ---------- 10 OHA 40 (June 30, 1993)
3711(a)(3) ---------- 20 IBIA 168 (Aug. 13, 1991)
3711(c)(1) ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
3727 ---------- IBCA-2777 et al., 98 I.D. 281 (1991)
3729-3731 ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
3729-3733 ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
3729(a) ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
3730(a) ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
3901-3906 ---------- IBCA-3379-E (Dec. 22, 1994)

TITLE 32:

sec. 665(a) ---------- M-36974, 100 I.D. 195 (1993)
1322(b)(2) ---------- M-36977, 100 I.D. 418 (1993)
3101(a) ---------- M-36974, 100 I.D. 195 (1993)
3717 ---------- 125 IBLA 313 (Mar. 23, 1993)
3717(g)(2) ---------- 125 IBLA 313 (Mar. 23, 1993)
3727 ---------- IBCA-2103-N, 99 I.D. 1 (1992)
3901-3906 ---------- IBCA-3037, 100 I.D. 45 (1993)
3908 ---------- IBCA-3037, 100 I.D. 45 (1993)

TITLE 33:

sec. 1251-1376 ---------- 116 IBLA 355 (Nov. 5, 1990)
1319(a)(3) ---------- 131 IBLA 169 (Nov. 2, 1994)
1375 ---------- IBCA-2553, 99 I.D. 194 (1992)

TITLE 35:

sec. 183 ---------- 114 IBLA 28 (Apr. 3, 1990)

TITLE 40:

sec. 257 ---------- 18 IBIA 131 (Feb. 1, 1990)

TITLE 41:

sec. 15 ---------- IBCA-2777 et al., 98 I.D. 281 (1991)
IBCA-2103-N, 99 I.D. 1 (1992)
251 et seq. -------- IBCA-2995, 101 I.D. 92 (1994)
254(d)(1) ---------- IBCA-2319 et al., 99 I.D. 249 (1992)
254(d)(1)(D) ------- IBCA-2319 et al., 99 I.D. 249 (1992)
254(d)(3) ---------- IBCA-2319 et al., 99 I.D. 249 (1992)
254(d)(4) ---------- IBCA-2319 et al., 99 I.D. 249 (1992)
300h ---------- 18 IBIA 431 (Sept. 17, 1990)
401 et seq. -------- M-36974, 100 I.D. 195 (1993)
403 ---------- M-36974, 100 I.D. 195 (1993)
405(a) ---------- M-36974, 100 I.D. 195 (1993)
601 ---------- IBCA-2863, 98 I.D. 213 (1991)
IBCA-2885-89, 98 I.D. 253 (1991)
IBCA-2953, 98 I.D. 355 (1991)
IBCA-2103-N, 99 I.D. 1 (1992)
IBCA-2553, 99 I.D. 194 (1992)
IBCA-2995, 101 I.D. 92 (1994)
IBCA-3230 (Nov. 23, 1994)
IBCA-3379-E (Dec. 22, 1994)
601-613 ---------- IBCA-2554, 97 I.D. 231 (1990)
IBCA-2262 (Nov. 26, 1990)
IBCA-3037, 100 I.D. 45 (1993)
18 IBIA 221 (Mar. 27, 1990)
18 IBIA 297 (May 22, 1990)
19 IBIA 279, 98 I.D. 200 (1991)
601 et seq. -------- IBCA-2885-89, 98 I.D. 210 (1991)
IBCA-2103-N, 99 I.D. 126 (1992)
IBCA-3008 et al., 99 I.D. 248 (1992)
601(1) ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
601(4) ---------- IBCA-2995, 101 I.D. 92 (1994)
601(5) ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
602(4) ---------- IBCA-2103-N, 99 I.D. 1 (1992)
602(a) ---------- IBCA-3007, 100 I.D. 301 (1993)
IBCA-2995, 101 I.D. 92 (1994)
604 ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
605 ---------- 18 IBIA 221 (Mar. 27, 1990)
18 IBIA 297 (May 22, 1990)

605(a) ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
IBCA-2863, 98 I.D. 213 (1991)
IBCA-2885-89, 98 I.D. 253 (1991)
IBCA-2777 et al., 98 I.D. 281 (1991)
IBCA-2103-N, 99 I.D. 1 (1992)
IBCA-2448, 99 I.D. 121 (1992)
IBCA-2319 et al., 99 I.D. 249 (1992)
IBCA-2995, 101 I.D. 92 (1994)
605(b) ---------- IBCA-2885-89, 98 I.D. 253 (1991)
IBCA-2448, 99 I.D. 121 (1992)
605(c) ---------- IBCA-2319 et al., 99 I.D. 242 (1992)
IBCA-2970, 100 I.D. 1 (1993)
605(c)(1) ---------- IBCA-2777 et al., 98 I.D. 281 (1991)
IBCA-2953, 98 I.D. 355 (1991)
IBCA-2103-N, 99 I.D. 1 (1992)
IBCA-2319 et al., 99 I.D. 242 (1992)
IBCA-2970, 100 I.D. 1 (1993)
IBCA-3230 (Nov. 23, 1994)
605(c)(5) ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
IBCA-2319, 100 I.D. 215 (1993)
606 ---------- IBCA-2777 et al., 98 I.D. 281 (1991)
IBCA-2944 et al., 99 I.D. 163 (1992)
607 ---------- 18 IBIA 221 (Mar. 27, 1990)
607(a)(1) ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
607(d) ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
IBCA-2863, 98 I.D. 213 (1991)
607(e) ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
607(g)(1) ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
607(g)(1)(A) ------- IBCA-2918-F, -2919-F (Aug. 2, 1991)
609(a)(1) ---------- IBCA-2995, 101 I.D. 92 (1994)
611 ---------- IBCA-2319 et al., 98 I.D. 23 (1991)
IBCA-2448, 99 I.D. 121 (1992)
IBCA-3007, 100 I.D. 301 (1993)
IBCA-3108-F, 100 I.D. 321 (1993)
IBCA-3379-E (Dec. 22, 1994)
612(b) ---------- IBCA-2262 (Nov. 26, 1990)

TITLE 42:

sec. 300f ---------- 129 IBLA 112 (Apr. 11, 1994)
300h-3(e) ---------- 124 IBLA 211 (Oct. 23, 1992)
602(a)(7)(A) ------- 20 IBIA 195 (Aug. 20, 1991)
612 ---------- 20 IBIA 195 (Aug. 20, 1991)
1983 ---------- M-36978, 100 I.D. 431 (1993)

1988 ---------- IBCA-3108-F, 100 I.D. 321 (1993)
1996 ---------- 117 IBLA 167, 97 I.D. 263 (1990)
124 IBLA 267 (Nov. 3, 1992)
2000e-5(k) ---------- IBCA-3037, 100 I.D. 45 (1993)
2004a ---------- 24 IBIA 33 (May 28, 1993)
3534 ---------- 22 IBIA 271 (Sept. 9, 1992)
4321 ---------- 118 IBLA 381 (Mar. 15, 1991)
120 IBLA 229 (Aug. 8, 1991)
124 IBLA 191 (Oct. 15, 1992)
124 IBLA 52 (Jan. 5, 1993)
126 IBLA 251 (June 1, 1993)
127 IBLA 331, 100 I.D. 370 (1993)
131 IBLA 257 (Nov. 23, 1994)
131 IBLA 349 (Dec. 28, 1994)
4321-4335 ---------- 22 IBIA 22 (Apr. 13, 1992)
22 IBIA 47 (May 4, 1992)
27 IBIA 8 (Nov. 14, 1994)
116 IBLA 269 (Oct. 22, 1990)
4321-4361 ---------- 129 IBLA 1 (Mar. 14, 1994)
130 IBLA 105 (Aug. 2, 1994)
4321-4370 ---------- 114 IBLA 51 (Apr. 6, 1990)
124 IBLA 162 (Oct. 1, 1992)
125 IBLA 52 (Jan. 5, 1993)
130 IBLA 61 (July 22, 1994)
131 IBLA 1 (Sept. 16, 1994)
4321-4370a ---------- 115 IBLA 1 (May 30, 1990)
125 IBLA 210 (Feb. 5, 1993)
128 IBLA 377 (Mar. 11, 1994)
4321-4370c ---------- 126 IBLA 142 (May 6, 1993)
4331 ---------- 115 IBLA 218 (July 12, 1990)
125 IBLA 52 (Jan. 5, 1993)
4331(a) ---------- 27 IBIA 8 (Nov. 14, 1994)
4332 ---------- 114 IBLA 366 (May 14, 1990)
115 IBLA 88 (June 21, 1990)
122 IBLA 65 (Jan. 9, 1992)
123 IBLA 302 (June 25, 1992)
126 IBLA 48 (Apr. 14, 1993)
128 IBLA 146 (Jan. 13, 1994)
128 IBLA 377 (Mar. 11, 1994)
129 IBLA 158 (Apr. 20, 1994)
131 IBLA 1 (Sept. 16, 1994)
131 IBLA 257 (Nov. 23, 1994)
4332-4361 ---------- 116 IBLA 129 (Sept. 21, 1990)
118 IBLA 354 (Mar. 14, 1991)
4332(c) ---------- 128 IBLA 52 (Dec. 2, 1993)
129 IBLA 130 (Apr. 15, 1994)
4332(2)(C) ---------- 22 IBIA 22 (Apr. 13, 1992)
112 IBLA 293 (Jan. 9, 1990)
115 IBLA 347 (Aug. 13, 1990)
116 IBLA 269 (Oct. 22, 1990)
116 IBLA 355 (Nov. 5, 1990)
117 IBLA 167, 97 I.D. 263 (1990)

	120 IBLA 34 (July 11, 1991)
	120 IBLA 47 (July 12, 1991)
	120 IBLA 290 (Sept. 6, 1991)
	122 IBLA 53 (Jan. 9, 1992)
	122 IBLA 334 (Mar. 11, 1992)
	122 IBLA 155 (Feb. 4, 1992)
	122 IBLA 165 (Feb. 7, 1992)
	122 IBLA 255 (Feb. 28, 1992)
	122 IBLA 362 (Mar. 20, 1992)
	123 IBLA 302 (June 25, 1992)
	124 IBLA 44 (Aug. 26, 1992)
	124 IBLA 83 (Sept. 15, 1992)
	124 IBLA 130 (Sept. 20, 1992)
	124 IBLA 211 (Oct. 23, 1992)
	124 IBLA 267 (Nov. 3, 1992)
	125 IBLA 52 (Jan. 5, 1993)
	125 IBLA 132 (Jan. 15, 1993)
	125 IBLA 210 (Feb. 5, 1993)
	126 IBLA 93 (Apr. 21, 1993)
	126 IBLA 142 (May 6, 1993)
	126 IBLA 304 (June 15, 1993)
	127 IBLA 282 (Oct. 7, 1993)
	128 IBLA 370 (Mar. 11, 1994)
	129 IBLA 1 (Mar. 14, 1994)
	129 IBLA 130 (Apr. 15, 1994)
	129 IBLA 269 (May 17, 1994)
	130 IBLA 105 (Aug. 2, 1994)
	130 IBLA 244 (Aug. 5, 1994)
	131 IBLA 180 (Nov. 3, 1994)
	131 IBLA 342 (Dec. 27, 1994)
4332(2)(D)(iii) -----	129 IBLA 130 (Apr. 15, 1994)
4332(2)(E) ----------	22 IBIA 22 (Apr. 13, 1992)
	115 IBLA 179 (July 3, 1990)
	120 IBLA 47 (July 12, 1991)
	122 IBLA 334 (Mar. 11, 1992)
	124 IBLA 83 (Sept. 15, 1992)
	124 IBLA 130 (Sept. 24, 1992)
4601 ----------	10 OHA 20 (May 18, 1993)
4601(6)(A)(i)(I) ----	10 OHA 36 (June 28, 1993)
4601(6)(B) ----------	10 OHA 36 (June 28, 1993)
4601-4655 ----------	9 OHA 181 (Aug. 28, 1992)
	10 OHA 1 (Apr. 27, 1993)
	10 OHA 20 (May 18, 1993)
	10 OHA 110 (Aug. 31, 1993)
	10 OHA 175 (Feb. 28, 1994)
	10 OHA 175 (Feb. 28, 1994)
4601 *et seq.* --------	9 OHA 161 (May 15, 1992)
	10 OHA 1 (Apr. 27, 1993)
	10 OHA 20 (May 18, 1993)
4601(6)(A)(i)(I) ----	9 OHA 181 (Aug. 28, 1992)
4601(6)(B) ----------	9 OHA 181 (Aug. 28, 1992)
4601(7)(A) ----------	9 OHA 170 (June 9, 1992)

4601(7)(B) ---------- 9 OHA 170 (June 9, 1992)
4601(10) ---------- 9 OHA 99 (Oct. 31, 1991)
10 OHA 110 (Aug. 31, 1993)
4622 ---------- 10 OHA 36 (June 28, 1993)
4622(a) ---------- 9 OHA 161 (May 15, 1992)
9 OHA 170 (June 9, 1992)
4622(a)(1) ---------- 8 OHA 134 (Jan. 12, 1990)
8 OHA 222 (Sept. 14, 1990)
8 OHA 237 (Nov. 26, 1990)
9 OHA 8 (Feb. 28, 1991)
10 OHA 1 (Apr. 27, 1993)
10 OHA 20 (May 18, 1993)
4622(a)(2) ---------- 10 OHA 1 (Apr. 27, 1993)
10 OHA 20 (May 18, 1993)
4622(c) ---------- 9 OHA 170 (June 9, 1992)
10 OHA 1 (Apr. 27, 1993)
10 OHA 20 (May 18, 1993)
4623 ---------- 9 OHA 99 (Oct. 31, 1991)
10 OHA 110 (Aug. 31, 1993)
4623(a)(1) ---------- 8 OHA 134 (Jan. 12, 1990)
9 OHA 8 (Feb. 28, 1991)
4623(a)(1)(C) ------- 10 OHA 110 (Aug. 31, 1993)
4624 ---------- 8 OHA 216 (Aug. 27, 1990)
4626 ---------- 10 OHA 110 (Aug. 31, 1993)
4633 ---------- 9 OHA 161 (May 15, 1992)
4651 ---------- 9 OHA 99 (Oct. 31, 1991)
4651(3) ---------- M-36974, 100 I.D. 195 (1993)
4652 ---------- 9 OHA 161 (May 15, 1992)
4652(b)(1) ---------- 9 OHA 161 (May 15, 1992)
4653 ---------- 9 OHA 15 (Mar. 21, 1991)
10 OHA 188 (Mar. 10, 1994)
10 OHA 188 (Mar. 10, 1994)
4654(a) ---------- 9 OHA 15 (Mar. 21, 1991)
6901-6987 ---------- 123 IBLA 150 (May 28, 1992)
6903(3) ---------- 123 IBLA 150 (May 28, 1992)
6903(29) ---------- 123 IBLA 150 (May 28, 1992)
6944(a) ---------- 123 IBLA 150 (May 28, 1992)
7172 ---------- 115 IBLA 301 (Aug. 6, 1990)
7401-7642 ---------- 116 IBLA 355 (Nov. 5, 1990)
9601-9657 ---------- 123 IBLA 150 (May 28, 1992)

TITLE 43:

sec. 2 ---------- 126 IBLA 281 (June 7, 1993)
126 IBLA 361 (June 29, 1993)
52 ---------- 126 IBLA 361 (June 29, 1993)
102 ---------- 128 IBLA 266 (Mar. 10, 1994)
102-106 ---------- 128 IBLA 266 (Mar. 10, 1994)
141 ---------- 112 IBLA 273 (Jan. 4, 1990)
113 IBLA 86 (Feb. 13, 1990)
130 IBLA 50 (July 13, 1994)
141-143 ---------- 112 IBLA 273 (Jan. 4, 1990)

	127 IBLA 375 (Oct. 21, 1993)
142 ----------	113 IBLA 286 (Feb. 13, 1990)
	130 IBLA 50 (July 13, 1994)
154 ----------	112 IBLA 312 (Jan. 10, 1990)
	128 IBLA 257 (Mar. 4, 1994)
155 ----------	127 IBLA 375 (Oct. 21, 1993)
155-158 ----------	117 IBLA 239 (Jan. 3, 1991)
	127 IBLA 375 (Oct. 21, 1993)
156 ----------	117 IBLA 239 (Jan. 3, 1991)
161 ----------	124 IBLA 363 (Dec. 8, 1992)
161-284 ----------	M-36969, 97 I.D. 54 (1989)
164 ----------	121 IBLA 31 (Oct. 10, 1991)
171 ----------	121 IBLA 31 (Oct. 10, 1991)
	129 IBLA 345 (June 2, 1994)
178 ----------	129 IBLA 345 (June 2, 1994)
209(b)(3) ----------	123 IBLA 51, 99 I.D. 64 (1992)
213 ----------	123 IBLA 354 (July 20, 1992)
226(B)(i) ----------	129 IBLA 144 (Apr. 18, 1994)
226(b)(3)(A) -------	129 IBLA 144 (Apr. 18, 1994)
226(b)(3)(B)(i) ----	129 IBLA 144 (Apr. 18, 1994)
256a ----------	125 IBLA 158 (Jan. 28, 1993)
270-1 ----------	113 IBLA 80 (Feb. 12, 1990)
	114 IBLA 86 (Apr. 11, 1990)
	115 IBLA 43 (June 12, 1990)
	117 IBLA 247 (Jan. 9, 1991)
	118 IBLA 1 (Feb. 13, 1991)
	118 IBLA 204 (Mar. 6, 1991)
	121 IBLA 224 (Nov. 13, 1991)
	123 IBLA 6 (Apr. 22, 1992)
	124 IBLA 294 (Nov. 4, 1992)
	125 IBLA 235 (Feb. 11, 1993)
	126 IBLA 256 (June 2, 1993)
	126 IBLA 256 (June 2, 1993)
	128 IBLA 252 (Mar. 2, 1994)
	131 IBLA 121 (Oct. 25, 1994)
270-1-270-2 --------	130 IBLA 5 (July 5, 1994)
270-1-270-3 --------	113 IBLA 21 (Jan. 29, 1990)
	113 IBLA 80 (Feb. 12, 1990)
	115 IBLA 97 (June 26, 1990)
	115 IBLA 317 (Aug. 7, 1990)
	116 IBLA 145 (Sept. 24, 1990)
	116 IBLA 301 (Oct. 24, 1990)
	116 IBLA 317 (Oct. 29, 1990)
	117 IBLA 148 (Dec. 13, 1990)
	117 IBLA 247 (Jan. 9, 1991)
	117 IBLA 330 (Jan. 24, 1991)
	117 IBLA 358 (Jan. 31, 1991)
	117 IBLA 373 (Feb. 7, 1991)
	118 IBLA 204 (Mar. 6, 1991)
	119 IBLA 260 (May 22, 1991)
	120 IBLA 367 (Sept. 18, 1991)
	121 IBLA 52 (Oct. 23, 1991)

	121 IBLA 155 (Oct. 31, 1991)
	122 IBLA 30 (Jan. 3, 1992)
	122 IBLA 109 (Jan. 14, 1992)
	122 IBLA 209 (Feb. 12, 1992)
	122 IBLA 344 (Mar. 11, 1992)
	123 IBLA 6 (Apr. 22, 1992)
	123 IBLA 233 (June 9, 1992)
	124 IBLA 1 (Aug. 13, 1992)
	124 IBLA 57 (Aug. 27, 1992)
	124 IBLA 294 (Nov. 4, 1992)
	124 IBLA 336 (Nov. 18, 1992)
	124 IBLA 349 (Dec. 2, 1992)
	124 IBLA 386 (Dec. 10, 1992)
	125 IBLA 235 (Feb. 11, 1993)
	125 IBLA 291 (Mar. 9, 1993)
	126 IBLA 168 (May 11, 1993)
	126 IBLA 204 (May 20, 1993)
	126 IBLA 256 (June 2, 1993)
	126 IBLA 281 (June 7, 1993)
	127 IBLA 175 (Sept. 2, 1993)
	127 IBLA 196 (Sept. 14, 1993)
	127 IBLA 224 (Sept. 24, 1993)
	128 IBLA 130 (Dec. 30, 1993)
	128 IBLA 161 (Jan. 13, 1994)
	128 IBLA 252 (Mar. 2, 1994)
	128 IBLA 393 (Mar. 11, 1994)
	129 IBLA 35 (Mar. 21, 1994)
	129 IBLA 167 (Apr. 21, 1994)
	129 IBLA 279 (May 20, 1994)
	129 IBLA 293 (May 24, 1994)
	130 IBLA 5 (July 5, 1994)
	130 IBLA 83 (July 27, 1994)
270-2 ----------	123 IBLA 6 (Apr. 22, 1992)
	125 IBLA 291 (Mar. 9, 1993)
270-3 ----------	113 IBLA 80 (Feb. 12, 1990)
	115 IBLA 43 (June 12, 1990)
	117 IBLA 148 (Dec. 13, 1990)
	117 IBLA 247 (Jan. 9, 1991)
	117 IBLA 358 (Jan. 31, 1991)
	118 IBLA 204 (Mar. 6, 1991)
	121 IBLA 224 (Nov. 13, 1991)
	124 IBLA 294 (Nov. 4, 1992)
	125 IBLA 235 (Feb. 11, 1993)
	126 IBLA 256 (June 2, 1993)
	127 IBLA 196 (Sept. 14, 1993)
	127 IBLA 224 (Sept. 24, 1993)
	128 IBLA 393 (Mar. 11, 1994)
	128 IBLA 252 (Mar. 2, 1994)
	128 IBLA 393 (Mar. 11, 1994)
	129 IBLA 35 (Mar. 21, 1994)
291 ----------	23 IBIA 286 (Apr. 6, 1993)
	126 IBLA 269 (June 3, 1993)

291-298 ---------- 127 IBLA 395 (Nov. 2, 1993)
291-301 ---------- 122 IBLA 68 (Jan. 10, 1992)
291-302 ---------- M-36969, 97 I.D. 54 (1989)
299 ---------- 23 IBIA 286 (Apr. 6, 1993)
122 IBLA 36 (Jan. 7, 1992)
122 IBLA 68 (Jan. 10, 1992)
123 IBLA 51, 99 I.D. 64 (1992)
300 ---------- 129 IBLA 182 (Apr. 28, 1994)
315 ---------- 116 IBLA 32 (Aug. 27, 1990)
122 IBLA 77 (Jan. 14, 1992)
123 IBLA 80 (May 11, 1992)
124 IBLA 176 (Oct. 13, 1992)
124 IBLA 200 (Oct. 21, 1992)
126 IBLA 8 (Apr. 1, 1993)
126 IBLA 296 (June 14, 1993)
127 IBLA 395 (Nov. 2, 1993)
129 IBLA 250 (May 2, 1994)
131 IBLA 146 (Oct. 31, 1994)
315-315o-1 --------- 125 IBLA 170 (Feb. 5, 1993)
315-315q ---------- 126 IBLA 238 (May 28, 1993)
315-315r ---------- 130 IBLA 119 (Aug. 4, 1994)
315-316o ---------- 130 IBLA 376 (Sept. 15, 1994)
315 et seq. -------- 129 IBLA 304 (May 25, 1994)
M-36972, 100 I.D. 163 (1993)
315a ---------- 115 IBLA 69 (June 15, 1990)
116 IBLA 32 (Aug. 27, 1990)
122 IBLA 77 (Jan. 14, 1992)
123 IBLA 80 (May 11, 1992)
124 IBLA 67 (Sept. 2, 1992)
124 IBLA 176 (Oct. 13, 1992)
124 IBLA 200 (Oct. 21, 1992)
126 IBLA 111 (Apr. 27, 1993)
129 IBLA 304 (May 25, 1994)
130 IBLA 119 (Aug. 4, 1994)
315a-315r ---------- 116 IBLA 32 (Aug. 27, 1990)
122 IBLA 77 (Jan. 14, 1992)
123 IBLA 80 (May 11, 1992)
124 IBLA 176 (Oct. 13, 1992)
124 IBLA 200 (Oct. 21, 1992)
126 IBLA 8 (Apr. 1, 1993)
131 IBLA 146 (Oct. 31, 1994)
315b ---------- 120 IBLA 374 (Sept. 19, 1991)
124 IBLA 176 (Oct. 13, 1992)
125 IBLA 170 (Feb. 5, 1993)
126 IBLA 8 (Apr. 1, 1993)
126 IBLA 111 (Apr. 27, 1993)
126 IBLA 238 (May 28, 1993)
315c ---------- 115 IBLA 69 (June 15, 1990)
115 IBLA 92 (June 21, 1990)
315f ---------- 112 IBLA 321 (Jan. 12, 1990)
116 IBLA 29 (Aug. 27, 1990)
117 IBLA 239 (Jan. 3, 1991)

	131 IBLA 251 (Nov. 22, 1994)
	131 IBLA 306 (Dec. 5, 1994)
315g ----------	127 IBLA 105 (Aug. 9, 1993)
315g(b) ----------	131 IBLA 14 (Sept. 22, 1994)
315h ----------	118 IBLA 345 (Mar. 13, 1991)
	120 IBLA 342 (Sept. 12, 1991)
	126 IBLA 238 (May 28, 1993)
	127 IBLA 259 (Sept. 28, 1993)
	130 IBLA 119 (Aug. 4, 1994)
316 ----------	129 IBLA 250 (May 2, 1994)
321 ----------	112 IBLA 321 (Jan. 12, 1990)
	113 IBLA 292 (Mar. 12, 1990)
	114 IBLA 239 (May 7, 1990)
	114 IBLA 380 (May 24, 1990)
	116 IBLA 158 (Sept. 25, 1990)
	116 IBLA 169 (Sept. 26, 1990)
	120 IBLA 153 (July 16, 1991)
	121 IBLA 218 (Nov. 13, 1991)
	124 IBLA 363 (Dec. 8, 1992)
	125 IBLA 158 (Jan. 28, 1993)
	125 IBLA 165 (Jan. 28, 1993)
	126 IBLA 20 (Apr. 8, 1993)
	130 IBLA 369 (Sept. 15, 1994)
	131 IBLA 251 (Nov. 22, 1994)
	131 IBLA 306 (Dec. 5, 1994)
321-323 ----------	125 IBLA 165 (Jan. 28, 1993)
321-329 ----------	131 IBLA 251 (Nov. 22, 1994)
	131 IBLA 306 (Dec. 5, 1994)
	M-36969, 97 I.D. 54 (1989)
321-339 ----------	114 IBLA 239 (May 7, 1990)
	121 IBLA 218 (Nov. 13, 1991)
	124 IBLA 363 (Dec. 8, 1992)
322 ----------	112 IBLA 321 (Jan. 12, 1990)
	114 IBLA 380 (May 24, 1990)
	116 IBLA 169 (Sept. 26, 1990)
	121 IBLA 218 (Nov. 13, 1991)
	124 IBLA 363 (Dec. 8, 1992)
	131 IBLA 251 (Nov. 22, 1994)
	131 IBLA 306 (Dec. 5, 1994)
324 ----------	130 IBLA 369 (Sept. 15, 1994)
325 ----------	125 IBLA 165 (Jan. 28, 1993)
	130 IBLA 369 (Sept. 15, 1994)
327 ----------	114 IBLA 239 (May 7, 1990)
	124 IBLA 363 (Dec. 8, 1992)
327-329 ----------	125 IBLA 165 (Jan. 28, 1993)
328 ----------	116 IBLA 169 (Sept. 26, 1990)
	120 IBLA 153 (July 16, 1991)
	121 IBLA 218 (Nov. 18, 1991)
	124 IBLA 363 (Dec. 8, 1992)
	125 IBLA 158 (Jan. 28, 1993)
	125 IBLA 165 (Jan. 28, 1993)
	126 IBLA 20 (Apr. 8, 1993)

329 ---------- 116 IBLA 169 (Sept. 26, 1990)
120 IBLA 153 (July 16, 1991)
121 IBLA 218 (Nov. 13, 1991)
125 IBLA 158 (Jan. 28, 1993)
125 IBLA 165 (Jan. 28, 1993)
126 IBLA 20 (Apr. 8, 1993)
333 ---------- 116 IBLA 169 (Sept. 26, 1990)
117 IBLA 13 (Nov. 21, 1990)
120 IBLA 153 (July 16, 1991)
121 IBLA 218 (Nov. 13, 1991)
125 IBLA 158 (Jan. 28, 1993)
334 ---------- 116 IBLA 169 (Sept. 26, 1990)
117 IBLA 13 (Nov. 21, 1990)
120 IBLA 153 (July 16, 1991)
125 IBLA 158 (Jan. 28, 1993)
336 ---------- 116 IBLA 169 (Sept. 26, 1990)
117 IBLA 13 (Nov. 21, 1990)
125 IBLA 158 (Jan. 28, 1993)
336a ---------- 125 IBLA 158 (Jan. 28, 1993)
343 ---------- 130 IBLA 301 (Aug. 31, 1994)
372 ---------- M-36966, 97 I.D. 21 (1989)
M-36967, 97 I.D. 32 (1989)
374 ---------- M-36969, 97 I.D. 54 (1989)
375 ---------- M-36969, 97 I.D. 54 (1989)
383 ---------- M-36966, 97 I.D. 21 (1989)
M-36967, 97 I.D. 32 (1989)
387 ---------- 112 IBLA 312 (Jan. 10, 1990)
9 OHA 137 (Mar. 19, 1992)
389 ---------- M-36967, 97 I.D. 32 (1989)
390hh ---------- M-36969, 97 I.D. 54 (1989)
391 ---------- M-36969, 97 I.D. 54 (1989)
391 et seq. -------- M-36969, 97 I.D. 54 (1989)
392 ---------- M-36969, 97 I.D. 54 (1989)
391a-1 ---------- M-36969, 97 I.D. 54 (1989)
392a ---------- M-36969, 97 I.D. 54 (1989)
394 ---------- M-36969, 97 I.D. 54 (1989)
401 ---------- M-36969, 97 I.D. 54 (1989)
414 ---------- M-36969, 97 I.D. 54 (1989)
416 ---------- 113 IBLA 393 (Mar. 28, 1990)
128 IBLA 257 (Mar. 4, 1994)
441 ---------- 124 IBLA 196 (Oct. 20, 1992)
471 et seq. -------- M-36969, 97 I.D. 54 (1989)
485 ---------- M-36969, 97 I.D. 54 (1989)
485b ---------- M-36969, 97 I.D. 54 (1989)
485h(c) ---------- M-36969, 97 I.D. 54 (1989)
501 ---------- M-36969, 97 I.D. 54 (1989)
504 ---------- M-36969, 97 I.D. 54 (1989)
511 ---------- M-36967, 97 I.D. 32 (1989)
521 ---------- M-36969, 97 I.D. 54 (1989)
522 ---------- M-36969, 97 I.D. 54 (1989)
526 ---------- M-36969, 97 I.D. 54 (1989)
569 ---------- M-36969, 97 I.D. 54 (1989)

569(c) ---------- M-36969, 97 I.D. 54 (1989)
569(d) ---------- M-36969, 97 I.D. 54 (1989)
597 ---------- M-36973, 100 I.D. 185 (1993)
613 ---------- 112 IBLA 326 (Jan. 12, 1990)
614 ---------- M-36967, 97 I.D. 32 (1989)
614c ---------- M-36967, 97 I.D. 32 (1989)
620 ---------- 128 IBLA 99 (Dec. 20, 1993)
661 ---------- 128 IBLA 43 (Dec. 1, 1993)
666 ---------- M-36966, 97 I.D. 21 (1989)
M-36973, 100 I.D. 185 (1993)
670g ---------- 119 IBLA 332 (June 18, 1991)
670h ---------- 119 IBLA 332 (June 18, 1991)
682(a) ---------- 115 IBLA 105 (June 27, 1990)
119 IBLA 319 (June 18, 1991)
682a-682e ---------- 129 IBLA 91 (Apr. 4, 1994)
687(a) ---------- 116 IBLA 203 (Oct. 4, 1990)
125 IBLA 335 (Mar. 29, 1993)
129 IBLA 108 (Apr. 7, 1994)
M-36911 (Supp. I), 100 I.D. 103 (1993)
687a-1 ---------- 125 IBLA 335 (Mar. 29, 1993)
129 IBLA 108 (Apr. 7, 1994)
687a-2-687a-5 ------ M-36911 (Supp. I), 100 I.D. 103 (1993)
693-697 ---------- 127 IBLA 307 (Oct. 7, 1993)
732 ---------- 114 IBLA 377 (May 24, 1990)
116 IBLA 349 (Oct. 30, 1990)
117 IBLA 285 (Jan. 16, 1991)
128 IBLA 13 (Nov. 3, 1993)
735 ---------- 114 IBLA 377 (May 24, 1990)
116 IBLA 349 (Oct. 30, 1990)
117 IBLA 285 (Jan. 16, 1991)
127 IBLA 13 (Nov. 3, 1993)
751 ---------- 126 IBLA 361 (June 29, 1993)
751-753 ---------- 126 IBLA 361 (June 29, 1993)
751-774 ---------- 114 IBLA 177, 97 I.D. 171 (1990)
752 ---------- 115 IBLA 327 (Aug. 7, 1990)
772 ---------- 126 IBLA 361 (June 29, 1993)
130 IBLA 238 (Aug. 5, 1994)
130 IBLA 342 (Sept. 13, 1994)
131 IBLA 337 (Dec. 27, 1994)
869 ---------- 114 IBLA 177, 97 I.D. 171 (1990)
119 IBLA 33 (Mar. 25, 1991)
119 IBLA 375 (June 28, 1991)
123 IBLA 150 (May 28, 1992)
869-869-4 ---------- 116 IBLA 108 (Sept. 18, 1990)
123 IBLA 150 (May 28, 1992)
127 IBLA 145 (Aug. 25, 1993)
869-1 ---------- 116 IBLA 108 (Sept. 18, 1990)
869-2 ---------- 119 IBLA 33 (Mar. 25, 1991)
123 IBLA 150 (May 28, 1992)
869-2(b) ---------- 119 IBLA 33 (Mar. 25, 1991)

869-2(b)(1) -------- 119 IBLA 33 (Mar. 25, 1991)
123 IBLA 150 (May 28, 1992)
869-2(b)(2) -------- 123 IBLA 150 (May 28, 1992)
869-2(b)(6) -------- 123 IBLA 150 (May 28, 1992)
869-2(b)(7) -------- 123 IBLA 150 (May 28, 1992)
870 ---------- 113 IBLA 287 (Mar. 12, 1990)
128 IBLA 249 (Mar. 2, 1994)
870-871 ---------- 131 IBLA 284 (Nov. 30, 1994)
870c ---------- 131 IBLA 284 (Nov. 30, 1994)
870(d)(4) ---------- 131 IBLA 284 (Nov. 30, 1994)
871a ---------- 131 IBLA 284 (Nov. 30, 1994)
898 ---------- 118 IBLA 78 (Feb. 27, 1991)
905(a) ---------- 130 IBLA 83 (July 27, 1994)
932 ---------- 122 IBLA 275 (Mar. 5, 1992)
124 IBLA 7 (Aug. 13, 1992)
127 IBLA 325 (Oct. 14, 1993)
129 IBLA 341 (May 31, 1994)
942-1 ---------- 127 IBLA 137 (Aug. 25, 1993)
942-1-942-9 -------- M-36911 (Supp. I), 100 I.D. 103 (1993)
945 ---------- 124 IBLA 336 (Nov. 18, 1992)
128 IBLA 257 (Mar. 4, 1994)
946 ---------- 124 IBLA 353 (Dec. 4, 1992)
948 ---------- 124 IBLA 353 (Dec. 4, 1992)
956 ---------- 117 IBLA 281 (Jan. 16, 1991)
959 ---------- 124 IBLA 353 (Dec. 4, 1992)
125 IBLA 262 (Feb. 17, 1993)
961 ---------- 113 IBLA 327 (Mar. 15, 1990)
114 IBLA 205 (Apr. 24, 1990)
114 IBLA 399 (May 30, 1990)
116 IBLA 164 (Sept. 26, 1990)
981 ---------- 113 IBLA 380 (Mar. 28, 1990)
982-994 ---------- 121 IBLA 73, 98 I.D. 321 (1991)
1061 ---------- 126 IBLA 101 (Apr. 21, 1993)
1068 ---------- 113 IBLA 8 (Jan. 25, 1990)
113 IBLA 209 (Feb. 22, 1990)
113 IBLA 380 (Mar. 28, 1990)
114 IBLA 302 (May 10, 1990)
117 IBLA 339 (Jan. 29, 1991)
121 IBLA 73, 98 I.D. 321 (1991)
123 IBLA 354 (July 20, 1992)
125 IBLA 143 (Jan. 15, 1993)
125 IBLA 230 (Feb. 11, 1993)
125 IBLA 247 (Feb. 11, 1993)
125 IBLA 255 (Feb. 16, 1993)
127 IBLA 47 (July 15, 1993)
129 IBLA 330 (May 31, 1994)
129 IBLA 334 (May 31, 1994)
129 IBLA 345 (June 2, 1994)
130 IBLA 249 (Aug. 9, 1994)
1068-1068b ---------- 123 IBLA 354 (July 20, 1992)
129 IBLA 301 (May 24, 1994)

1068(b) ---------- 125 IBLA 230 (Feb. 11, 1993)
1152 ---------- 121 IBLA 31 (Oct. 10, 1991)
1161 ---------- 125 IBLA 335 (Mar. 29, 1993)
1164 ---------- 125 IBLA 335 (Mar. 29, 1993)
1166 ---------- 121 IBLA 31 (Oct. 10, 1991)
124 IBLA 386 (Dec. 10, 1992)
129 IBLA 35 (Mar. 21, 1994)
1181a ---------- 116 IBLA 355 (Nov. 5, 1990)
122 IBLA 362 (Mar. 20, 1992)
126 IBLA 93 (Apr. 21, 1993)
127 IBLA 379 (Oct. 27, 1993)
1181a-1181f --------- 114 IBLA 51 (Apr. 6, 1990)
116 IBLA 81 (Sept. 10, 1990)
116 IBLA 129 (Sept. 21, 1990)
116 IBLA 355 (Nov. 5, 1990)
120 IBLA 374 (Sept. 19, 1991)
122 IBLA 53 (Jan. 9, 1992)
1181b ---------- 122 IBLA 362 (Mar. 20, 1992)
1181d-1181f --------- 122 IBLA 362 (Mar. 20, 1992)
1181f ---------- 127 IBLA 379 (Oct. 27, 1993)
1201 ---------- 114 IBLA 326 (May 22, 1990)
123 IBLA 96 (May 12, 1992)
1205(b) ---------- 120 IBLA 324 (Sept. 12, 1991)
1211 ---------- 120 IBLA 63 (July 15, 1991)
1221 ---------- 117 IBLA 339 (Jan. 29, 1991)
1301-1315 ---------- 127 IBLA 317 (Oct. 13, 1993)
M-36911 (Supp. I), 100 I.D. 103 (1993)
1301(f) ---------- M-36911 (Supp. I), 100 I.D. 103 (1993)
1311(a) ---------- M-36911 (Supp. I), 100 I.D. 103 (1993)
1312 ---------- M-36911 (Supp. I), 100 I.D. 103 (1993)
1313 ---------- 127 IBLA 317 (Oct. 13, 1993)
1313(a) ---------- 127 IBLA 317 (Oct. 13, 1993)
129 IBLA 386 (June 20, 1994)
M-36911 (Supp. I), 100 I.D. 103 (1993)
1313(b) ---------- M-36911 (Supp. I), 100 I.D. 103 (1993)
1313(c) ---------- M-36911 (Supp. I), 100 I.D. 103 (1993)
1313(e) ---------- 129 IBLA 386 (June 20, 1994)
1314 ---------- M-36911 (Supp. I), 100 I.D. 103 (1993)
1314(b) ---------- M-36911 (Supp. I), 100 I.D. 103 (1993)
1331 ---------- 125 IBLA 1 (Dec. 10, 1992)
1331-1356 ---------- 115 IBLA 195 (July 3, 1990)
118 IBLA 30 (Feb. 21, 1991)
123 IBLA 229 (June 8, 1992)

	123 IBLA 361 (July 21, 1992)
	125 IBLA 7 (Dec. 10, 1992)
	129 IBLA 285 (May 20, 1994)
1333(a)(2)(A) -------	114 IBLA 42 (Apr. 3, 1990)
1334 ----------	116 IBLA 152 (Sept. 24, 1990)
	117 IBLA 230 (Dec. 21, 1990)
1334(a) ----------	113 IBLA 243 (Mar. 7, 1990)
	118 IBLA 338 (Mar. 12, 1991)
	M-36977, 100 I.D. 418 (1993)
1335 ----------	118 IBLA 30 (Feb. 21, 1991)
1335(a)(1)-(11) -----	M-36968, 97 I.D. 49 (1989)
1335(a)(2) ----------	M-36968, 97 I.D. 49 (1989)
1335(a)(9) ----------	M-36968, 97 I.D. 49 (1989)
1335(b) ----------	118 IBLA 30 (Feb. 21, 1991)
	M-36968, 97 I.D. 49 (1989)
1337 ----------	115 IBLA 195 (July 3, 1990)
	115 IBLA 304 (Aug. 7, 1990)
	115 IBLA 393 (Aug. 21, 1990)
	118 IBLA 30 (Feb. 21, 1991)
	131 IBLA 357, 101 I.D. (1994)
1337(a)(1) ----------	117 IBLA 230 (Dec. 21, 1990)
	129 IBLA 285 (May 20, 1994)
1337(a)(1)(A) -------	M-36977, 100 I.D. 418 (1993)
1337(g) ----------	115 IBLA 62 (June 14, 1990)
	127 IBLA 220 (Sept. 23, 1993)
	M-36977, 100 I.D. 418 (1993)
1338 ----------	M-36977, 100 I.D. 418 (1993)
1339 ----------	113 IBLA 30, 97 I.D. 11 (1990)
	116 IBLA 176, 97 I.D. 239 (1990)
	123 IBLA 229 (June 8, 1992)
	124 IBLA 206 (Oct. 22, 1992)
	125 IBLA 1 (Dec. 10, 1992)
	125 IBLA 7 (Dec. 10, 1992)
	127 IBLA 96 (July 27, 1993)
	127 IBLA 220 (Sept. 23, 1993)
	M-36977, 100 I.D. 418 (1993)
	9 OHA 68, 98 I.D. 248 (1991)
1339(a) ----------	113 IBLA 30, 97 I.D. 11 (1990)
	113 IBLA 186 (Feb. 15, 1990)
	114 IBLA 28 (Apr. 3, 1990)
	116 IBLA 67 (Sept. 5, 1990)
	116 IBLA 176, 97 I.D. 239 (1990)
	117 IBLA 120 (Dec. 3, 1990)
	117 IBLA 125 (Dec. 3, 1990)
	124 IBLA 206 (Oct. 22, 1992)
	125 IBLA 1 (Dec. 10, 1992)
	125 IBLA 7 (Dec. 10, 1992)
	127 IBLA 96 (July 27, 1993)
	128 IBLA 94 (Dec. 13, 1993)
1339(b) ----------	114 IBLA 28 (Apr. 3, 1990)
1344(a)(4) ----------	117 IBLA 230 (Dec. 21, 1990)
	117 IBLA 255 (Jan. 10, 1991)

1353 ---------- M-36977, 100 I.D. 418 (1993)
1411 ---------- 115 IBLA 214 (July 3, 1990)
1411-1418 ---------- 115 IBLA 214 (July 3, 1990)
123 IBLA 330 (July 10, 1992)
129 IBLA 369 (June 7, 1994)
1412 ---------- 115 IBLA 214 (July 3, 1990)
1414 ---------- 115 IBLA 214 (July 3, 1990)
129 IBLA 369 (June 7, 1994)
1452 ---------- 120 IBLA 245 (Aug. 9, 1991)
1542 ---------- 22 IBIA 220 (Aug. 14, 1992)
1601 ---------- 117 IBLA 373 (Feb. 7, 1991)
118 IBLA 60 (Feb. 21, 1991)
119 IBLA 301 (June 11, 1991)
123 IBLA 109 (May 18, 1992)
9 OHA 143, 99 I.D. 31 (1992)
1601-29a ---------- 127 IBLA 317 (Oct. 13, 1993)
1601-1624 ---------- 116 IBLA 301 (Oct. 24, 1990)
1601 et seq. -------- 120 IBLA 324 (Sept. 12, 1991)
M-36911 (Supp. I), 100 I.D. 103 (1993)
M-36972, 100 I.D. 163 (1993)
9 OHA 239, 100 I.D. 75 (1993)
Sol. Memo, 100 I.D.4 (1993)
1601(a) ---------- 113 IBLA 218 (Feb. 27, 1990)
122 IBLA 375 (Apr. 2, 1992)
129 IBLA 179 (Apr. 22, 1994)
1601(b) ---------- 122 IBLA 375 (Apr. 2, 1992)
1602 ---------- 128 IBLA 119 (Dec. 22, 1993)
1602(a) ---------- 122 IBLA 375 (Apr. 2, 1992)
1602(c) ---------- 26 IBIA 159 (Aug. 3, 1994)
1602(d) ---------- 122 IBLA 375 (Apr. 2, 1992)
1602(e) ---------- 115 IBLA 249 (July 19, 1990)
123 IBLA 109 (May 18, 1992)
127 IBLA 317 (Oct. 13, 1993)
M-36972, 100 I.D. 163 (1993)
9 OHA 143, 99 I.D. 31 (1992)
1602(m) ---------- 118 IBLA 334 (Mar. 12, 1991)
1603(a) ---------- M-36972, 100 I.D. 163 (1993)
1604 ---------- 122 IBLA 375 (Apr. 2, 1992)
1604(c) ---------- 122 IBLA 375 (Apr. 2, 1992)
1606(c) ---------- 122 IBLA 375 (Apr. 2, 1992)
1606(f) ---------- 122 IBLA 375 (Apr. 2, 1992)
1606(h)(2)(A) ------- 22 IBIA 261 (Sept. 1, 1992)
1607 ---------- 26 IBIA 262 (Oct. 18, 1994)
1607(c) ---------- 22 IBIA 261 (Sept. 1, 1992)
1610 ---------- 113 IBLA 218 (Feb. 27, 1990)
115 IBLA 301 (Aug. 6, 1990)
125 IBLA 335 (Mar. 29, 1993)
127 IBLA 22 (July 15, 1993)
9 OHA 143, 99 I.D. 31 (1992)
1610(a) ---------- 113 IBLA 334 (Mar. 20, 1990)
128 IBLA 119 (Dec. 22, 1993)

	129 IBLA 293 (May 24, 1994)
1610(a)(1) ----------	115 IBLA 301 (Aug. 6, 1990)
	117 IBLA 247 (Jan. 9, 1991)
	123 IBLA 109 (May 18, 1992)
	M-36972, 100 I.D. 163 (1993)
1610(a)(1)(A) -------	124 IBLA 349 (Dec. 2, 1992)
	M-36972, 100 I.D. 163 (1993)
1610(a)(2) ----------	123 IBLA 109 (May 18, 1992)
	128 IBLA 119 (Dec. 22, 1993)
1610(a)(3)(A) -------	M-36972, 100 I.D. 163 (1993)
1610(b) ----------	9 OHA 143, 99 I.D. 31 (1992)
1610(b)(1) ----------	122 IBLA 375 (Apr. 2, 1992)
1610(b)(3) ----------	115 IBLA 301 (Aug. 6, 1990)
1611 ----------	26 IBIA 262 (Oct. 18, 1994)
	113 IBLA 334 (Mar. 20, 1990)
	115 IBLA 301 (Aug. 6, 1990)
	118 IBLA 334 (Mar. 12, 1991)
	119 IBLA 301 (June 11, 1991)
	119 IBLA 375 (June 28, 1991)
	123 IBLA 109 (May 18, 1992)
	125 IBLA 335 (Mar. 29, 1993)
	128 IBLA 119 (Dec. 22, 1993)
	M-36972, 100 I.D. 163 (1993)
1611(a) ----------	123 IBLA 109 (May 18, 1992)
	128 IBLA 119 (Dec. 22, 1993)
1611(a)(1) ----------	M-36972, 100 I.D. 163 (1993)
1611(a)(2) ----------	128 IBLA 119 (Dec. 22, 1993)
1611(a)(3) ----------	113 IBLA 86 (Feb. 13, 1990)
1611(b) ----------	113 IBLA 218 (Feb. 27, 1990)
	113 IBLA 334 (Mar. 20, 1990)
	M-36972, 100 I.D. 163 (1993)
1612 ----------	113 IBLA 86 (Feb. 13, 1990)
1613 ----------	124 IBLA 57 (Aug. 27, 1992)
1613(a) ----------	115 IBLA 301 (Aug. 6, 1990)
	119 IBLA 260 (May 22, 1991)
	M-36972, 100 I.D. 163 (1993)
1613(b)(8)(B) -------	127 IBLA 22 (July 15, 1993)
1613(c)(1) ----------	118 IBLA 334 (Mar. 12, 1991)
	124 IBLA 57 (Aug. 27, 1992)
1613(c)(1)-(4) ------	M-36972, 100 I.D. 163 (1993)
1613(c)(2) ----------	118 IBLA 334 (Mar. 12, 1991)
1613(e) ----------	118 IBLA 60 (Feb. 21, 1991)
	129 IBLA 179 (Apr. 22, 1994)
1613(f) ----------	119 IBLA 260 (May 22, 1991)
	128 IBLA 119 (Dec. 22, 1993)
1613(g) ----------	115 IBLA 301 (Aug. 6, 1990)
	121 IBLA 197, 98 I.D. 398 (1991)
	129 IBLA 293 (May 24, 1994)
	129 IBLA 386 (June 20, 1994)
1613(h)(1) ----------	115 IBLA 249 (July 19, 1990)
	115 IBLA 257 (July 19, 1990)
	126 IBLA 383 (July 6, 1993)

	127 IBLA 22 (July 15, 1993)
	127 IBLA 40 (July 15, 1993)
	127 IBLA 59 (July 20, 1993)
1613(h)(2) ----------	122 IBLA 375 (Apr. 2, 1992)
1613(h)(4) ----------	122 IBLA 375 (Apr. 2, 1992)
1615 ----------	115 IBLA 301 (Aug. 6, 1990)
	127 IBLA 22 (July 15, 1993)
	M-36972, 100 I.D. 163 (1993)
1616(b) ----------	118 IBLA 1 (Feb. 13, 1991)
	123 IBLA 109 (May 18, 1992)
	123 IBLA 233 (June 9, 1992)
	126 IBLA 204 (May 20, 1993)
1616(c) ----------	M-36972, 100 I.D. 163 (1993)
1616(d) ----------	9 OHA 143, 99 I.D. 31 (1992)
1616(d)(1) ----------	113 IBLA 86 (Feb. 13, 1990)
	M-36972, 100 I.D. 163 (1993)
	9 OHA 143, 99 I.D. 31 (1992)
1616(d)(2) ----------	M-36972, 100 I.D. 163 (1993)
	9 OHA 143, 99 I.D. 31 (1992)
1616(d)(3) ----------	9 OHA 143, 99 I.D. 31 (1992)
1616(j) ----------	M-36972, 100 I.D. 163 (1993)
1617 ----------	114 IBLA 86 (Apr. 11, 1990)
	116 IBLA 301 (Oct. 24, 1990)
	117 IBLA 330 (Jan. 24, 1991)
	117 IBLA 358 (Jan. 31, 1991)
	120 IBLA 367 (Sept. 18, 1991)
	121 IBLA 66 (Oct. 25, 1991)
	122 IBLA 209 (Feb. 12, 1992)
	124 IBLA 1 (Aug. 13, 1992)
	124 IBLA 386 (Dec. 10, 1992)
	127 IBLA 196 (Sept. 14, 1993)
	127 IBLA 224 (Sept. 24, 1993)
	128 IBLA 161 (Jan. 13, 1994)
	129 IBLA 167 (Apr. 21, 1994)
	129 IBLA 293 (May 24, 1994)
	130 IBLA 83 (July 27, 1994)
1617(a) ----------	113 IBLA 21 (Jan. 29, 1990)
	113 IBLA 80 (Feb. 12, 1990)
	115 IBLA 43 (June 12, 1990)
	115 IBLA 317 (Aug. 7, 1990)
	116 IBLA 145 (Sept. 24, 1990)
	116 IBLA 317 (Oct. 29, 1990)
	117 IBLA 148 (Dec. 13, 1990)
	117 IBLA 247 (Jan. 9, 1991)
	117 IBLA 330 (Jan. 24, 1991)
	117 IBLA 373 (Feb. 7, 1991)
	118 IBLA 1 (Feb. 13, 1991)
	118 IBLA 204 (Mar. 6, 1991)
	119 IBLA 260 (May 22, 1991)
	121 IBLA 52 (Oct. 23, 1991)
	121 IBLA 155 (Oct. 31, 1991)
	121 IBLA 224 (Nov. 13, 1991)

	122 IBLA 30 (Jan. 3, 1992)
	122 IBLA 109 (Jan. 14, 1992)
	122 IBLA 344 (Mar. 11, 1992)
	123 IBLA 6 (Apr. 22, 1992)
	123 IBLA 233 (June 9, 1992)
	124 IBLA 57 (Aug. 27, 1992)
	124 IBLA 294 (Nov. 4, 1992)
	124 IBLA 336 (Nov. 18, 1992)
	124 IBLA 386 (Dec. 10, 1992)
	125 IBLA 235 (Feb. 11, 1993)
	126 IBLA 168 (May 11, 1993)
	126 IBLA 204 (May 20, 1993)
	126 IBLA 256 (June 2, 1993)
	126 IBLA 281 (June 7, 1993)
	127 IBLA 137 (Aug. 25, 1993)
	127 IBLA 175 (Sept. 2, 1993)
	128 IBLA 130 (Dec. 30, 1993)
	128 IBLA 252 (Mar. 2, 1994)
	128 IBLA 393 (Mar. 11, 1994)
	129 IBLA 35 (Mar. 21, 1994)
	129 IBLA 279 (May 20, 1994)
	130 IBLA 5 (July 5, 1994)
	131 IBLA 121 (Oct. 25, 1994)
	9 OHA 239, 100 I.D. 75 (1993)
	Sol. Memo, 100 I.D. 4 (1993)
1618 ----------	M-36972, 100 I.D. 163 (1993)
1618(a) ----------	127 IBLA 1 (July 12, 1993)
1621 ----------	119 IBLA 260 (May 22, 1991)
1621(c) ----------	129 IBLA 179 (Apr. 22, 1994)
1621(j) ----------	119 IBLA 260 (May 22, 1991)
	126 IBLA 281 (June 7, 1993)
	M-36972, 100 I.D. 163 (1993)
1621(j)(2) ----------	M-36972, 100 I.D. 163 (1993)
1624 ----------	122 IBLA 375 (Apr. 2, 1992)
1631 ----------	M-36911 (Supp. I), 100 I.D. 103 (1993)
	M-36972, 100 I.D. 163 (1993)
1632(a) ----------	126 IBLA 281 (June 7, 1993)
1634 ----------	113 IBLA 80 (Feb. 12, 1990)
	114 IBLA 86 (Apr. 11, 1990)
	115 IBLA 43 (June 12, 1990)
	117 IBLA 373 (Feb. 7, 1991)
	118 IBLA 204 (Mar. 6, 1991)
	121 IBLA 52 (Oct. 23, 1991)
	124 IBLA 1 (Aug. 13, 1992)
	124 IBLA 57 (Aug. 27, 1992)
	126 IBLA 168 (May 11, 1993)
	126 IBLA 281 (June 7, 1993)
	127 IBLA 196 (Sept. 14, 1993)
	131 IBLA 121 (Oct. 25, 1994)
	131 IBLA 329 (Dec. 16, 1994)
1634(a) ----------	115 IBLA 43 (June 12, 1990)

	115 IBLA 317 (Aug. 7, 1990)
	116 IBLA 145 (Sept. 24, 1990)
	116 IBLA 305 (Oct. 29, 1990)
	119 IBLA 260 (May 22, 1991)
	121 IBLA 66 (Oct. 25, 1991)
	121 IBLA 224 (Nov. 13, 1991)
	122 IBLA 30 (Jan. 3, 1992)
	122 IBLA 109 (Jan. 14, 1992)
	124 IBLA 1 (Aug. 13, 1992)
	124 IBLA 57 (Aug. 27, 1992)
	124 IBLA 349 (Dec. 2, 1992)
	124 IBLA 386 (Dec. 10, 1992)
	126 IBLA 168 (May 11, 1993)
	126 IBLA 281 (June 7, 1993)
	129 IBLA 167 (Apr. 21, 1994)
	130 IBLA 83 (July 27, 1994)
1634(a)(1) ----------	115 IBLA 43 (June 12, 1990)
	116 IBLA 301 (Oct. 24, 1990)
	118 IBLA 334 (Mar. 12, 1991)
	122 IBLA 109 (Jan. 14, 1992)
	122 IBLA 209 (Feb. 12, 1992)
	123 IBLA 6 (Apr. 22, 1992)
	123 IBLA 233 (June 9, 1992)
	124 IBLA 294 (Nov. 4, 1992)
	124 IBLA 336 (Nov. 18, 1992)
	124 IBLA 386 (Dec. 10, 1992)
	125 IBLA 235 (Feb. 11, 1993)
	128 IBLA 161 (Jan. 13, 1994)
	129 IBLA 279 (May 20, 1994)
	130 IBLA 5 (July 5, 1994)
	131 IBLA 121 (Oct. 25, 1994)
1634(a)(1)(B) -------	126 IBLA 168 (May 11, 1993)
1634(a)(2) ----------	120 IBLA 367 (Sept. 18, 1991)
1634(a)(3) ----------	122 IBLA 209 (Feb. 12, 1992)
	128 IBLA 161 (Jan. 13, 1994)
	131 IBLA 121 (Oct. 25, 1994)
1634(a)(4) ----------	113 IBLA 80 (Feb. 12, 1990)
	115 IBLA 317 (Aug. 7, 1990)
	116 IBLA 301 (Oct. 24, 1990)
	117 IBLA 148 (Dec. 13, 1990)
	117 IBLA 247 (Jan. 9, 1991)
	117 IBLA 358 (Jan. 31, 1991)
	118 IBLA 204 (Mar. 6, 1991)
	121 IBLA 52 (Oct. 23, 1991)
	124 IBLA 1 (Aug. 13, 1992)
	124 IBLA 349 (Dec. 2, 1992)
	125 IBLA 235 (Feb. 11, 1993)
1634(a)(5) ----------	115 IBLA 43 (June 12, 1990)
	117 IBLA 373 (Feb. 7, 1991)
	118 IBLA 334 (Mar. 12, 1991)
	122 IBLA 209 (Feb. 12, 1992)
	123 IBLA 233 (June 9, 1992)

124 IBLA 57 (Aug. 27, 1992)
124 IBLA 294 (Nov. 4, 1992)
124 IBLA 386 (Dec. 10, 1992)
126 IBLA 281 (June 7, 1993)
128 IBLA 393 (Mar. 11, 1994)
129 IBLA 279 (May 20, 1994)
131 IBLA 121 (Oct. 25, 1994)
1634(a)(5)(A) ------- 118 IBLA 334 (Mar. 12, 1991)
126 IBLA 281 (June 7, 1993)
1634(a)(5)(B) ------- 116 IBLA 317 (Oct. 29, 1990)
118 IBLA 1 (Feb. 13, 1991)
123 IBLA 233 (June 9, 1992)
126 IBLA 168 (May 11, 1993)
126 IBLA 204 (May 20, 1993)
9 OHA 239, 100 I.D. 75 (1993)
Sol. Memo, 100 I.D. 4 (1993)
1634(a)(5)(C) ------- 121 IBLA 155 (Oct. 31, 1991)
122 IBLA 109 (Jan. 14, 1992)
126 IBLA 168 (May 11, 1993)
126 IBLA 281 (June 7, 1993)
131 IBLA 329 (Dec. 16, 1994)
1634(a)(6) ---------- 121 IBLA 66 (Oct. 25, 1991)
1634(b) ---------- 117 IBLA 148 (Dec. 13, 1990)
127 IBLA 175 (Sept. 2, 1993)
1634(c) ---------- 115 IBLA 317 (Aug. 7, 1990)
116 IBLA 305 (Oct. 29, 1990)
117 IBLA 330 (Jan. 24, 1991)
119 IBLA 260 (May 22, 1991)
122 IBLA 109 (Jan. 14, 1992)
124 IBLA 57 (Aug. 27, 1992)
126 IBLA 168 (May 11, 1993)
126 IBLA 281 (June 7, 1993)
127 IBLA 156 (Aug. 26, 1993)
127 IBLA 196 (Sept. 14, 1993)
128 IBLA 130 (Dec. 30, 1993)
128 IBLA 393 (Mar. 11, 1994)
129 IBLA 82 (Apr. 1, 1994)
130 IBLA 83 (July 27, 1994)
1634(c)(1) ---------- 117 IBLA 330 (Jan. 24, 1991)
1634(c)(4) ---------- 130 IBLA 83 (July 27, 1994)
1634(e) ---------- 115 IBLA 43 (June 12, 1990)
116 IBLA 305 (Oct. 29, 1990)
1635 ---------- 116 IBLA 41 (Aug. 28, 1990)
9 OHA 143, 99 I.D. 31 (1992)
1635(a)(5) ---------- 119 IBLA 260 (May 22, 1991)
1635(a)(5)(B) ------- 119 IBLA 260 (May 22, 1991)
1635(a)(5)(C) ------- 115 IBLA 43 (June 12, 1990)
1635(c) ---------- 9 OHA 143, 99 I.D. 31 (1992)
1635(c)(1) ---------- 123 IBLA 156 (May 28, 1992)
1635(c)(2) ---------- 123 IBLA 156 (May 28, 1992)
1635(c)(3) ---------- 123 IBLA 156 (May 28, 1992)
1635(c)(4) ---------- 9 OHA 143, 99 I.D. 31 (1992)

1635(e) ---------- 113 IBLA 86 (Feb. 13, 1990)
9 OHA 239, 100 I.D. 75 (1993)
Sol. Memo, 100 I.D. 4 (1993)
1635(f) ---------- 116 IBLA 41 (Aug. 28, 1990)
1635(f)(2) ---------- 118 IBLA 350 (Mar. 14, 1991)
1635(i) ---------- 123 IBLA 156 (May 28, 1992)
1635(o)(1) ---------- M-36972, 100 I.D. 163 (1993)
1635(p) ---------- M-36911 (Supp. I), 100 I.D. 103 (1993)
1638 ---------- 129 IBLA 386 (June 20, 1994)
1639 ---------- M-36972, 100 I.D. 163 (1993)
1643(a) ---------- 120 IBLA 367 (Sept. 18, 1991)
1701 ---------- 114 IBLA 326 (May 22, 1990)
118 IBLA 60 (Feb. 21, 1991)
122 IBLA 65 (Jan. 9, 1992)
122 IBLA 334 (Mar. 11, 1992)
123 IBLA 377 (July 23, 1992)
124 IBLA 67 (Sept. 2, 1992)
124 IBLA 191 (Oct. 15, 1992)
128 IBLA 188 (Feb. 8, 1994)
128 IBLA 257 (Mar. 4, 1994)
129 IBLA 158 (Apr. 20, 1994)
129 IBLA 255 (May 5, 1994)
1701-1782 ---------- 114 IBLA 8, 97 I.D. 125 (1990)
123 IBLA 96 (May 12, 1992)
1701-1784 ---------- 115 IBLA 214 (July 3, 1990)
116 IBLA 355 (Nov. 5, 1990)
119 IBLA 388 (July 3, 1991)
122 IBLA 53 (Jan. 9, 1992)
122 IBLA 131 (Jan. 27, 1992)
122 IBLA 165 (Feb. 7, 1992)
122 IBLA 362 (Mar. 20, 1992)
123 IBLA 68 (May 11, 1992)
130 IBLA 61 (July 22, 1994)
1701 *et seq.* -------- 124 IBLA 67 (Sept. 2, 1992)
124 IBLA 125 (Sept. 28, 1992)
1701(a) ---------- 122 IBLA 53 (Jan. 9, 1992)
1701(a)(4) ---------- 117 IBLA 239 (Jan. 3, 1991)
1701(a)(5) ---------- 127 IBLA 50 (July 20, 1993)
1701(a)(7) ---------- 112 IBLA 293 (Jan. 9, 1990)
122 IBLA 165 (Feb. 7, 1992)
125 IBLA 15 (Dec. 17, 1992)
128 IBLA 188 (Feb. 8, 1994)
131 IBLA 223 (Nov. 17, 1994)
1701(a)(8) ---------- 125 IBLA 15 (Dec. 17, 1992)
128 IBLA 188 (Feb. 8, 1994)
1701(a)(9) ---------- 113 IBLA 76 (Feb. 9, 1990)
114 IBLA 135 (Apr. 18, 1990)
120 IBLA 216 (Aug. 5, 1991)
124 IBLA 7 (Aug. 13, 1992)
9 OHA 108 (Nov. 12, 1991)
1702 ---------- 122 IBLA 334 (Mar. 11, 1992)

1702(a) ---------- 116 IBLA 47 (Sept. 5, 1990)
1702(c) ---------- 125 IBLA 15 (Dec. 17, 1992)
126 IBLA 111 (Apr. 27, 1993)
128 IBLA 188 (Feb. 8, 1994)
1702(d) ---------- 123 IBLA 142 (May 28, 1992)
1702(e) ---------- 118 IBLA 60 (Feb. 21, 1991)
1702(h) ---------- 112 IBLA 293 (Jan. 9, 1990)
1702(j) ---------- 117 IBLA 239 (Jan. 3, 1991)
122 IBLA 375 (Apr. 2, 1992)
1705(a)(5) ---------- 129 IBLA 57 (Mar. 25, 1994)
1709(9) ---------- 115 IBLA 92 (June 12, 1990)
1711 ---------- 122 IBLA 334 (Mar. 11, 1992)
1712 ---------- 119 IBLA 33 (Mar. 25, 1991)
120 IBLA 153 (July 16, 1991)
122 IBLA 17 (Jan. 2, 1992)
122 IBLA 334 (Mar. 11, 1992)
129 IBLA 351 (June 6, 1994)
131 IBLA 251 (Nov. 22, 1994)
131 IBLA 306 (Dec. 5, 1994)
1712(a) ---------- 122 IBLA 165 (Feb. 7, 1992)
125 IBLA 15 (Dec. 17, 1992)
1712(c) ---------- 122 IBlA 165 (Feb. 7, 1992)
1712(c)(3) ---------- 115 IBLA 359 (Aug. 14, 1990)
1712(e) ---------- 125 IBLA 15 (Dec. 17, 1992)
126 IBLA 304 (June 15, 1993)
131 IBLA 251 (Nov. 22, 1994)
131 IBLA 306 (Dec. 5, 1994)
1712(e)(2) ---------- 131 IBLA 251 (Nov. 22, 1994)
131 IBLA 306 (Dec. 5, 1994)
1712(f) ---------- 123 IBLA 142 (May 28, 1992)
129 IBLA 351 (June 6, 1994)
1713 ---------- 117 IBLA 339 (Jan. 29, 1991)
123 IBLA 150 (May 28, 1992)
124 IBLA 130 (Sept. 30, 1992)
126 IBLA 174 (May 11, 1993)
1713(a) ---------- 119 IBLA 33 (Mar. 25, 1991)
129 IBLA 373 (June 8, 1994)
1713(a)(3) ---------- 119 IBLA 33 (Mar. 25, 1991)
1713(d) ---------- 119 IBLA 33 (Mar. 25, 1991)
1714 ---------- 114 IBLA 216 (Apr. 25, 1990)
117 IBLA 239 (Jan. 3, 1991)
118 IBLA 60 (Feb. 21, 1991)
127 IBLA 375 (Oct. 21, 1993)
1714(a) ---------- 114 IBLA 216 (Apr. 15, 1990)
117 IBLA 285 (Jan. 16, 1991)
1714(b) ---------- 117 IBLA 239 (Jan. 3, 1991)
1714(e) ---------- M-36972, 100 I.D. 163 (1993)
1714(j) ---------- 117 IBLA 239 (Jan. 3, 1991)
1714(l) ---------- 116 IBLA 105 (Sept. 17, 1990)
1715(e) ---------- 127 IBLA 379 (Oct. 27, 1993)
1716 ---------- 114 IBLA 393 (May 30, 1990)
120 IBLA 187 (July 29, 1991)

	120 IBLA 347 (Sept. 13, 1991)
	122 IBLA 244 (Feb. 26, 1992)
	122 IBLA 250 (Feb. 28, 1992)
	123 IBLA 150 (May 28, 1992)
	124 IBLA 44 (Aug. 26, 1992)
	124 IBLA 104 (Sept. 17, 1992)
	125 IBLA 153 (Jan. 21, 1993)
	127 IBLA 379 (Oct. 27, 1993)
	128 IBLA 17 (Nov. 4, 1993)
	M-36974, 100 I.D. 195 (1993)
1716(a) ----------	120 IBLA 308 (Sept. 11, 1991)
	122 IBLA 244 (Feb. 26, 1992)
	127 IBLA 379 (Oct. 27, 1993)
1716(b) ----------	120 IBLA 308 (Sept. 11, 1991)
	122 IBLA 250 (Feb. 28, 1992)
	128 IBLA 17 (Nov. 4, 1993)
1716(b)(1) ----------	129 IBLA 213 (Apr. 28, 1994)
1716(g) ----------	120 IBLA 308 (Sept. 11, 1991)
	122 IBLA 250 (Feb. 28, 1992)
1716(i) ----------	120 IBLA 308 (Sept. 11, 1991)
1719 ----------	119 IBLA 289 (June 6, 1991)
	129 IBLA 213 (Apr. 28, 1994)
1719(a) ----------	119 IBLA 33 (Mar. 25, 1991)
	122 IBLA 244 (Feb. 26, 1992)
1719(b) ----------	119 IBLA 33 (Mar. 25, 1991)
	122 IBLA 255 (Feb. 28, 1992)
	123 IBLA 51, 99 I.D. 64 (1992)
1719(b)(1) ----------	122 IBLA 255 (Feb. 28, 1992)
	123 IBLA 51, 99 I.D. 64 (1992)
	129 IBLA 213 (Apr. 28, 1994)
1719(b)(2) ----------	123 IBLA 51, 99 I.D. 64 (1992)
1721 ----------	114 IBLA 177, 97 I.D. 171 (1990)
1731(b) ----------	130 IBLA 234 (Aug. 5, 1994)
1732 ----------	113 IBLA 321 (Mar. 14, 1990)
	113 IBLA 376 (Mar. 28, 1990)
	114 IBLA 326 (May 22, 1990)
	115 IBLA 92 (June 21, 1990)
	116 IBLA 108 (Sept. 18, 1990)
	118 IBLA 259 (Mar. 11, 1991)
	119 IBLA 355 (June 18, 1991)
	126 IBLA 101 (Apr. 21, 1993)
	126 IBLA 251 (June 1, 1993)
	126 IBLA 269 (June 3, 1993)
	126 IBLA 353 (June 29, 1993)
	127 IBLA 331, 100 I.D. 370 (1993)
	127 IBLA 375 (Oct. 21, 1993)
	129 IBLA 52 (Mar. 25, 1994)
	130 IBLA 13 (July 6, 1994)
	130 IBLA 73 (July 26, 1994)
	130 IBLA 311 (Sept. 2, 1994)
	130 IBLA 369 (Sept. 15, 1994)
1732(a) ----------	116 IBLA 355 (Nov. 5, 1990)

	125 IBLA 15 (Dec. 17, 1992)
	125 IBLA 170 (Feb. 5, 1993)
	128 IBLA 188 (Feb. 8, 1994)
	131 IBLA 223 (Nov. 17, 1994)
1732(b) ----------	113 IBLA 1 (Jan. 25, 1990)
	113 IBLA 321 (Mar. 14, 1990)
	114 IBLA 135 (Apr. 18, 1990)
	115 IBLA 92 (June 21, 1990)
	118 IBLA 259 (Mar. 11, 1991)
	118 IBLA 381 (Mar. 15, 1991)
	119 IBLA 370 (June 26, 1991)
	120 IBLA 34 (July 11, 1991)
	120 IBLA 216 (Aug. 5, 1991)
	122 IBLA 330 (Mar. 11, 1992)
	123 IBLA 314 (June 29, 1992)
	124 IBLA 7 (Aug. 13, 1992)
	124 IBLA 155 (Sept. 30, 1992)
	124 IBLA 191 (Oct. 15, 1992)
	124 IBLA 242 (Nov. 2, 1992)
	124 IBLA 325 (Nov. 6, 1992)
	125 IBLA 15 (Dec. 17, 1992)
	125 IBLA 72 (Jan. 6, 1993)
	126 IBLA 1 (Apr. 1, 1993)
	126 IBLA 48 (Apr. 14, 1993)
	126 IBLA 222 (May 21, 1993)
	126 IBLA 251 (June 1, 1993)
	127 IBLA 331, 100 I.D. 370 (1993)
	128 IBLA 72 (Dec. 7, 1993)
	129 IBLA 130 (Apr. 15, 1994)
	131 IBLA 257 (Nov. 23, 1994)
1732(c) ----------	116 IBLA 108 (Sept. 18, 1990)
	120 IBLA 374 (Sept. 19, 1991)
	124 IBLA 267 (Nov. 3, 1992)
	127 IBLA 145 (Aug. 25, 1993)
1732(2)(c) ----------	129 IBLA 130 (Apr. 15, 1994)
1733 ----------	123 IBLA 20 (Apr. 24, 1992)
	126 IBLA 251 (June 1, 1993)
1733(a) ----------	113 IBLA 396 (Mar. 28, 1990)
	120 IBLA 374 (Sept. 19, 1991)
1733(g) ----------	113 IBLA 396 (Mar. 28, 1990)
1734 ----------	117 IBLA 96 (Dec. 3, 1990)
1734(b) ----------	128 IBLA 377 (Mar. 11, 1994)
1739(e) ----------	123 IBLA 142 (May 28, 1992)
1740 ----------	119 IBLA 355 (June 18, 1991)
	123 IBLA 20 (Apr. 24, 1992)
	126 IBLA 174 (May 11, 1993)
	126 IBLA 353 (June 29, 1993)
	130 IBLA 311 (Sept. 2, 1994)
1744 ----------	113 IBLA 235 (Feb. 28, 1990)
	113 IBLA 280 (Mar. 12, 1990)
	113 IBLA 287 (Mar. 12, 1990)
	114 IBLA 221 (Apr. 25, 1990)

	114 IBLA 323 (May 22, 1990)
	115 IBLA 102 (June 26, 1990)
	115 IBLA 277 (July 26, 1990)
	115 IBLA 312 (Aug. 7, 1990)
	116 IBLA 222 (Oct. 4, 1990)
	116 IBLA 257 (Oct. 17, 1990)
	117 IBLA 377 (Feb. 12, 1991)
	118 IBLA 210 (Mar. 7, 1991)
	119 IBLA 25 (Mar. 19, 1991)
	119 IBLA 252 (May 16, 1991)
	119 IBLA 319 (June 18, 1991)
	119 IBLA 370 (JUne 26, 1991)
	119 IBLA 383 (July 3, 1991)
	122 IBLA 357 (Mar. 19, 1992)
	124 IBLA 122 (Sept. 24, 1992)
	124 IBLA 247 (Nov. 2, 1992)
	124 IBLA 318 (Nov. 4, 1992)
	127 IBLA 18 (July 13, 1993)
	127 IBLA 73 (July 20, 1993)
	127 IBLA 211 (Sept. 14, 1993)
	128 IBLA 26 (Nov. 16, 1993)
	128 IBLA 77 (Dec. 7, 1993)
	128 IBLA 84 (Dec. 10, 1993)
	128 IBLA 165 (Jan. 21, 1994)
	128 IBLA 257 (Mar. 4, 1994)
	129 IBLA 341 (May 31, 1994)
	129 IBLA 384 (June 14, 1994)
	130 IBLA 50 (July 13, 1994)
	130 IBLA 333 (Sept. 12, 1994)
	130 IBLA 346 (Sept. 14, 1994)
	130 IBLA 349, 101 I.D. 311 (1994)
	131 IBLA 39 (Oct. 12, 1994)
	131 IBLA 245 (Nov. 21, 1994)
	131 IBLA 284 (Nov. 30, 1994)
1744(a) ----------	112 IBLA 281 (Jan. 5, 1990)
	122 IBLA 68 (Jan. 10, 1992)
	122 IBLA 357 (Mar. 19, 1992)
	127 IBLA 73 (July 20, 1993)
	128 IBLA 137 (Jan. 7, 1994)
	128 IBLA 243 (Mar. 2, 1994)
	129 IBLA 173 (Apr. 22, 1994)
	130 IBLA 87 (July 29, 1994)
	130 IBLA 314 (Sept. 8, 1994)
	130 IBLA 346 (Sept. 14, 1994)
	131 IBLA 1 (Sept. 16, 1994)
	131 IBLA 39 (Oct. 12, 1994)
	131 IBLA 166 (Nov. 2, 1994)
	131 IBLA 271 (Nov. 23, 1994)
1744(a)(1) ----------	131 IBLA 1 (Sept. 16, 1994)
1744(a)(2) ----------	114 IBLA 323 (May 22, 1990)
	131 IBLA 1 (Sept. 16, 1994)

1744(b) ---------- 112 IBLA 281 (Jan. 5, 1990)
113 IBLA 387 (Mar. 28, 1990)
113 IBLA 299, 97 I.D. 109 (1990)
115 IBLA 102 (June 26, 1990)
117 IBLA 239 (Jan. 3, 1991)
123 IBLA 188 (May 19, 1992)
123 IBLA 27, 99 I.D. 55 (1992)
123 IBLA 330 (July 10, 1992)
124 IBLA 344 (Dec. 1, 1992)
125 IBLA 104 (Jan. 12, 1993)
127 IBLA 73 (July 20, 1993)
127 IBLA 217 (Sept. 21, 1993)
127 IBLA 395 (Nov. 2, 1993)
128 IBLA 143 (Jan. 11, 1994)
1744(c) ---------- 113 IBLA 235 (Feb. 28, 1990)
113 IBLA 280 (Mar. 12, 1990)
113 IBLA 299, 97 I.D. 109 (1990)
114 IBLA 221 (Apr. 25, 1990)
114 IBLA 323 (May 22, 1990)
115 IBLA 102 (June 26, 1990)
116 IBLA 222 (Oct. 4, 1990)
117 IBLA 239 (Jan. 3, 1991)
118 IBLA 210 (Mar. 7, 1991)
119 IBLA 25 (Mar. 19, 1991)
119 IBLA 370 (June 26, 1991)
119 IBLA 383 (July 3, 1991)
122 IBLA 357 (Mar. 19, 1992)
123 IBLA 118 (May 19, 1992)
124 IBLA 122 (Sept. 24, 1992)
127 IBLA 73 (July 20, 1993)
128 IBLA 77 (Dec. 7, 1993)
128 IBLA 137 (Jan. 7, 1994)
128 IBLA 143 (Jan. 11, 1994)
128 IBLA 243 (Mar. 2, 1994)
129 IBLA 173 (Apr. 22, 1994)
130 IBLA 87 (July 29, 1994)
130 IBLA 314 (Sept. 8, 1994)
130 IBLA 333 (Sept. 12, 1994)
130 IBLA 346 (Sept. 14, 1994)
131 IBLA 1 (Sept. 16, 1994)
131 IBLA 39 (Oct. 12, 1994)
131 IBLA 44 (Oct. 12, 1994)
131 IBLA 166 (Nov. 2, 1994)
131 IBLA 271 (Nov. 23, 1994)
1744(l) ---------- 113 IBLA 393 (Mar. 28, 1990)
1744(2)(c) ---------- 127 IBLA 270 (Oct. 1, 1993)
1746 ---------- 116 IBLA 203 (Oct. 4, 1990)
121 IBLA 73, 98 I.D. 321 (1991)
127 IBLA 307 (Oct. 7, 1993)
9 OHA 143, 99 I.D. 31 (1992)
1751-1753 ---------- 116 IBLA 32 (Aug. 27, 1990)
122 IBLA 77 (Jan. 14, 1992)

	123 IBLA 80 (May 11, 1992)
	124 IBLA 176 (Oct. 13, 1992)
	124 IBLA 200 (Oct. 21, 1992)
	126 IBLA 111 (Apr. 27, 1993)
1752(a) ----------	126 IBLA 238 (May 28, 1993)
	130 IBLA 119 (Aug. 4, 1994)
1752(c)(3) ----------	115 IBLA 69 (June 15, 1990)
1752(d) ----------	123 IBLA 142 (May 28, 1992)
1752(e) ----------	128 IBLA 150 (Jan. 13, 1994)
1761 ----------	112 IBLA 369 (Jan. 19, 1990)
	113 IBLA 239 (Feb. 28, 1990)
	113 IBLA 327 (Mar. 15, 1990)
	114 IBLA 8, 97 I.D. 125 (1990)
	114 IBLA 336 (May 22, 1990)
	115 IBLA 1 (May 30, 1990)
	115 IBLA 347 (Aug. 13, 1990)
	116 IBLA 63 (Sept. 5, 1990)
	116 IBLA 164 (Sept. 26, 1990)
	116 IBLA 225 (Oct. 12, 1990)
	117 IBLA 281 (Jan. 16, 1991)
	122 IBLA 200 (Feb. 10, 1992)
	124 IBLA 225 (Oct. 27, 1992)
	125 IBLA 317 (Mar. 25, 1993)
	125 IBLA 326 (Mar. 25, 1993)
	126 IBLA 256 (June 2, 1993)
	127 IBLA 101 (July 29, 1993)
	127 IBLA 375 (Oct. 21, 1993)
	128 IBLA 43 (Dec. 1, 1993)
	128 IBLA 126 (Dec. 22, 1993)
	128 IBLA 377 (Mar. 11, 1994)
	129 IBLA 30 (Mar. 21, 1994)
	129 IBLA 182 (Apr. 28, 1994)
1761-1771 ----------	113 IBLA 61 (Feb. 7, 1990)
	113 IBLA 264 (Mar. 9, 1990)
	113 IBLA 367 (Mar. 27, 1990)
	114 IBLA 135 (Apr. 18, 1990)
	115 IBLA 117 (June 27, 1990)
	115 IBLA 239 (July 18, 1990)
	116 IBLA 225 (Oct. 12, 1990)
	117 IBLA 138 (Dec. 6, 1990)
	119 IBLA 241 (May 15, 1991)
	119 IBLA 281 (June 6, 1991)
	120 IBLA 146 (July 16, 1991)
	120 IBLA 172 (July 23, 1991)
	120 IBLA 240 (Aug. 9, 1991)
	120 IBLA 290 (Sept. 6, 1991)
	120 IBLA 374 (Sept. 19, 1991)
	121 IBLA 61 (Oct. 25, 1991)
	121 IBLA 197, 98 I.D. 398 (1991)
	122 IBLA 349 (Mar. 12, 1992)
	122 IBLA 20 (Apr. 24, 1992)
	123 IBLA 295 (June 23, 1992)

	124 IBLA 7 (Aug. 13, 1992)
	124 IBLA 358 (Dec. 4, 1992)
	125 IBLA 132 (Jan. 15, 1993)
	125 IBLA 262 (Feb. 17, 1993)
	126 IBLA 349 (June 25, 1993)
	127 IBLA 313 (Oct. 12, 1993)
	129 IBLA 397 (June 30, 1994)
	130 IBLA 98 (Aug. 2, 1994)
	131 IBLA 169 (Nov. 2, 1994)
1761(a) ----------	113 IBLA 250 (Mar. 8, 1990)
	115 IBLA 347 (Aug. 13, 1990)
	117 IBLA 138 (Dec. 6, 1990)
	119 IBLA 277 (June 6, 1991)
	124 IBLA 7 (Aug. 13, 1992)
	125 IBLA 132 (Jan. 15, 1993)
	125 IBLA 262 (Feb. 17, 1993)
	127 IBLA 375 (Oct. 21, 1993)
	129 IBLA 18 (Mar. 14, 1994)
	129 IBLA 255 (May 5, 1994)
	129 IBLA 397 (June 30, 1994)
1761(a)(1) ----------	119 IBLA 281 (June 6, 1991)
	120 IBLA 290 (Sept. 6, 1991)
	128 IBLA 43 (Dec. 1, 1993)
1761(a)(5) ----------	126 IBLA 174 (May 11, 1993)
	131 IBLA 188 (Nov. 7, 1994)
1761(a)(6) ----------	113 IBLA 250 (Mar. 8, 1990)
	117 IBLA 138 (Dec. 6, 1990)
	121 IBLA 138 (Oct. 28, 1991)
	127 IBLA 101 (July 29, 1993)
	129 IBLA 255 (May 5, 1994)
	130 IBLA 105 (Aug. 2, 1994)
1761(a)(7) ----------	113 IBLA 250 (Mar. 8, 1990)
	121 IBLA 197, 98 I.D. 398 (1991)
	127 IBLA 375 (Oct. 21, 1993)
	129 IBLA 255 (May 5, 1994)
1761(b)(1) ----------	113 IBLA 239 (Feb. 28, 1990)
	120 IBLA 347 (Sept. 13, 1991)
1763 ----------	113 IBLA 250 (Mar. 8, 1990)
	120 IBLA 290 (Sept. 6, 1991)
1764(b) ----------	120 IBLA 347 (Sept. 13, 1991)
1764(g) ----------	113 IBLA 264 (Mar. 9, 1990)
	113 IBLA 367 (Mar. 27, 1990)
	114 IBLA 135 (Apr. 18, 1990)
	114 IBLA 336 (May 22, 1990)
	115 IBLA 117 (June 27, 1990)
	115 IBLA 239 (July 18, 1990)
	116 IBLA 225 (Oct. 12, 1990)
	117 IBLA 51 (Nov. 27, 1990)
	117 IBLA 138 (Dec. 6, 1990)
	119 IBLA 65 (Mar. 29, 1991)
	119 IBLA 257 (May 16, 1991)
	119 IBLA 281 (June 6, 1991)

	120 IBLA 146 (July 16, 1991)
	120 IBLA 172 (July 23, 1991)
	120 IBLA 240 (Aug. 9, 1991)
	120 IBLA 266 (Aug. 21, 1991)
	122 IBLA 200 (Feb. 10, 1992)
	122 IBLA 349 (Mar. 12, 1992)
	123 IBLA 295 (June 23, 1992)
	124 IBLA 358 (Dec. 4, 1992)
	125 IBLA 262 (Feb. 17, 1993)
	125 IBLA 326 (Mar. 25, 1993)
	126 IBLA 174 (May 11, 1993)
	127 IBLA 101 (July 29, 1993)
	127 IBLA 313 (Oct. 12, 1993)
	128 IBLA 377 (Mar. 11, 1994)
	129 IBLA 397 (June 30, 1994)
	130 IBLA 13 (July 6, 1994)
	130 IBLA 73 (July 26, 1994)
1764(i) ----------	121 IBLA 61 (Oct. 25, 1991)
1765 ----------	114 IBLA 8, 97 I.D. 125 (1990)
	120 IBLA 290 (Sept. 6, 1991)
1766 ----------	114 IBLA 336 (May 22, 1990)
	121 IBLA 61 (Oct. 25, 1991)
	121 IBLA 197, 98 I.D. 398 (1991)
	122 IBLA 349 (Mar. 12, 1992)
	126 IBLA 335 (June 17, 1993)
	127 IBLA 145 (Aug. 25, 1993)
	129 IBLA 30 (Mar. 21, 1994)
1767 ----------	131 IBLA 188 (Nov. 7, 1994)
1767(a) ----------	131 IBLA 188 (Nov. 7, 1994)
1768 ----------	121 IBLA 185 (Nov. 5, 1991)
	121 IBLA 197, 98 I.D. 398 (1991)
1770 ----------	126 IBLA 256 (June 2, 1993)
	128 IBLA 43 (Dec. 1, 1993)
1781 ----------	116 IBLA 47 (Sept. 5, 1990)
	116 IBLA 210 (Oct. 4, 1990)
	131 IBLA 251 (Nov. 22, 1994)
	131 IBLA 306 (Dec. 5, 1994)
1781(d) ----------	116 IBLA 210 (Oct. 4, 1990)
	131 IBLA 251 (Nov. 22, 1994)
	131 IBLA 306 (Dec. 5, 1994)
1781(f) ----------	116 IBLA 210 (Oct. 4, 1990)
1782 ----------	112 IBLA 287 (Jan. 5, 1990)
	114 IBLA 163 (Apr. 19, 1990)
	116 IBLA 210 (Oct. 4, 1990)
	118 IBLA 381 (Mar. 15, 1991)
	122 IBLA 123 (Jan. 24, 1992)
	123 IBLA 68 (May 11, 1992)
	124 IBLA 155 (Sept. 30, 1992)
	125 IBLA 175, 100 I.D. 14 (1993)
	126 IBLA 232 (May 27, 1993)
	127 IBLA 331, 100 I.D. 370 (1993)
1782(a) ----------	116 IBLA 230 (Oct. 16, 1990)

	122 IBLA 131 (Jan. 27, 1992)
	122 IBLA 165 (Feb. 7, 1992)
	122 IBLA 334 (Mar. 11, 1992)
	124 IBLA 155 (Sept. 30, 1992)
	128 IBLA 43 (Dec. 1, 1993)
	129 IBLA 76 (Mar. 25, 1994)
	130 IBLA 327 (Sept. 12, 1994)
1782(c) ----------	112 IBLA 287 (Jan. 5, 1990)
	114 IBLA 8, 97 I.D. 125 (1990)
	114 IBLA 163 (Apr. 19, 1990)
	116 IBLA 84 (Sept. 17, 1990)
	116 IBLA 210 (Oct. 4, 1990)
	116 IBLA 230 (Oct. 16, 1990)
	116 IBLA 288 (Oct. 23, 1990)
	117 IBLA 274 (Jan. 16, 1991)
	119 IBLA 310 (June 11, 1991)
	122 IBLA 131 (Jan. 27, 1992)
	124 IBLA 7 (Aug. 13, 1992)
	124 IBLA 155 (Sept. 30, 1992)
	125 IBLA 175, 100 I.D. 14 (1993)
	127 IBLA 331, 100 I.D. 370 (1993)
	128 IBLA 43 (Dec. 1, 1993)
	129 IBLA 64 (Mar. 25, 1994)
	129 IBLA 76 (Mar. 25, 1994)
	130 IBLA 327 (Sept. 12, 1994)
	131 IBLA 332 (Dec. 22, 1994)
1901 ----------	129 IBLA 150 (Jan. 13, 1994)
1901 *et seq.* --------	129 IBLA 304 (May 25, 1994)
1901(a)(1) ----------	128 IBLA 231 (Mar. 1, 1994)
1901(b)(2) ----------	128 IBLA 231 (Mar. 1, 1994)
1903(b) ----------	115 IBLA 69 (June 15, 1990)
2808.1(a) ----------	123 IBLA 20 (Apr. 24, 1992)
4321 ----------	126 IBLA 238 (May 28, 1993)
4321-4361 ----------	120 IBLA 347 (Sept. 13, 1991)
4321-4370 ----------	131 IBLA 132 (Oct. 25, 1994)
4332(2)(C) ----------	115 IBLA 88 (June 21, 1990)
	120 IBLA 347 (Sept. 13, 1991)
	122 IBLA 17 (Jan. 2, 1992)
4601-4653 ----------	10 OHA 98 (July 22, 1993)

TITLE 44:

sec. 1507 ----------	113 IBLA 214 (Feb. 23, 1990)
	114 IBLA 340 (May 22, 1990)
	115 IBLA 43 (June 12, 1990)
	127 IBLA 101 (July 29, 1993)
	10 OHA 98 (July 22, 1993)
1510 ----------	115 IBLA 43 (June 12, 1990)
	10 OHA 98 (July 22, 1993)
3501 ----------	26 IBIA 122 (July 14, 1994)

TITLE 45:

sec. 1201 et seq. -------- 120 IBLA 324 (Sept. 12, 1991)
1203(b)(1)(B) ------- 120 IBLA 324 (Sept. 12, 1991)
1205(b)(4)(A)(i) ---- 120 IBLA 324 (Sept. 12, 1991)

TITLE 48:

sec. 21 ---------- 116 IBLA 301 (Oct. 24, 1990
321a ---------- 127 IBLA 137 (Aug. 25, 1993)
321a-321c ---------- 127 IBLA 137 (Aug. 25, 1993)
322 ---------- 127 IBLA 137 (Aug. 25, 1993)
324 ---------- 127 IBLA 137 (Aug. 25, 1993)
354a ---------- 113 IBLA 21 (Jan. 29, 1990)
511 ---------- M-36978, 100 I.D. 431 (1993)
691 ---------- M-36978, 100 I.D. 431 (1993)

TITLE 49:

sec. 1(1) ---------- 120 IBLA 290 (Sept. 6, 1991)
1(4) ---------- 120 IBLA 290 (Sept. 6, 1991)
65(b) ---------- 118 IBLA 78 (Feb. 27, 1991)
211-213 ---------- 113 IBLA 387 (Mar. 28, 1990)
211-214 ---------- 121 IBLA 155 (Oct. 31, 1991)
1671-1687 ---------- 122 IBLA 224, 99 I.D. 20 (1992)
10102(19) ---------- 120 IBLA 290 (Sept. 6, 1991)
10501(a) ---------- 120 IBLA 290 (Sept. 6, 1991)
11101(a) ---------- 120 IBLA 290 (Sept. 6, 1991)

ACCOUNTS
(See also Fees, Funds, Payments)

FEES AND COMMISSIONS

A party seeking a waiver of fees due for a special recreation permit is not barred from receiving the waiver simply because it is engaged in "commercial use" as that term is defined in the regulations. Rather, the party may receive the waiver if it meets the criteria set out in 43 CFR 8372.4(c)(1) and (2).

Pacific Crest Outward Bound School, 117 IBLA 309 (Jan. 23, 1991)

PAYMENTS

A company check for oil and gas lease bid deposit is not an acceptable form of remittance under 43 CFR 3120.4-1 (1987), which requires remittances to be submitted in the form specified in the competitive sale notice, where that notice requires bidders to submit a bid deposit "by guaranteed remittance, i.e., cash, cashier's check, or money order."

Gulf States Petroleum, Inc., 113 IBLA 55 (Jan. 31, 1990)

An unsigned check is not a negotiable instrument pursuant to the Uniform Commerical Code and where such a check is submitted to MMS in payment of the annual rental for an oil and gas lease such submission does not constitute timely payment within the meaning of 30 U.S.C. § 188(b) (1982). MMS has no affirmative obligation to attempt to negotiate an unsigned check since, by definition, such an unsigned check is not a negotiable instrument.

Burton/Hawks, Inc., 115 IBLA 143 (June 28, 1990)

An attempt by MMS to assess a lessee with additional royalties based upon an alleged violation of a provision of the lease and reporting regulations in effect in 1980 and 1981 will be overturned where the record shows that although the lessee underreported volumes of royalty-in-kind oil, resulting in underbilling of the Government's contract refiner, the lessee did, in fact, deliver all required royalty-in-kind oil

ACCOUNTS--Continued

PAYMENTS--Continued

to or on behalf of the refiner during the period in question.

Texaco, Inc., 129 IBLA 46 (Mar. 23, 1994)

A demand by MMS directed to an oil and gas lessee for additional royalty payments based on the underreporting of the volume of royalty-in-kind crude oil delivered to a purchaser during the period from Jan. 1, 1977, through May 31, 1982, will be reversed where the record establishes that the lessee did, in fact, deliver the correct volume of oil to the purchaser.

A demand by MMS directed to an oil and gas lessee for additional royalty payments based on the miscategorization of royalty-in-kind crude oil delivered to a purchaser during a period of price controls will be affirmed where the record establishes that the effect of this miscategorization was to deprive the Government of the percentage of the full value of the production to which it was entitled.

ARCO Oil & Gas Co., 131 IBLA 299 (Dec. 2, 1994)

REFUNDS

Because BLM had no authority to accept rental payment for land within a geothermal lease over which it had no jurisdiction, it was obliged to refund to the lessee any excess payment.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

ACCRETION
(See also Boundaries, Public Lands)

In apportioning accreted lands between two adjoining riparian sections, BLM properly uses the perpendicular survey method where it is not feasible to use the proportionate shoreline survey method because no zero accretion point or end point of a perpendicular line drawn to the new bank of the river created by accretion may be used to

ACCRETION--Continued

allocate proportionate parts of that bank to the sections.

In utilizing the perpendicular survey method to apportion accreted lands between two adjoining riparian sections, BLM must select a perpendicular line drawn to the new bank of the river created by accretion which equitably apportions that bank between the sections, consistent, whenever practicable, with awarding to each section the land in front of it.

First American Title Insurance Co. v. Bureau of Land Management, Fort Mojave Indian Tribe (Intervenor), 9 OHA 17 (Mar. 26, 1991) 98 I.D. 164

ACQUIRED LANDS

The land acquisitions in question are not subject to the requirements of so-called procurement laws. However, specific actions related to land acquisition may provide bureaus with an opportunity to contract certain functions.

Generally, the bureaus have the authority to pay in excess of appraisal values for property acquired.

Inspector General's Report on Land Acquisitions, M-36974 (July 30, 1992) 100 I.D. 195

ACT OF JULY 26, 1866

The appeal of an administrative determination by BLM that a road is a R.S. 2477 right-of-way will be dismissed for lack of standing where the appellant makes no colorable allegation of adverse effect. That a group's organizational interest in protection of the public lands, which its members utilize, might be adversely affected by a BLM action is not subject to dispute. However, the group may not rely on that general organizational interest alone in challenging a BLM action. It must identify how the particular BLM action in question actually adversely affects its interest.

Southern Utah Wilderness Alliance, 127 IBLA 325 (Oct. 14, 1993)

ACT OF FEBRUARY 8, 1887

An application for attorney fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (West Supp. 1989), for services rendered in obtaining BLM approval of an allotment under the General Allotment Act of 1887, 25 U.S.C. § 334 (1982), is properly denied when no adversary adjudication has occurred or when the Office of Hearings and Appeals has not conducted an adjudication.

Ann Marie Sayers, 115 IBLA 40 (June 8, 1990)

BLM properly rejected an application under sec. 4 of the Indian General Allotment Act, as amended, 25 U.S.C. § 334 (1988), for an Indian allotment when the applicant failed to provide, either with her application or in response to a BLM decision requiring her to do so, a certificate of eligibility showing that she is or is entitled to be a recognized member of a Federally recognized Indian tribe.

Ramona L. Randa, 125 IBLA 153 (Jan. 21, 1993)

ACT OF MARCH 3, 1891

Where a right-of-way grant issued under the Act of Mar. 3, 1891, does not contain provisions expressly mandating the filing of proof of construction of required improvements, failure to file does not, by itself, justify cancellation of the right-of-way.

The holder of a right-of-way issued under the Act of Mar. 3, 1891, is entitled to a factfinding hearing prior to cancellation for failure to construct improvements within 5 years of issuance as required by sec. 20 of that Act, where the case record does not demonstrate that improvements were not timely constructed, and where the right-of-way holder has expressly asserted that construction has been completed. In such hearing, BLM, as the proponent of the invalidity of the right-of-way, has the burden of proving that authorized improvements were not timely constructed.

John C. Urquidi, 124 IBLA 353 (Dec. 4, 1992)

ACT OF JUNE 17, 1902

The requirement of the Acquired Lands Act, 36 Stat. 895, that mineral leasing revenues be distributed "to the same funds or accounts and in the same manner as other receipts from the land affected by the lease" is most fully met for mineral revenues from acquired reclamation lands that have been charged to the reimbursable component of a project by the "credit to the project" disbursement formula. When revenues are generated from acquired lands which have not been charged to a project, a general credit to the Reclamation fund is appropriate. A credit to the annual obligations of the project is not appropriate for mineral leasing revenues from acquired lands because future use of the subsec. I annual credit method was cut off by the Hayden-O'Mahoney Amendment of 1938, 52 Stat. 322, except where such treatment was grandfathered in under that amendment.

Credits created by the statutory disbursement of mineral leasing revenues to projects may be used to satisfy new construction obligations in the same manner that such credits were applied against past obligations.

Proper Disbursement & Crediting of Mineral Leasing Revenues from Reclamation Acquired Lands, M-36969 (Sept. 8, 1989) 97 I.D. 54

ACT OF MARCH 3, 1909

The assignment of the obligation to make royalty payments is not related to an assignment of a lease or an interest in a lease that must be approved by BIA under 25 CFR 212.22.

Mesa Operating Ltd Partnership, 125 IBLA 28 (Dec. 31, 1992) 99 I.D. 272

ACT OF JUNE 25, 1910

A BLM decision declaring lode mining claims null and void ab initio because they were located on land withdrawn by the President on Oct. 12, 1910, pursuant to sec. 1 of the Act of June 25, 1910, ch. 421, 36 Stat. 847, will be reversed if it cannot be shown that the

ACT OF JUNE 25, 1910--Continued

claims were located solely for nonmetalliferous minerals.

Jonathan Z. Herod et al., 121 IBLA 339 (Dec. 13, 1991)

A PLO, issued in 1963 pursuant to the authority of the Act of June 25, 1910, ch. 421, 36 Stat. 847 (1910), did not withdraw the land described therein from location for gold because sec. 2 of that Act provided that lands withdrawn under its authority were to remain open under the mining laws for metalliferous minerals.

James Aubert et al., 130 IBLA 50 (July 13, 1994)

ACT OF MARCH 20, 1911

Lands conveyed to the U.S. under 16 U.S.C. § 485 (1988), become, upon acceptance of title, a part of the national forest within whose external boundaries they are located. The Office of the General Counsel for the U.S. Dept. of Agriculture has stated that acceptance of title is not final until the final title opinion is issued by that office. It is therefore the date on which the Office of the General Counsel accepts title that determines when exchanged land is subject to location of mining claims.

Robert S. Glenn, DeLoyd Cazier, 124 IBLA 104 (Sept. 17, 1992)

ACT OF AUGUST 24, 1912

A PLO, issued in 1963 pursuant to the authority of the Act of June 25, 1910, ch. 421, 36 Stat. 847 (1910), did not withdraw the land described therein from location for gold because sec. 2 of that Act provided that lands withdrawn under its authority were to remain open under the mining laws for metalliferous minerals.

James Aubert et al., 130 IBLA 50 (July 13, 1994)

ACT OF JULY 17, 1914

Where patents issued pursuant to the Act of July 17, 1914, as amended, reserve "all oil and gas and all shale or other rock valuable as a source of petroleum," that reservation is properly held to include sodium which occurs as an integral component of the reserved oil shale rock.

Shell Western E&P, Inc., 119 IBLA 125 (Apr. 22, 1991)

ACT OF DECEMBER 29, 1916

In determining the appropriate amount of a bond for the protection of the owner of the surface estate of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. §§ 291-301 (1976), BLM properly considers possible damages from projected mining operations within the entirety of the mining claims sought to be re-entered and occupied, relying on the current value of tangible improvements and of the projected lost grazing use of that land from such operations and subsequent reclamation. However, where BLM improperly discounts the value of future lost grazing use, the Board will recompute that value and set the proper bond amount.

William C. Hayes et ux., 122 IBLA 68 (Jan. 10, 1991)

ACT OF MARCH 13, 1921

A right to select lieu lands under the authority of sec. 13 of the Act of Mar. 13, 1921, 41 Stat. 1239, was a claim required to be recorded with the Department within 2 years from the effective date of the Act of Aug. 5, 1955, 69 Stat. 534. Failure to present the claim within the time established by the 1955 Recordation Act barred acquisition of the land. Filing a selection application in 1946 did not constitute compliance with the 1955 recordation requirement.

Tommy Chavez, 127 IBLA 395 (Nov. 2, 1993)

ACT OF JUNE 9, 1921

The Hawaiian Homes Commission Act of 1920, 42 Stat. 108, as amended (HHCA), established neither a trust corpus nor a beneficial owner, both of which are essential elements of a common law trust. The HHCA simply made lands available for homesteading on a limited basis.

The HHCA did not create a fiduciary responsibility in any party, the United States, the Territory of Hawaii, or the State of Hawaii.

The duties the HHCA placed in the Secretary of the Interior and in the Territory of Hawaii are not those of a trustee. Price v. Hawaii, 921 F.2d 950, 955 (9th Cir. 1990). They are, rather, those of a Goverment administrator.

The Scope of Federal Responsibility for Native Hawaiians Under the Hawaiian Homes Commission Act, M-36978 (Jan. 19, 1993) 100 I.D. 431

ACT OF NOVEMBER 9, 1921

Those portions of mining claims located on land subject to a valid, ongoing, and pre-existing highway right-of-way granted to the State of California pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982), are null and void ab initio.

William Peterson et al., 113 IBLA 19 (Jan. 26, 1990)

That portion of a mining claim located on land subject to a pre-existing highway right-of-way granted to the State of California pursuant to the Federal Highway Act of Nov. 9, 1921, 42 Stat. 212, now the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), is null and void ab initio.

Jesse R. Collins et al., 127 IBLA 122 (Aug. 23, 1993)

ACT OF MARCH 20, 1922

Lands conveyed to the United States under 16 U.S.C. § 485 (1988), become, upon acceptance of title, a part of the national forest within whose external boundaries they are located. Forest Service documents indicate that authority to accept title to exchanged land has been delegated to the Regional Forester. It is therefore the date the Regional Forester or his authorized designee accepts title which determines when exchanged land is subject to location of mining claims.

Robert N. Shanahan et al., 120 IBLA 187 (July 29, 1991)

ACT OF APRIL 23, 1932

It is proper to declare mining locations null and void ab initio where the locations were not perfected by performance of the condition precedent set forth in the order opening lands in a reclamation withdrawal to mineral location and entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1988).

American Colloid Co., 128 IBLA 257 (Mar. 4, 1994)

ACT OF SEPTEMBER 1, 1937

Implementation of the Act of Sept. 1, 1937 (Reindeer Industry Act), is committed to the discretion of the Secretary of the Interior, as delegated to BLM. Where, as required by 43 CFR 4310.1, BLM rejects the application for reindeer grazing privileges only after consulting with the Alaska Department of Fish and Game, which also expressly opposes approval, and where the applicant fails to show error in BLM's and ADF&G's findings, BLM's decision is properly affirmed on appeal.

Donald C. Olson, 120 IBLA 166 (July 22, 1991)

Implementation of the Act of Sept. 1, 1937 (the Reindeer Industry Act) is committed to the discretion of the Secretary of the Interior. When BLM rejects an application for a reindeer grazing permit after consulting with the Alaska Dept. of Fish and Game, which opposes approval, and the applicant fails to show error

ACT OF SEPTEMBER 1, 1937--Continued

in BLM's findings or an abuse of discretion, BLM's decision is properly affirmed on appeal.

Thomas L. Gray, 121 IBLA 295 (Dec. 3, 1991)

ACT OF AUGUST 24, 1954

Applicants who timely showed that they were owners of land in Wisconsin lying along a meander line, subsequently resurveyed, who held down lands between the original meander and the water shown on the later survey and have, since Jan. 21, 1953, held the land in good faith and peaceful adverse possession, were entitled to purchase it under the Act of Aug. 24, 1954, known as the O'Konski Act, 43 U.S.C. § 1221 (1988).

Victor A. Markunas, Victoria E. Markunas, 119 IBLA 70 (Apr. 1, 1991)

ACT OF AUGUST 5, 1955

A right to select lieu lands under the authority of sec. 13 of the Act of Mar. 13, 1921, 41 Stat. 1239, was a claim required to be recorded with the Department within 2 years from the effective date of the Act of Aug. 5, 1955, 69 Stat. 534. Failure to present the claim within the time established by the 1955 Recordation Act barred acquisition of the land. Filing a selection application in 1946 did not constitute compliance with the 1955 recordation requirement.

Tommy Chavez, 127 IBLA 395 (Nov. 2, 1993)

ACT OF AUGUST 11, 1955

Locators of claims on land opened under 30 U.S.C. § 621(a) (1988), have been required by 30 U.S.C. § 623 (1988), to file copies of their location notices with BLM within 1 year after Aug. 11, 1955, for all locations previously made, or within 60 days of location for locations thereafter made.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1988), authorizes the location and patent of mining claims on public lands withdrawn for power purposes. However, the Department may hold a

ACT OF AUGUST 11, 1955--Continued

public hearing to determine whether placer mining operations would substantially interfere with other uses of the land and may issue an order providing for one of the following three alternatives: (1) a complete prohibition on placer mining; (2) permission to engage in placer mining upon the condition that the locator shall restore the surface of the claim; or (3) a general permission to engage in placer mining.

Where a copy of the notice of location of a mining claim on land withdrawn for powersite purposes was not recorded with BLM within the time prescribed by 30 U.S.C. § 623 (1988), a notice of intent from BLM to conduct a hearing under sec. 621(b) will not be considered untimely if the notice of intent was issued within 60 days after receipt of some affirmative acknowledgement by the owner of the claim that the claim was subject to that provision of the Act.

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1988), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits from other uses.

In making a determination whether placer mining operations would substantially interfere with other uses of powersite lands, the party who seeks to restrict or prohibit placer mining bears the initial burden of presenting a prima facie case. The burden then shifts to the mining claimant to overcome the case so proved by a preponderance of the evidence.

United States v. Phyrne Brown, 124 IBLA 247 (Nov. 2, 1992)

Evidence produced at a hearing held pursuant to the MCRRA, 30 U.S.C. § 621 (1988), established that placer mining on land subject to a powersite withdrawal would interfere with recreational use of the land and that the benefits of mining were outweighed by the benefits derived from recreational use; an order prohibiting

ACT OF AUGUST 11, 1955--Continued

placer mining on the claim was therefore properly entered.

United States v. Robert G. McEwen, 129 IBLA 99 (Apr. 7, 1994)

ACT OF OCTOBER 18, 1974

A Cooperative Wildlife Habitat-Farming Development Agreement negotiated under the Sikes Act, as amended by the Act of Oct. 18, 1974, 16 U.S.C. § 670g (1988), was properly cancelled when the state agency responsible for monitoring the agreement reported and inspection revealed that there had been a failure to seed, irrigate, and maintain the lands as agreed. An unsupported allegation that facts supporting the decision were not correct was insufficient to overcome the presumption that conditions reported by the public officials were as stated in the record.

George W. Anthony, 119 IBLA 332 (June 18, 1991)

ACT OF JANUARY 2, 1976

Notwithstanding the principle of administrative finality, the Secretary or those exercising his delegated authority may reconsider a matter previously decided and correct or reverse an erroneous decision to the extent the Department has retained jurisdiction over the subject of the adjudication. With respect to administration of an escrow fund under P.L. 94-204 for revenue arising from use of lands withdrawn for Native selection, the jurisdiction of the Department ends with the disbursement of the funds subsequent to conveyance and a decision reconsidering the allocation of the disbursed funds and requiring repayment of those funds will be vacated for lack of jurisdiction.

Mary Sanford, 129 IBLA 293 (May 24, 1994)

ADMINISTRATIVE AUTHORITY
(See also Delegation of Authority, Federal Employees & Officers, Secretary of the Interior)

GENERALLY

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

Although 30 U.S.C. §§ 29, 30 (1982), do not authorize the Department to rule on the merits of an adverse claim, it is within the Department's authority to determine whether a document presents an adverse claim within the meaning of the statutes. The issue whether land is mineral or nonmineral in character is within the exclusive jurisdiction of the Department of the Interior and for this reason a conflict between mineral and nonmineral claimants does not raise an "adverse claim" within the meaning of the term in the statutes.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299
(Mar. 12, 1990) 97 I.D. 109

Withdrawal of patent applications following a hearing but before a decision on the merits concerning the validity of the claims which were the subject of the hearing eliminated the subject matter on which the Administrative Law Judge's jurisdiction to render a decision was founded. Dismissal of a protest for lack of subject matter jurisdiction is not a decision on the merits and is therefore made without prejudice.

Sunshine Mining Co. v. State of Idaho, 114 IBLA 317
(May 14, 1990)

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

A decision by a BLM officer which does not fall within any of the exceptions enumerated in 43 CFR 4.410 or provided by other duly promulgated regulation is subject to appeal to the Board of Land Appeals and a BLM official is without authority to state otherwise.

Southern Utah Wilderness Alliance, 114 IBLA 326
(May 22, 1990)

Imposition of an assessment to compel compliance with regulations implementing the Mineral Leasing Act is an exercise of the Department's regulatory power which is not stayed by the filing of a bankruptcy petition by an oil and gas lessee or operator.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

The Conservation Division Manual is an administrative manual which governed the internal operations of the Conservation Division, Geological Survey. It does not have the force of law and its provisions are guidelines rather than rules which are binding on the Board of Land Appeals. Review is not limited to determining whether its provisions were correctly applied and the Board may consider whether application of the provisions is arbitrary, capricious, an abuse of discretion, or contrary to law.

Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164
(June 28, 1990)

Where the record is too vague to support a townsite trustee's determination that applicants for certain townsite lots did not occupy those lots prior to repeal of the Townsite Acts on Oct. 21, 1976, and hence did not qualify for trustee deeds to those lots, the Board will order a hearing pursuant to 43 CFR 4.415 to resolve questions of fact concerning applicant's alleged occupancy on the crucial date.

Larry L. Ledlow, Florence Ledlow, 116 IBLA 349
(Oct. 30, 1990)

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

The Board of Land Appeals has no authority to revise, amend, or clarify language of a United States District Court order defining "appropriate management levels" and "excess."

Animal Protection Institute of America et al., 118 IBLA 63 (Feb. 22, 1991)

A statute establishing time limitations for commencement of civil actions for damages by the United States does not apply to limit administrative review within DOI.

Mobil Exploration & Producing U.S., Inc., 119 IBLA 76 (Apr. 5, 1991) 98 I.D. 207

The Board of Land Appeals exercises no supervisory authority or appellante jurisdiction over proceedings pending in the district court or over actions taken by a United States Marshal pursuant to a subpoena issued by a district court.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

Lands conveyed to the United States under 16 U.S.C. § 485 (1988), become, upon acceptance of title, a part of the national forest within whose external boundaries they are located. Forest Service documents indicate that authority to accept title to exchanged land has been delegated to the Regional Forester. It is therefore the date the Regional Forester or his authorized designee accepts title which determines when exchanged land is subject to location of mining claims.

Robert N. Shanahan et al., 120 IBLA 187 (July 29, 1991)

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

Once jurisdiction over an appeal has been lodged in the Board of Land Appeals by the timely filing of a notice of appeal, the supervisory authority provided by 43 CFR 4.5 may be exercised only by the Secretary, Deputy Secretary, or Director, Office of Hearings and Appeals.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

The Department may consider a request to reinstate a relinquished Native allotment application for land which has been either patented or made part of an interim conveyance to a Native corporation. If the record shows that the possibility exists that the applicant involuntarily and unknowingly relinquished the application in whole or in part, or was fraudulently induced to do so, he is entitled an evidentiary hearing. If the relinquishment was not knowing and voluntary or was fraudulently procured, the Department may reinstate the application to adjudicate its validity prior to recommending the instigation of judicial proceedings to cancel conflicting interests in the land.

Heir of Frank Hobson (On Reconsideration), 120 IBLA 66 (Oct. 25, 1991)

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within DOI.

Anadarko Petroleum Corp., 122 IBLA 141 (Feb. 3, 1992)

Benson-Montin-Greer Drilling Corp., 123 IBLA 341 (July 15, 1992) 99 I.D. 115

Bolling Construction Co. & Bob Bolling, 125 IBLA 303 (Mar. 16, 1993)

Quality Broadcasting Corp., Unicom Broadcasting, Inc., 126 IBLA 174 (May 11, 1993)

Texaco, Inc., 129 IBLA 46 (Mar. 23, 1994)

ARCO Oil & Gas Co., 131 IBLA 299 (Dec. 2, 1994)

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

Where the Colorado State Director, BLM, issued a decision approving a record of decision for an EIS regarding a vegetative treatment program for 13 western states, insofar as it related to public lands administered by BLM in Colorado, and the Ass't Secretary, Land and Minerals Management, subsequently concurred in selection of the vegetative treatment program, that concurrence amounted to Secretarial approval of the vegetative treatment program for BLM lands in 13 western states, including Colorado. Accordingly, the Board of Land Appeals lacks jurisdiction to consider an appeal of the Colorado State Director's decision file subsequent to the Ass't Secretary's action.

The Wilderness Society, 122 IBLA 162 (Feb. 6, 1992)

The burden to establish that there are engineering, geologic, or economic reasons to justify venting or flaring gas from an oil well rests with the lessee who appeals a decision that there has been avoidable waste as a result of such venting or flaring. Where no proof is offered by the lessee to support allegations that there was a danger of drainage, relief cannot be afforded. Arguments that assessment for avoidably lost gas were barred by laches or limitations of action cannot be considered favorably where the lessee was timely notified of an audit that indicated avoidable loss was occurring, even though subsequent review of the matter was protracted.

Proper application of IM 87-652 required that BLM evaluate whether, if an application to flare gas had been made for oil wells produced by the lessee prior to flaring, the application would have been entitled to approval on the merits.

Maxus Exploration Co., 122 IBLA 190 (Feb. 10, 1992)

So long as the legal title to public lands remains in the United States, the Department has the power, after proper notice and hearing, to inquire into the propriety of conveying the land, at any time prior to the issuance of patent.

Mary Johansen, 122 IBLA 344 (Mar. 11, 1992)

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

In order to correct prior error, an official of the BIA may change an administrative interpretation of a statute as long as the reason for the change is clearly set forth to show that the departure from the prior administrative position is not arbitrary or capricious.

Hopi Indian Tribe v. Director, Office of Trust & Economic Development, Bureau of Indian Affairs, 22 IBIA 10 (Apr. 7, 1992)

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

When unpatented mining claims have been donated to the NPS by quitclaim deed and the record before BLM discloses a dispute regarding the chain of title to the claims or the existence of encumbrances upon title to the claims, neither the regulations applicable to mining claims recordation nor the regulations governing acceptance of donated interests in real property authorizes BLM to adjudicate title to the claims and a decision purporting to do so is properly vacated.

David J. Bartoli, 123 IBLA 27 (Apr. 29, 1992)
99 I.D. 55

Lands conveyed to the U.S. under 16 U.S.C. § 485 (1988), become, upon acceptance of title, a part of the national forest within whose external boundaries they are located. The Office of the General Counsel for the U.S. Dept. of Agriculture has stated that acceptance of title is not final until the final title opinion is issued by that office. It is therefore the date on which the Office of the General Counsel accepts title that determines when exchanged land is subject to location of mining claims.

Robert S. Glenn, DeLoyd Cazier, 124 IBLA 104 (Sept. 17, 1992)

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

A statute establishing time limitations for commencement of civil actions for damages by the United States does not apply to limit administrative action by the Department.

BHP Petroleum (Americas) Inc., 124 IBLA 185 (Oct. 14, 1992)

Under the provisions of 43 CFR 3101.7-3. a third-party objecting to issuance of an oil and gas lease on land within the National Forest System, pursuant to the consent of the FS, has standing to appeal to the Interior Board of Land Appeals. However, to the extent that the third-party raises objections to the conformity of actions undertaken by the FS with respect to its own internal operating procedures or with laws solely applicable to the FS, the Board will not review such contentions where the FS has provided its own appeal system for the resolution of such issues.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

An interim conveyance is similar to a patent in that it conveys legal title to the land described. In the absence of legal title, DOI lacks jurisdiction to adjudicate entitlement of an applicant for a tract of land. Where the applicant is a Native American, the fiduciary duty of DOI may justify a review of the application to determine whether to seek reconveyance of the land.

With respect to lands which have been conveyed out of Federal ownership, a decision accepting a Native allotment application as amended is not an adversarial adjudication of entitlement of the applicant to an allotment which is dispositive of the rights of the applicant or adverse parties since DOI lacks jurisdiction to make such a ruling in the absence of legal title. In this context, an appeal by an adverse party is properly dismissed as premature. If the land is reconveyed, any decision adjudicating the amended location will be subject to appeal.

Bay View, Inc., 126 IBLA 281 (June 7, 1993)

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the U.S. does not limit administrative proceedings within the DOI to recover indebtedness from an oil and gas operator.

CCCo., 127 IBLA 291 (Oct. 7, 1993)

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

The Secretary of the Interior and those authorized to act on his behalf have the discretionary authority to suspend operations and production under any oil or gas lease for conservation purposes, including the prevention of environmental damage. Where the record indicates that an EA prepared for drilling operations on an oil and gas lease located within both a ESA and an area of critical environmental concern failed to consider this option in evaluating the proposal to drill, the decision approving drilling operations will be set aside and the case will be remanded to permit consideration of whether, under this discretionary authority, operations under the lease should be suspended.

Since no express or implied rights of access arise upon issuance of a Federal oil and gas lease, the approval of the committal of a pre-FLPMA lease to a unit plan subsequent to the adoption of sec. 603(c) of FLPMA does not alter the application of the nonimpairment standard in determining whether access to the lease across other lands within the unit may be permitted.

Southern Utah Wilderness Alliance et al., 127 IBLA 331 (Oct. 19, 1993) 100 I.D. 370

IBLA has no authority to declare sec. 10(a) of OCSLA, 43 U.S.C. § 1339(a) (1988), or any other act of Congress unconstitutional. If an enactment of Congress is in conflict with the U.S. Constitution, it is for the Judicial Branch to so declare.

Amerada Hess Corp., 128 IBLA 94 (Dec. 13, 1993)

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

Vern T. Weiss et al., 128 IBLA 119 (Dec. 22, 1993)

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

Notwithstanding the principle of administrative finality, the Secretary or those exercising his delegated authority may reconsider a matter previously decided and correct or reverse an erroneous decision to the extent the Department has retained jurisdiction over the subject of the adjudication. With respect to administration of an escrow fund under P.L. 94-204 for revenue arising from use of lands withdrawn for Native selection, the jurisdiction of the Department ends with the disbursement of the funds subsequent to conveyance and a decision reconsidering the allocation of the disbursed funds and requiring repayment of those funds will be vacated for lack of jurisdiction.

Mary Sanford, 129 IBLA 293 (May 24, 1994)

The Tribal aboriginal title of the Western Shoshone has been extinguished pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 1055 (1946).

Western Shoshone Nat'l Council, 130 IBLA 69 (July 26, 1994)

Except to the extent expressly delineated in its decision or order, when the Board of Land Appeals remands a case to the Hearings Division for the taking of additional evidence, the ALJ to whom the matter is assigned has full authority to admit such evidence as is deemed relevant and probative and to enter such rulings as judged appropriate.

United States v. J. Gary Feezor et al., 130 IBLA 146 (Aug. 4, 1994)

In accepting a right-of-way grant for salt water disposal, the grantee agrees to be bound by all applicable State and Federal laws, including those related to water quality. Where the U.S. EPA determines that the grantee is polluting waters of the United States in violation of Federal law and orders the grantee to cease and desist, this Board has no jurisdiction to review such an order.

Laguna Gatuna, Inc., 131 IBLA 169 (Nov. 2, 1994)

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

BLM properly refuses to allow a DLE and returns the DLE application where the land sought to be entered, located within the California Desert Conservation Area, has been classified as unavailable for agricultural use in the land-use plan promulgated for the area in accordance with 43 U.S.C. §§ 1712 and 1781 (1988). The Board has no authority to review such a land-use plan or the classifications contained therein.

Max Wilson, 131 IBLA 306 (Dec. 5, 1994)

Under the provisions of 43 CFR 3163.1(b)(1), where a notice of an incident of noncompliance has issued for a failure to install well control equipment in accordance with an approved APD, BLM must issue an immediate assessment in the amount of $500 per day for each day the violation existed, including days the violation existed prior to discovery, up to a limit of $5,000.

Absent the existence of unusual circumstances which might be revealed on a case-by-case analysis, the exercise of a State Director's discretion under 43 CFR 3163.1(e) in the context of reviewing an assessment for a violation of 43 CFR 3163.1(b)(1), which violation was properly classified as "minor," should result in a reduction of the assessment so that the assessment does not exceed a $250 daily rate.

Conley P. Smith Oil Producers, 131 IBLA 313 (Dec. 13, 1994)

ESTOPPEL

Verbal permission to drill from a BLM employee prior to approval by BLM of an application for permit to drill, even if established in the record, would not provide a defense to the issuance of an incident of noncompliance for drilling without approval, where such verbal permission is contrary to controlling Departmental regulations, knowledge of which is limited to the operator.

Jack J. Grynberg dba Grynberg Petroleum Co., 114 IBLA 225 (Apr. 26, 1990)

ADMINISTRATIVE AUTHORITY--Continued

ESTOPPEL--Continued

Because of the Department's obligation to lease to the first-qualified applicant, issuance of a lease pursuant to a noncompetitive future interest oil and gas lease offer for acquired lands does not preclude a junior offeror from challenging issuance of the lease on appeal from BLM's rejection of the junior offer for the reasons that the lands requested were leased to a senior offeror. The junior offeror has standing to appeal for, if the lease is cancelled, the junior offer must be processed. The right to challenge issuance of the lease and the Department's authority to cancel an improperly issued lease were not lost through estoppel or laches where the junior offeror was not notified of lease issuance nor allowed to be heard until the decision rejecting its offer.

Beard Oil Co., 117 IBLA 54 (Nov. 27, 1990)

A party claiming reliance upon a misrepresentation by a Department employee must be ignorant of the true facts. When a party successfully bidding at an oil and gas lease sale receives a Receipt and Accounting Advice Statement indicating less than full payment of the monies owing, the bidder cannot claim ignorance of the fact that additional monies are due. BLM properly rejected the lease offer upon the bidder's failure to pay the balance of the bonus bid within 10 working days after the sale.

Partnership One, Inc., 119 IBLA 7 (Mar. 15, 1991)

The Secretary of the Interior has continuing jurisdiction with respect to public lands until patent issues, and he is not estopped by principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors in interest; so long as legal title remains in the Government, the Secretary has the power and duty, upon proper notice and hearing, to determine whether the claim is valid. The existence of older favorable mineral reports will not preclude a later contest of the validity of mining claims based on a subsequent mineral examination disclosing the absence of a valuable mineral deposit.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

ADMINISTRATIVE AUTHORITY--Continued

ESTOPPEL--Continued

While situations may arise where the Government can be estopped because a private party, acting in reliance upon Governmental conduct, was prevented from obtaining a right which might have been obtained, the Government can never be estopped where the effect of the estoppel is to grant someone a right which was not available in the first instance.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be valid in an earlier contest is not dispositive of a mining claim contest.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

When BLM has indicated to a trespasser that gravel extraction operations may continue, there is no basis for concluding that the continued operations were unreasonable or lacked good faith. Absent evidence showing knowledge that the violation is occurring or a reckless disregard for whether a violation is occurring, there is no justification for imposing what are essentially punitive damages for willful trespass. In such a case the Board will find, in the interest of fundamental fairness, that BLM is precluded from charging that the operator, who remained in trespass with permission to

ADMINISTRATIVE AUTHORITY--Continued

ESTOPPEL--Continued

continue operations, but absent formal authorization, was in willful trespass.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

Circumstances may exist where the Government can be estopped because a private party, acting in reliance upon Governmental conduct, was prevented from obtaining a right which might have been otherwise obtained. However, the Government can never be estopped if the effect of invoking estoppel would grant a right which was not available in the first instance.

Edgar Sebastian Roberts, 127 IBLA 217 (Sept. 21, 1993)

A claim of estoppel against the Government will be rejected in the absence of affirmative misconduct in the nature of an erroneous statement of fact in an official written decision.

While situations may arise where the Government may be estopped because a private party, acting in reliance upon a Governmental representation, was prevented from obtaining a right which might have been obtained, the Government cannot be estopped where the effect of the estoppel is to grant someone a right which was not available in the first instance.

James W. Bowling, 129 IBLA 52 (Mar. 25, 1994)

LACHES

Because of the Department's obligation to lease to the first-qualified applicant, issuance of a lease pursuant to a noncompetitive future interest oil and gas lease offer for acquired lands does not preclude a junior offeror from challenging issuance of the lease on appeal from BLM's rejection of the junior offer for the reasons that the lands requested were leased to a senior offeror. The junior offeror has standing to appeal for, if the lease is cancelled, the junior offer must be processed. The right to challenge issuance of the lease and the Department's authority to cancel an improperly issued lease were not lost through estoppel

ADMINISTRATIVE AUTHORITY--Continued

LACHES--Continued

or laches where the junior offeror was not notified of lease issuance nor allowed to be heard until the decision rejecting its offer.

Beard Oil Co., 117 IBLA 54 (Nov. 27, 1990)

ADMINISTRATIVE PRACTICE

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract for one of the Five Civilized Tribes is final for the Department and is not subject to appeal within the Department.

Principal Chief, Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 105 (Jan. 17, 1990)

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision.

Kanawha & Hocking Coal & Coke Co., 112 IBLA 365 (Jan. 19, 1990)

When issuing a formal decision one must do more than ensure that the decision is supported by a rational basis. The basis for that decision must be stated in the written decision and demonstrated in the administrative record accompanying the decision. The recipient of the decision deserves a reasoned and factual explanation of the rationale for the decision, and must be given some basis for understanding it and accepting it or, alternatively, for appealing and disputing it.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

ADMINISTRATIVE PRACTICE--Continued

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within 10 business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

MMS must provide a lessee with an adequate basis for accepting or appealing a determination of the manufacturing allowance to be utilized in royalty calculation. An MMS decision must be supported by a rational basis which is stated in the written decision and supported by the record.

Union Oil Co. of California, Union Exploration Partners, Ltd., 116 IBLA 8 (Aug. 24, 1990)

As a general rule, adjudications should be so structured that determinations of subsidiary or interrelated questions are made within the confines of a single unified decision so as to avoid needless multiplicity of appeals and the resulting confusion which piecemeal adjudication engenders.

Cities Service Oil & Gas Corp., 117 IBLA 17 (Nov 26, 1990) 97 I.D. 243

Where a decision of the Acting Secretary of the Interior disclaiming any Federal interests in a parcel of land has stood unchallenged for over 80 years and subsequent development of those lands has occurred, at least arguably in reliance on this determination, the doctrine of administrative finality is properly invoked

ADMINISTRATIVE PRACTICE--Continued

as a bar to readjudication of the conclusions reached by the Acting Secretary in his original decision.

State of California et al., 121 IBLA 73 (Oct. 28, 1991)
98 I.D. 321

Where BLM issues a decision denying the assignment of a salt water disposal right-of-way and such decision is merely conclusory in nature, the record is barren of any supporting rationale, and other unaddressed issues are presented, the decision will be set aside and the case remanded for BLM to reassess assignment of the right-of-way and determine what steps are necessary for the protection of the Federal mineral interest in the land in question.

Burnett Oil Co., Inc., 122 IBLA 330 (Mar. 11, 1992)

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

Although authorized under 43 CFR 4.415, a fact-finding hearing will be ordered only when the record before the Board presents conflicting issues of fact that cannot be resolved on the basis of that record. Where appellant fails to submit all available evidence to the Board, it is not possible to conclude that the evidence is irreconcilable, and the request for hearing is properly denied.

Pine Grove Farms, 126 IBLA 269 (June 3, 1993)

ADMINISTRATIVE PRACTICE--Continued

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

An extension of time for filing a petition for reconsideration may be granted in accordance with 43 CFR 4.22(f).

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

ADMINISTRATIVE PROCEDURE
(See also Appeals, Confidential Information, Contests & Protests, Hearings, Judicial Review, Public Records, Regulations, Rules of Practice)

GENERALLY

A regulation should be sufficiently clear that there is no basis for an oil and gas lessee's non-compliance with the regulation before that regulation is interpreted to the detriment of a lessee. If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of its Oil and Gas Payor Handbook, because that Handbook lacks the force and effect of law enjoyed by a statute or regulation.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

Where a decision by BLM cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest is delivered to the last address of record of the holder of the interest, and where no appeal is filed by him, BLM's decision cancelling his interest becomes final for him.

Where the record fails to establish that a copy of a BLM decision cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest was received by the interest holder, by a qualified representative of her estate, or by her heirs, a failure to appeal does not render BLM's decision final.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)
97 I.D. 137

Under the circumstances of this case, in which, inter alia, a grant application under the Indian Business Development Program was disapproved on grounds not communicated to the applicant in the disapproval notification, the disapproval will be vacated and the matter referred to the Assistant Secretary--Indian Affairs for the exercise of discretion committed to the Bureau of Indian Affairs and the issuance of a new decision.

Sherry Wilson Price v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 272 (May 1, 1990)

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

Withdrawal of patent applications following a hearing but before a decision on the merits concerning the validity of the claims which were the subject of the hearing eliminated the subject matter on which the Administrative Law Judge's jurisdiction to render a decision was founded. Dismissal of a protest for lack of subject matter jurisdiction is not a decision on the merits and is therefore made without prejudice.

Sunshine Mining Co. v. State of Idaho, 114 IBLA 317 (May 14, 1990)

When the reason for denial of an application to modify a loan under the Indian Revolving Loan Program is not given in the denial decision, the decision will be vacated and the matter remanded for further proceedings.

Lyle Cochran v. Acting Billings Area Director, Bureau of Indian Affairs, 18 IBIA 406 (Aug. 21, 1990)

Pursuant to 43 CFR Subpart 4160, a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

An appeal from a decision denying an application for a grazing permit will not be dismissed as moot even though the relevant grazing season has passed, where issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

The Board has discretion not to dismiss an appeal for failure to serve copies of appeal documents on an adverse party, as the regulations state merely that such failure will "subject the appeal to dismissal." In the absence of a showing of prejudice on the adverse party, a motion to dismiss for failure to serve is properly denied.

Even though an appellant corporation is not incorporated until after the date of issuance by BLM of the decision it seeks to appeal, its appeal is not properly dismissed for lack of standing if it appears (1) that the appellant corporation succeeded to the interests of an entity that participated in the decisionmaking process and, thus, became a party to the case, and (2) that both the appellant corporation and the earlier entity are adversely affected by BLM's decision.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)
97 I.D. 263

Pursuant to 43 CFR 2631.1, the Department may require applicants for patent under the Transportation Act of 1940 to provide specific proof of transfer of title.

Southern Pacific Transportation Co., Eugene F. Snow, & Lloyd D. Hayes, 118 IBLA 78 (Feb. 27, 1991)

BLM is required to fully adjudicate a protest against a proposed land sale where it raises reasonable doubt about the correctness of BLM's proposed action. BLM should specifically address the substantive questions in its decision ruling on the protest and, if it decides to reject them, should explain its reasons for doing so.

Joyce & Tony Padilla, 119 IBLA 33 (Mar. 25, 1991)

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

Pursuant to provision of 43 CFR 3162.3-4, the Department must allow an oil and gas operator a reasonable time to produce or plug and abandon a well in which oil and gas is not encountered in paying quantities. It was not unreasonable to require an operator to plug and abandon a well after the operator was allowed from Aug. 1988 until Feb. 1990 to produce the well.

Viking Exploration, Inc., 119 IBLA 73 (Apr. 5, 1991)

If an appellant's notice of appeal did not include a SOR for the appeal, the appellant must file such a statement with the Board of Land Appeals within 30 days after the notice of appeal was filed. Where no SOR is ever filed and no reason is offered for the failure to file, the appeal is properly dismissed.

Sybil W. Taylor, 120 IBLA 193 (July 30, 1991)

To the extent that a unit operator is delegated with all rights of the working interest owners with respect to allocation of production, receipt by the unit operator of a notice by BLM accepting the unit operator's determination that a well completion is noncommercial constitutes constructive service of that notice on the working interest owners.

Where, under a joint Federal/State unit agreement, authority for the approval of a noncommerciality determination is vested in the authorized officer, the New Mexico Land Commissioner, or the New Mexico Conservation Commission, depending upon whether the well in question is completed on Federal, State, or private land, respectively, a notice that BLM is filing a noncommerciality determination for a well not located on Federal land "for the record" does not constitute an appealable decision under 43 CFR 4.410.

Global Natural Resources Corp., 121 IBLA 286 (Nov. 22, 1991)

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

A letter from counsel for OWM to an operator that (1) speaks only of "considering the possibility of settlement," (2) cautions that remedial action required by the NOVs must be completed and failure-to-abate COs terminated before any settlement can be negotiated, and (3) invites the operator to contact him after completion of reclamation if it is still interested in settlement, creates no basis on which the operator may reasonably rely that OSM agreed that the civil penalties for the NOVs would be settled when reclamation was completed. Where an offer to settle is made by counsel for OSM following completion of reclamation, but is not accepted by the operator, there is no basis to consider estopping OSM from collecting civil penalties for the NOVs.

J&M Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 122 IBLA 90 (Jan. 14, 1992)

Unless otherwise specified, a decision of the Board of Indian Appeals remanding a matter to an official of the BIA restores that official's full authority to consider the matter.

Stone Trucking v. Portland Area Director, Bureau of Indian Affairs, 22 IBIA 52 (May 5, 1992)

A Federal agency has a responsibility to explain the rationale and factual basis for decisions affecting persons dealing with the agency. Failure to provide such information is a violation of due process.

Quileute Tribe v. Portland Area Director, Bureau of Indian Affairs, 23 IBIA 20 (Oct. 29, 1992)

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

Even in the case of a decision based on the exercise of discretion, BIA has a responsibility to explain the rationale and factual basis of the decision.

ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 228 (Mar. 8, 1993)

Except as otherwise provided by law or other pertinent regulation, a decision issued before Feb. 18, 1993, will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. It is not necessary to seek a stay of a decision issued prior to Feb. 18, 1993, which is not automatically effective by law or pertinent regulation, and a request for an extension of time in which to file a stay request will be denied.

Committee for Idaho's High Desert, 123 IBLA 301 (Mar. 16, 1993)

Even in the case of a decision based on the exercise of discretionary authority, the BIA has a responsibility to explain the rationale and factual basis of the decision.

Kaw Nation v. Anadarko Area Director, Bureau of Indian Affairs, 24 IBIA 21 (May 26, 1993)

An appeal from a BLM decision to issue a land-use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the U.S., but is instead owned by the applicant. The application for a land-use permit was an admission by the applicant that the land sought was public land.

Lawrence Smart Trust, 127 IBLA 55 (July 20, 1993)

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

The failure to file a SOR subjects an appeal to summary dismissal. 43 CFR 4.402(a). If no SOR or reason for the failure to file a SOR is filed, the appeal is properly dismissed.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

An extension of time for filing a petition for reconsideration may be granted in accordance with 43 CFR 4.22(f).

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

When determining whether to grant a trader's license or peddler's permit, it is a denial of due process for BIA to rely on adverse allegations relating to the character of the applicant without giving the applicant an opportunity to respond to those allegations.

Jane Rush v. Acting Navajo Area Director, Bureau of Indian Affairs, 25 IBIA 198 (Mar. 4, 1994)

A notice of appeal signed by an individual on behalf of other parties (two associations and two individuals) is not a valid notice of appeal as to those other parties unless the signer is authorized to represent them. Where the signer is neither an attorney, an officer in the associations, nor a family member of the individuals, the signer does not meet the criteria allowing her to practice before the Department on their behalf, and the notice of appeal is properly dismissed as to the parties that she is not authorized to represent.

Audubon Society of Portland et al., 128 IBLA 370 (Mar. 11, 1994)

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

For summary judgment there must be no true issue of fact when all factual inferences are drawn in the light most favorable to the opposing party. Therefore, the party seeking permission to file an interlocutory appeal from the denial of a motion for summary dismissal, pursuant to 43 CFR 4.28, must show that there is no true issue of fact and that an immediate appeal from the denial order will materially advance the final decision. The degree to which a FWS Biological Opinion may or may not have foreclosed BLM's obligation and discretionary authority to act in accordance with the Taylor Grazing Act and other applicable laws is an unresolved issue of sufficient magnitude and import to justify denying a motion for summary dismissal.

Edwin O. Larson v. Bureau of Land Management (On Reconsideration), 129 IBLA 250 (May 2, 1994)

BLM properly denied a request to file a late protest of a final river management plan, EIS, and record of decision after notice of the availability of the final plan and EIS for comment was published in the Federal Register and appellants were mailed copies of the plan, EIS, and record of decision.

Lawrence V. Smart Trust et al., 129 IBLA 351 (June 6, 1994)

Challenges to the approval or amendment of a RMP and its related EIS are accorded administrative review only in conformity with the protest procedures prescribed by 43 CFR Part 1600. Such challenges are properly distinguished from an appeal challenging implementing actions undertaken without preparation of a supplemental EIS which may be appealed to the Board of Land Appeals.

Colorado Environmental Coalition, 130 IBLA 61 (July 22, 1994)

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

Although a BIA Director has authority to place a Superintendent's decision into immediate effect under 25 CFR 2.6(a), an Area Director does not have authority to make his or her own decision final for the Department when Departmental regulations provide a right of appeal to the Board of Indian Appeals.

Even in the case of a decision based on the exercise of discretion, BIA has a responsibility to explain the rationale and factual basis of the decision.

Dean Wallace v. Aberdeen Area Director, Bureau of Indian Affairs, 26 IBIA 150 (Aug. 2, 1994)

Under 43 CFR 4.31, if a person submitting a document in a proceeding before the Department claims that some or all of the information contained in the document is confidential information the disclosure of which to another party in the proceeding is prohibited by law, notwithstanding that party's agreement to keep the information confidential, the submitter of the document has the burden of demonstrating why disclosure of the information is prohibited by law. That the information falls within an exemption from disclosure under FOIA, 5 U.S.C. § 552(b) (1988), does not suffice to establish that disclosure of the information is prohibited by law.

Yates Petroleum Corp., et al., 131 IBLA 230 (Nov. 18, 1994)

ADJUDICATION

Although 30 U.S.C. §§ 29, 30 (1982), do not authorize the Department to rule on the merits of an adverse claim, it is within the Department's authority to determine whether a document presents an adverse claim within the meaning of the statutes. The issue whether land is mineral or nonmineral in character is within the exclusive jurisdiction of the Department of the Interior and for this reason a conflict between mineral and nonmineral claimants does not raise an "adverse claim" within the meaning of the term in the statutes.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

ADMINISTRATIVE PROCEDURE--Continued

ADJUDICATION--Continued

A petition for permission to appeal an interlocutory ruling by an Administrative Law Judge that a party is not precluded from introducing evidence on the issue of whether his mining operation caused damage off the permit is properly denied when the governing law has changed and a significant time has elapsed between the finding in a state proceeding that the operation did cause such damage and the issuance of a Federal notice of violation.

Muskingum Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Delbert Lacy (Intervenor), 113 IBLA 352 (Mar. 22, 1990)

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

A litigant's failure to timely seek review of a notice of violation does not bar it from challenging OSMRE's jurisdictional authority to issue the underlying notice of violation in an application for review of a cessation order subsequently issued for failure to abate the violations set out in the NOV.

Stipulations in a proceeding in which a second party did not appear should not serve as the basis for concluding there was privity between the second party and a party to the previous action (a prerequisite for applying collateral estoppel) because the second party

ADMINISTRATIVE PROCEDURE--Continued

ADJUDICATION--Continued

was not a party to the proceeding in which the stipulations were entered.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

Withdrawal of patent applications following a hearing but before a decision on the merits concerning the validity of the claims which were the subject of the hearing eliminated the subject matter on which the Administrative Law Judge's jurisdiction to render a decision was founded. Dismissal of a protest for lack of subject matter jurisdiction is not a decision on the merits and is therefore made without prejudice.

Sunshine Mining Co. v. State of Idaho, 114 IBLA 317 (May 14, 1990)

As a general rule, adjudications should be so structured that determinations of subsidiary or interrelated questions are made within the confines of a single unified decision so as to avoid needless multiplicity of appeals and the resulting confusion which piecemeal adjudication engenders.

Cities Service Oil & Gas Corp., 117 IBLA 17 (Nov 26, 1990) 97 I.D. 243

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit

ADMINISTRATIVE PROCEDURE--Continued

ADJUDICATION--Continued

has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented the claimant must present sufficient evidence to overcome the Government's case by a preponderence of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a minor distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

On appeal, the Forest Service urges a finding that too much weight was given to claimant's evidence. It does not, however, allege that there is any contrary evidence or tender any proof that it possesses evidence which would lead to a different result if another hearing were held. If an appellant seeks another hearing it must tender sufficient evidence indicating a discovery (or lack thereof) to convince this Board that such a further hearing is warranted. Without such offer, no hearing will be ordered.

In a contest not involving a patent application, when the Government raises an issue not set out in the complaint during the hearing or in its posthearing brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the

ADMINISTRATIVE PROCEDURE--Continued

ADJUDICATION--Continued

doctrine of res judicata, that issue should be addressed if an adverse ruling on the issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

The Department may consider a request to reinstate a relinquished Native allotment application for land which has been either patented or made part of an interim conveyance to a Native corporation. If the record shows that the possibility exists that the applicant involuntarily and unknowingly relinquished the application in whole or in part, or was fraudulently induced to do so, he is entitled an evidentiary hearing. If the relinquishment was not knowing and voluntary or was fraudulently procured, the Department may reinstate the application to adjudicate its validity prior to recommending the instigation of judicial proceedings to cancel conflicting interests in the land.

Heir of Frank Hobson (On Reconsideration), 120 IBLA 66 (Oct. 25, 1991)

An appeal from an order establishing a reclamation bond for a mining operation becomes moot if, during appeal, the plan expires or is modified.

Jim D. Wills, Reggie N. Wills, 123 IBLA 74 (May 11, 1992)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the

ADMINISTRATIVE PROCEDURE--Continued

ADJUDICATION--Continued

extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

ADMINISTRATIVE LAW JUDGES

In an appeal from a decision by an Administrative Law Judge on motion for summary judgment after argument by the parties, the appellant has the burden of showing the existence of an issue of material fact which might alter the outcome of the proceedings or an error of law in the decision.

Pete Stamatakis v. Bureau of Land Management, 115 IBLA 69 (June 15, 1990)

Duly promulgated Departmental regulations provide parties to an Indian probate proceeding with a right to appeal to the Board of Indian Appeals. An Indian probate Administrative Law Judge lacks authority to restrict or cut off that right of appeal by saying that his or her orders are final.

Estate of Henry Houle, 19 IBIA 222 (Feb. 12, 1991)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE LAW JUDGES--Continued

It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

Reed B. Robison, RO Livestock v. Bureau of Land Management, 120 IBLA 181 (July 26, 1991)

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE LAW JUDGES--Continued

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

An order by an ALJ denying an appeal as frivolous will be vacated where appellant's SOR set out numerous specific objections to the propriety of BLM's decision granting a grazing permit, along with citations to Departmental regulations and the BLM Manual, presenting legitimate issues of fact and law requiring resolution.

Oregon Natural Resources Council, Oregon Natural Desert Ass'n v. Bureau of Land Management, MC Beaty Butte Grazing Ass'n, 129 IBLA 269 (May 17, 1994)

Except to the extent expressly delineated in its decision or order, when the Board of Land Appeals remands a case to the Hearings Division for the taking of additional evidence, the ALJ to whom the matter is assigned has full authority to admit such evidence as is deemed relevant and probative and to enter such rulings as judged appropriate.

United States v. J. Gary Feezor et al., 130 IBLA 146 (Aug. 4, 1994)

ADMINISTRATIVE PROCEDURE ACT

Although rulemaking procedures at 5 U.S.C. § 553 (1982), do not apply to interpretive rules, 5 U.S.C. § 552 (1982), requires publication in the Federal

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE PROCEDURE ACT--Continued

Register of statements of general policy and interpretations of general applicability.

Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164 (June 28, 1990)

Due process does not require that an evidentiary hearing under the Administrative Procedure Act be provided prior to cancellation of a lease of Indian land.

Dawn Mining Co. v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 50 (May 29, 1991)

An agency may establish a rule of law by adjudication. If such a rule has not been established by adjudication, then, in order for it to have the force and effect of law and be binding on the agency as well as the public, it must be a substantive rule affecting individual rights and obligations that has been issued by the agency pursuant to statutory authority and promulgated in accordance with the rulemaking requirements of the APA, 5 U.S.C. § 553 (1988), or other procedural requirements imposed with Congress.

Robert S. Glenn, DeLoyd Cazier, 124 IBLA 104 (Sept. 17, 1992)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE PROCEDURE ACT--Continued

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

Where a policy to restrict the offset of royalty overpayments against underpayments is the product of adjudication, the notice and comment procedures of 5 U.S.C. § 553 (1988), are not required.

Union Exploration Partners, Ltd., 127 IBLA 220 (Sept. 23, 1993)

The hearing before an ALJ provided by 43 CFR 4.470 for grazing appeals is authorized by sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988). This hearing is deemed to be a hearing "on the record" as provided by 5 U.S.C. § 554(a) (1988). The standard of proof at such a hearing is a preponderance of the evidence.

Ralph & Beverly Eason v. Bureau of Land Management, 127 IBLA 259 (Sept. 28, 1993)

A specific reference in duly promulgated regulations to the applicability of a section of the BIA Manual allows that section to be relied on, used, and cited as precedent by the agency in cases arising under those regulations.

Friends of the Wild Swan v. Portland Area Director, Bureau of Indian Affairs, 27 IBIA 8 (Nov. 14, 1994)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE RECORD

To sustain an assessment for failure to file documents required by an order issued by an Area Manager, evidence must appear in the record to support the finding of noncompliance. Where the record is unclear as to what documents were required or whether documents filed were inadequate, the record is insufficient to support assessment of a civil penalty for noncompliance with the order.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

As a general rule, an administrative decision is properly set aside and remanded where it is not supported by a case record providing the Board with the evidence necessary for an objective, independent review of the basis for the decision.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)
97 I.D. 74

When the administrative record in an appeal from a Bureau of Indian Affairs decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

GMG Oil & Gas Corp. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 187 (Mar. 7, 1990)

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE RECORD--Continued

decision declaring the claim abandoned and void will be reversed.

Howard G. Willison, 114 IBLA 323 (May 22, 1990)

When the administrative record in an appeal from a Bureau of Indian Affairs Area Director's decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

K. D. McPhail, dba Macro Oil Co. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 353 (July 6, 1990)

When a notice of appeal to the Board of Land Appeals from a decision of the Director, MMS, is filed, MMS is required to submit the complete, original case file, containing all documents relating to the dispute at hand.

Shell Offshore Inc., 116 IBLA 246 (Oct. 17, 1990)

BLM is expected to promptly forward the complete, original case file to the Board within 10 days of receipt of a notice of appeal.

Patrick G. Blumm, dba Rio Grande Rapid Transit, 116 IBLA 321 (Oct. 29, 1990)

Where a Bureau of Indian Affairs Area Director denies an application for a loan under the Indian Revolving Loan Fund on the grounds that the financial condition of the applicant is inadequate to provide a reasonable prospect of repayment, the administrative record should show how the Area Director reached his conclusions concerning the applicant's financial condition.

S&H Concrete Construction, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 19 IBIA 69 (Nov. 15, 1990)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE RECORD--Continued

When a BIA Area Director denies an application for a loan guaranty on the grounds that he or she lacks confidence in the ability of a new business to repay the loan out of its profits, the administrative record should show how the Area Director reached this conclusion.

Fred A. Reed v. Minneapolis Area Director, Bureau of Indian Affairs, 19 IBIA 249 (Mar. 5, 1991)

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

Where the Bureau of Indian Affairs conducts a hearing under 25 CFR 211.27, it is responsible for preserving the evidence presented at the hearing.

When the administrative record fails to support a Bureau of Indian Affairs Area Director's decision that an oil and gas lease of Indian land has expired because of failure to produce oil and/or gas in paying quantities, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

Duncan Oil, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 131 (July 12, 1991)

When the record does not confirm that a lessee has been assigned or assumed legal responsibility for making royalty payments on behalf of co-lessees, an MMS decision directing the lessee to recalculate the royalties for all co-lessees will be set aside and the case remanded for recalculation by the appropriate party or parties.

Phillips Petroleum Co., Phillips 66 Natural Gas Co., 121 IBLA 278 (Nov. 19, 1991)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE RECORD--Continued

When the BIA denies an application for a U.S. Direct Loan, the administrative record and the decision, when read together, must show how the Bureau reached its conclusions.

Charles McCloud v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 21 IBIA 254 (Mar. 18, 1992)

When the administrative record and the decision in an appeal from a BIA Area Director's decision are inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

White Earth Band of Chippewa Indians v. Minneapolis Area Director, Bureau of Indian Affairs, 23 IBIA 216 (Mar. 3, 1993)

When the administrative record in an appeal from a BIA Area Director's decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 228 (Mar. 8, 1993)

The regulations in 25 CFR Part 2 do not require a BIA Area Director, before whom an appeal is pending, to provide advance notice that he expects to address an issue not decided by the Superintendent or raised by the parties. However, when resolution of the new issue depends upon facts which may not be reflected in the record as originally constituted, the Area Director has an obligation to seek out any additional relevant documents and to advise the parties, in accordance with 25 CFR 2.21(b), that he intends to consider them.

Lower Peoples Creek Cooperative v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 297 (Apr. 22, 1993)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE RECORD--Continued

An administrative decision is properly set aside and remanded if it is not supported by a case record providing this Board the information necessary for an objective, independent review of the basis for decision.

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

When the boundary of a WSA excluding mining operations conducted before Oct. 21, 1976, is uncertain, it is appropriate to set aside the portion of a BLM decision requiring reclamation of slopes in the mined area and remand the matter for a delineation of the boundary.

Ceminex, Ltd., 129 IBLA 64 (Mar. 25, 1994)

An administrative decision is properly set aside and remanded where it is not supported by a case record providing the Board with the evidence necessary for an objective, independent review of the basis for the decision.

Confidential Communications Co., 131 IBLA 188 (Nov. 7, 1994)

ADMINISTRATIVE REVIEW

A BLM decision implementing a resource management plan will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal.

Uintah Mountain Club, 112 IBLA 287 (Jan. 5, 1990)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

To sustain an assessment for failure to file documents required by an order issued by an Area Manager, evidence must appear in the record to support the finding of noncompliance. Where the record is unclear as to what documents were required or whether documents filed were inadequate, the record is insufficient to support assessment of a civil penalty for noncompliance with the order.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

As a general rule, an administrative decision is properly set aside and remanded where it is not supported by a case record providing the Board with the evidence necessary for an objective, independent review of the basis for the decision.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990) 97 I.D. 74

A document that is styled as a "protest" is nevertheless a notice of appeal where the person filing it has been a party in a dispute and challenges BLM's decision to repossess a wild horse.

In keeping with the principle that the filing of a notice of appeal vests exclusive authority over the matter under appeal with the Board of Land Appeals, BLM must forward the case (as represented by BLM's case file) to the Board within no more than 10 working days so that it may exercise its authority to resolve the dispute.

Thana Conk, 114 IBLA 263 (May 9, 1990)

When an appellant attempts to remedy the defects which led to a BLM decision rejecting a nationwide oil and gas geophysical exploration bond rider by providing additional information on appeal, the Board may affirm the rejection decision but remand the matter to BLM for

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

adjudication of the acceptability of the rider in light of the additional information.

Frontier Exploration, Inc., Frontier Geophysical Co., 114 IBLA 280 (May 9, 1990)

Standing to appeal requires that an appellant be a party to the case adversely affected by the decision appealed. A cultural resources permittee is not a party to a case with standing to appeal a decision adjudicating a right-of-way holder's compliance with a stipulation to the right-of-way requiring mitigation of impacts to cultural resources.

Specific procedures for review of adjudication of a cultural resource use permit are found in the regulations at 43 CFR Part 7, Subpart B. These provisions give the permittee a right to request a conference to discuss a disputed decision relating to issuance, denial, modification, suspension, or revocation of a permit or the inclusion of specific terms and conditions in a permit. 43 CFR 7.36(a). Such decisions are properly distinguished from a decision adjudicating a right-of-way holder's compliance with a stipulation requiring mitigation of damage to cultural resources and denial of a conference in the latter context entails no reversible error.

The Board has no jurisdiction to review Bureau of Land Management procedures outlined in a manual in the absence of a decision applying such procedures to dispose of a case to which appellant is a party.

James C. Mackey, 114 IBLA 308 (May 14, 1990)

A decision by a BLM officer which does not fall within any of the exceptions enumerated in 43 CFR 4.410 or provided by other duly promulgated regulation is subject to appeal to the Board of Land Appeals and a BLM official is without authority to state otherwise.

An appeal from a decision approving geophysical exploration on land within and adjacent to a wilderness study area will not be dismissed as moot even though the challenged action had occurred, where issues raised by the appeal are capable of repetition, and where failure

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

to decide the appeal would cause substantial issues to evade review.

BLM is required to transmit the relevant case file within no more than 10 business days after receipt of a notice of appeal.

When a protest against a notice of intent to conduct geophysical operations has been filed or an appeal has been filed from a decision to allow such operations, BLM is obliged to inform the party filing the notice of intent that the notice cannot be processed until the protest and any appeal therefrom has been resolved.

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

The Conservation Division Manual is an administrative manual which governed the internal operations of the Conservation Division, Geological Survey. It does not have the force of law and its provisions are guidelines rather than rules which are binding on the Board of Land Appeals. Review is not limited to determining whether its provisions were correctly applied and the Board may consider whether application of the provisions is arbitrary, capricious, an abuse of discretion, or contrary to law.

Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164 (June 28, 1990)

The Board of Indian Appeals will not consider the merits of a moot appeal where there is no showing that it involves a potentially recurring question raised by a short term order, capable of repetition, yet evading review.

Erin Forrest v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 372 (July 19, 1990)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

An appeal from a decision denying an application for a grazing permit will not be dismissed as moot even though the relevant grazing season has passed, where issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review.

Shoshone-Paiute Tribes of the Duck Valley Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 423 (Sept. 13, 1990)

Cherokee Nation of Oklahoma, Chickasaw Nation, & Choctaw Nation of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 22 IBIA 240 (Aug. 24, 1992)

Provision of the Department of the Interior and Related Agencies Appropriations Act, 1989, 102 Stat. 1774 (Sept. 27, 1988), restricting "judicial review" to "particular activities" does not affect the authority of the Board of Land Appeals to consider timber sale appeals.

An appeal from a decision denying a protest against a timber sale will not be dismissed as moot even though the protested action has occurred, where issues raised by the appeal are capable of repetition and where failure to decide the appeal would cause substantial issues to evade review.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

The Department's regulations implementing the EAJA provide a two-tier adjudicatory procedure in which an application for an award of fees and expenses is filed with the adjudicative officer who presided at the adversary adjudication, and the decision of that officer on the application is then appealable to the appropriate appeals board. When an application is filed in the first instance with the Board of Land Appeals, it will ordinarily be transferred to the appropriate adjudicative officer; however, where, as a matter of law, the application must be denied, the Board may adjudicate the application, since transfer of the application would serve no useful purpose.

Herbert J. Hansen, 119 IBLA 29 (Mar. 21, 1991)

An appellant who does not show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. A party challenging a BLM determination that a right-of-way is subject to cost recovery, Category I, has the burden of establishing by a preponderance of the evidence that the BLM determination is incorrect.

Joe B. Kearl, 119 IBLA 122 (Apr. 22, 1991)

The Board of Land Appeals lacks jurisdiction to review appeals from decisions establishing resource management plans. If it is not alleged and the record does not show that there has been a decision implementing such a plan, an appeal challenging the plan will be dismissed.

Joe Trow, 119 IBLA 388 (July 3, 1991)

It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

Reed B. Robison, RO Livestock v. Bureau of Land Management, 120 IBLA 181 (July 26, 1991)

Once jurisdiction over an appeal has been lodged in the Board of Land Appeals by the timely filing of a notice of appeal, the supervisory authority provided by 43 CFR 4.5 may be exercised only by the Secretary, Deputy Secretary, or Director, Office of Hearings and Appeals.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

BLM is responsible for administering the public lands and it must be accorded the discretion necessary effectively to discharge that duty. Where a BLM decision to rehabilitate the Spanish Ridge Road within the King Range National Conservation Area is based on a consideration of all relevant factors, and is supported by the record, which includes an environmental assessment, it may not be overcome by a mere statement of a difference of opinion regarding the necessity for and effect of such action.

William R. Franklin, Linda Smith Franklin, 121 IBLA 37 (Oct. 16, 1991)

In exercising the authority of the Secretary of the Interior to review decisions issued by officials of the BIA, the Board of Indian Appeals is not limited by the standards of review set forth in the APA, 5 U.S.C. § 706 (1988), for review of agency decisionmaking by the Federal courts.

Ute Indian Tribe of the Uintah & Ouray Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 24 (Oct. 22, 1991)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

When the record does not confirm that a lessee has been assigned or assumed legal responsibility for making royalty payments on behalf of co-lessees, an MMS decision directing the lessee to recalculate the royalties for all co-lessees will be set aside and the case remanded for recalculation by the appropriate party or parties.

Phillips Petroleum Co., Phillips 66 Natural Gas Co., 121 IBLA 278 (Nov. 19, 1991)

Decisions made by officials of the BIA as supervisors of Indian timber leases will be upheld when they are reasonable and based upon substantial evidence in the record.

Bernell Kombol, dba Grass Mountain Logging Co. v. Ass't Portland Area Director, Bureau of Indian Affairs, 21 IBIA 116 (Dec. 19, 1991)

An appellant who does not with some particularity show adequate reason for appeal, and, as appropriate, support the allegation with argument or evidence showing error, cannot be afforded favorable consideration. Conclusory allegations of error, standing alone, do not suffice.

Glanville Farms, Inc. v. Bureau of Land Management, 122 IBLA 77 (Jan. 14, 1992)

Where the Colorado State Director, BLM, issued a decision approving a record of decision for an EIS regarding a vegetative treatment program for 13 western states, insofar as it related to public lands administered by BLM in Colorado, and the Ass't Secretary, Land and Minerals Management, subsequently concurred in selection of the vegetative treatment program, that concurrence amounted to Secretarial approval of the vegetative treatment program for BLM lands in 13 western states, including Colorado. Accordingly, the Board of Land Appeals lacks jurisdiction to consider an appeal of

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

the Colorado State Director's decision file subsequent to the Ass't Secretary's action.

The Wilderness Society, 122 IBLA 162 (Feb. 6, 1992)

When OSM and a coal miner agree that OSM will suspend enforcement of SMCRA while the miner pursues litigation in Federal court to determine whether a Federal coal mining permit is needed, enforcement may proceed when the Federal court litigation is ended.

Gabriel Energy Corp. v. Office of Surface Mining Reclamation & Enforcement, 122 IBLA 316 (Mar. 11, 1992)

Review of the merits of a trespass case may be expedited by the Board where the decision is made effective by regulation pending appeal and review of a motion for stay discloses a conflict between the threat of injury to the appellant and the threat of adverse effect to the public interest.

High Desert Communications, Inc., 123 IBLA 20 (Apr. 24, 1992)

The Board will not substitute its judgment for that of the duly authorized BLM official exercising discretion to reject a special recreation permit application on the ground that it conflicts with BLM objectives, responsibilities, or program for management of the public lands involved where the facts of record support the decision. However, where two criminal convictions which were substantially relied upon as a basis fo- the BLM decision are reversed on appeal subsequent to the BLM decision, and the record contains little factual detail of the basis for rejection, the case is properly remanded.

Red Rock Hounds, Inc., 123 IBLA 314 (June 29, 1992)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

A BLM decision implementing a final project plan for the development of a recreation site on public land will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons of modification or reversal.

Gerry Zamora, Joe Zamora, 125 IBLA 10 (Dec. 14, 1992)

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

Where, in an appeal of a decision to issue an outfitter and guide permit to a third party for the 1990 season, the appellant seeks to raise issues relating to the original issuance in 1987 of such a permit to the third party in 1987, such a challenge is barred by the doctrine of administrative finality.

Keith Rush dba Rush's Lakeview Ranch, Kevin Rush, 125 IBLA 346 (Mar. 29, 1993)

An appraisal will not be set aside unless an appellant shows error in the method of appraisal or shows by convincing evidence that the charges are excessive. When the decision of an ALJ does not clearly apply to this standard, the Board will review the evidence and the arguments of the parties to determine whether the result reached should be considered erroneous.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

An appeal from a BLM decision to issue a land-use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the U.S., but is instead owned by the applicant. The application for a land-use permit was an admission by the applicant that the land sought was public land.

Lawrence Smart Trust, 127 IBLA 55 (July 20, 1993)

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

An administrative decision is properly set aside and remanded if it is not supported by a case record providing this Board the information necessary for an objective, independent review of the basis for decision.

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

For summary judgment there must be no true issue of fact when all factual inferences are drawn in the light most favorable to the opposing party. Therefore, the party seeking permission to file an interlocutory appeal from the denial of a motion for summary dismissal, pursuant to 43 CFR 4.28, must show that there is no true issue of fact and that an immediate appeal from the denial order will materially advance the final decision. The degree to which a FWS Biological Opinion may or may not have foreclosed BLM's obligation and discretionary authority to act in accordance with the Taylor Grazing Act and other applicable laws is an unresolved issue of

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

sufficient magnitude and import to justify denying a motion for summary dismissal.

Edwin O. Larson v. Bureau of Land Management (On Reconsideration), 129 IBLA 250 (May 2, 1994)

While the Board of Land Appeals generally accords substantial deference to the findings of an ALJ with respect to conflicting evidence, such deference is not absolute, since the Board, in the exercise of its delegated plenary authority, may undertake a de novo review of the entire record and make findings of fact thereon as fully and finally as might the Secretary of the Interior.

United States v. J. Gary Feezor et al., 130 IBLA 146 (Aug. 4, 1994)

Where, in a previous appeal, this Board found that rental charges for a right-of-way were proper, and where that decision was not appealed, the grantee's challenge to the rental in a subsequent appeal is barred by the doctrine of administrative finality.

Laguna Gatuna, Inc., 131 IBLA 169 (Nov. 2, 1994)

An administrative decision is properly set aside and remanded where it is not supported by a case record providing the Board with the evidence necessary for an objective, independent review of the basis for the decision.

Confidential Communications Co., 131 IBLA 188 (Nov. 7, 1994)

The doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, dictates that once a party has availed himself of the opportunity to obtain administrative review of a decision within the Department, that party is precluded from

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

litigating the matter in subsequent proceedings except upon a showing of compelling legal or equitable reasons.

Gifford H. Allen et al., 131 IBLA 195 (Nov. 9, 1994)

A BLM decision notifying a claimant that continued occupancy of mining claims is unauthorized, requiring reclamation of the site, and demanding the removal of a mobile home, generators, and other personal property from mining claims because the property is located within a WSA is properly affirmed where the IMP provides that any temporary impacts must be removed and reclaimed by June 30, 1989, the date the Secretary was scheduled to send his recommendation on that WSA to the President.

Virgil Schuette, 131 IBLA 332 (Dec. 22, 1994)

BURDEN OF PROOF

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Morana Cheepo v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 131 (Feb. 1, 1990)

Louis Kahan & the Louis Kahan Trust v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 180 (Mar. 2, 1990)

Little Shell Tribe of Chippewa Indians of Montana v. Aberdeen Area Director, Bureau of Indian Affairs, 18 IBIA 282 (May 8, 1990)

Leonard & Ellen Pueblo v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 350 (July 6, 1990)

K. S. Hays v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 380 (July 20, 1990)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

When a hearing is held pursuant to 43 CFR 3563.4(c), affording a sodium preference right lease applicant an opportunity to demonstrate entitlement, the applicant has both the burden of going forward and the ultimate burden of proof of showing that a valuable sodium deposit has been discovered. If there is an appeal from the Administrative Law Judge decision following the hearing, the appealing party has the burden of showing error in the Administrative Law Judge's decision.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

When a challenge is raised to a discretionary decision issued by a BIA official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

Home Respiratory Services, Inc. & The Will Rogers Bank & Trust Co. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 299 (May 24, 1990)

Robert Gauthier v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 303 (May 24, 1990)

Raymond E. Patchen v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 219 (Aug. 27, 1991)

John Ross, Jr. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 21 IBIA 251 (Mar. 18, 1992)

Novak Brothers et al. v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 25 IBIA 104 (Jan. 5, 1994)

In an appeal from a decision by an Administrative Law Judge on motion for summary judgment after argument by the parties, the appellant has the burden of showing the existence of an issue of material fact which might alter the outcome of the proceedings or an error of law in the decision.

Pete Stamatakis v. Bureau of Land Management, 115 IBLA 69 (June 15, 1990)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

A party challenging BLM's rejection of a cemetery site selection application under sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

Sealaska Corp., 115 IBLA 249 (July 19, 1990)

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

Sealaska Corp., 115 IBLA 257 (July 19, 1990)

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of clear reasons for modification or reversal. When an appellant has challenged a timber sale located in an area of critical environmental concern on the basis that the sale is allegedly inconsistent with the applicable management plan, but such inconsistency has not been established, the timber sale shall be allowed to occur.

In re Grassy Overlook Timber Sale, 115 IBLA 359 (Aug. 14, 1990)

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan first approved in writing or prescribed by the authorized officer, as required by regulation 43 CFR 3152.3-4(a). Where the record establishes that the Secretary's technical experts have evaluated unapproved plugging and abandonment work performed by an operator and have found such work deficient, the Secretary is

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

entitled to rely on their professional opinion, absent a showing of error by a preponderance of the evidence.

Daniel C. Wychgram, 116 IBLA 89 (Sept. 17, 1990)

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 31 (Oct. 23, 1990)

Thomas J. Sweeney v. Acting Anadarko Area Director, Bureau of Indian Affairs, 19 IBIA 101 (Nov. 29, 1990)

All Materials of Montana, Inc. v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 202 (Feb. 27, 1992)

Navajo Precision Built Systems, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 22 IBIA 153 (June 26, 1992)

Maurice & Brian Schwan v. Aberdeen Area Director, Bureau of Indian Affairs, 23 IBIA 10 (Oct. 29, 1992)

Where BLM attempts to establish that lands were omitted from an officially filed original survey as a result of gross error or fraud, it may prove by clear and convincing evidence that the original survey was grossly in error. However, it need only demonstrate by a preponderance of the evidence that the omitted land was land in place at the time of the original survey and was similar to the surveyed land at that time.

Lawyers Title Insurance Corp. v. Bureau of Land Management, 117 IBLA 63 (Dec. 3, 1990)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Kiowa Tribe v. Acting Anadarko Area Director, Bureau of Indian Affairs, 19 IBIA 157 (Jan. 22, 1991)

Choctaw Nation of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 243 (Feb. 26, 1991)

Winlock Veneer Co. v. Acting Juneau Area Director, Bureau of Indian Affairs, 20 IBIA 3 (May 2, 1991)

S&H Concrete Construction, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 176 (Aug. 13, 1991)

Keith Dahl v. Ass't Portland Area Director, Bureau of Indian Affairs, 20 IBIA 225 (Aug. 28, 1991)

Sauk-Suiattle Indian Tribe v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 238 (Sept. 6, 1991)

Gilbert Keester v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 20 IBIA 277 (Sept. 24, 1991)

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 33 (Oct. 24, 1991)

Bernell Kombol, dba Grass Mountain Logging Co. v. Ass't Portland Area Director, Bureau of Indian Affairs, 21 IBIA 116 (Dec. 19, 1991)

Any party appealing from a decision of an officer of the Bureau of Land Management has the burden of establishing error in the decision under appeal, by a preponderance of the evidence. Conclusory allegations of error, standing alone, do not discharge this burden.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

Corrections to inventories in Indian estates may not be pursued through administrative appeals of unrelated BIA decisions.

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Georgianna L. Danks v. Aberdeen Area Director, Bureau of Indian Affairs, 20 IBIA 79 (June 12, 1991)

A Cooperative Wildlife Habitat-Farming Development Agreement negotiated under the Sikes Act, as amended by the Act of Oct. 18, 1974, 16 U.S.C. § 670g (1988), was properly cancelled when the state agency responsible for monitoring the agreement reported and inspection revealed that there had been a failure to seed, irrigate, and maintain the lands as agreed. An unsupported allegation that facts supporting the decision were not correct was insufficient to overcome the presumption that conditions reported by the public officials were as stated in the record.

George W. Anthony, 119 IBLA 332 (June 18, 1991)

Implementation of the Act of Sept. 1, 1937 (Reindeer Industry Act), is committed to the discretion of the Secretary of the Interior, as delegated to BLM. Where, as required by 43 CFR 4310.1, BLM rejects the application for reindeer grazing privileges only after consulting with the Alaska Department of Fish and Game, which also expressly opposes approval, and where the applicant fails to show error in BLM's and ADF&G's findings, BLM's decision is properly affirmed on appeal.

Donald C. Olson, 120 IBLA 166 (July 22, 1991)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

Where the current fair market value of a cabin site has been determined in accordance with accepted appraisal procedures and appellant fails to establish by positive, substantial evidence that the appraisal is in error, adjustment of the annual rental to the current fair market value rental will be affirmed.

Norman P. Steiner, William A. Phillips, M.D., Gloria M. Williams, Robert A. Smith, & Grace E. Fullerton, 9 OHA 108 (Nov. 12, 1991)

Implementation of the Act of Sept. 1, 1937 (the Reindeer Industry Act) is committed to the discretion of the Secretary of the Interior. When BLM rejects an application for a reindeer grazing permit after consulting with the Alaska Dept. of Fish and Game, which opposes approval, and the applicant fails to show error in BLM's findings or an abuse of discretion, BLM's decision is properly affirmed on appeal.

Thomas L. Gray, 121 IBLA 295 (Dec. 3, 1991)

A party appealing from a BLM decision has the burden of establishing error in the decision under appeal, and conclusory allegations of error, standing alone, do not discharge this burden.

Nat'l Park Service (Stuart G. Ramstad), 125 IBLA 335 (Mar. 29, 1993)

An appraiser's training and experience are properly considered in determining the weight to be given testimony. When an appraisal lacks an analysis showing why a specific value was selected from a range of values, the ALJ who presides at a hearing is in the best position to decide the weight to be accorded the appraiser's testimony.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

In cases arising under 25 CFR 2.8, challenging the failure of a BIA official to issue a decision, the burden is on the Bureau either to show that the failure was justified or to present and support a position that the official could have taken.

United Auburn Indian Community v. Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 33 (May 28, 1993)

BLM's determination of the volume of material removed in trespass is properly affirmed where it is amply supported by the record, where BLM has supported its conclusions with a thorough exposition of its methodology, and where the appellant fails to establish error in the methodology BLM used to collect data and its interpretation of that data to determine the amount of material removed from the site. Appellant's anecdotal evidence concerning observations of conditions at the site is insufficient to overcome BLM's documented survey of those conditions.

Pine Grove Farms, 126 IBLA 269 (June 3, 1993)

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of ANCSA bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

Sealaska Corp., 127 IBLA 22 (July 15, 1993)

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

Sealaska Corp., 127 IBLA 59 (July 20, 1993)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

Where the Board of Indian Appeals has not received a notice of appeal alleged to have been timely filed, the burden is on the appellant to show that the notice was timely mailed or delivered to the Board at its correct address.

American Land Development Corp. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 25 IBIA 120 (Jan. 12, 1994)

When a challenge is raised to a discretionary decision issued by a BIA official, the appellant bears the burden of showing that the official did not properly exercise discretion.

Sault Ste. Marie Tribe of Chippewa Indians v. Minneapolis Area Director, Bureau of Indian Affairs, 25 IBIA 236 (Mar. 16, 1994)

The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively researched the question of drainage of oil and gas beneath lands covered by a Federal oil and gas lease and has produced a significant body of evidence showing that a well was draining a Federal lease and in what amount, its conclusion that drainage is occurring and its establishment of a drainage factor wil be affirmed, where appellant fails to demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusions.

The duty to drill an offset well to prevent drainage arises when the lessee knew or should have known that drainage was occurring, unless the lessee can show that oil or gas could not be found on the lease at that time under conditions adequate to allow it to be economically developed. The burden of proving that a lessee's predecessor in interest knew or should have known that drainage was occurring rests with BLM. BLM has not met its burden of showing that compensatory royalty was due from 1980, where it did not inform the lessee that there was drainage until 1985, and where it shows on appeal only that lessee's predecessor had access to certain well data in 1979 from the offending

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

well that could have been reasonably interpreted to show that no drainage was occurring.

Amoco Production Co., 129 IBLA 186 (Apr. 28, 1994)
101 I.D. 39

Once the Government has presented a prima facie case as to the invalidity of a challenged mining claim, the burden of overcoming this showing, by a preponderance of the evidence, devolves upon the claimant as the proponent of the claim's validity. A claimant may be deemed to have preponderated even in the face of directly conflicting evidence where the factfinder determines that evidence presented by the claimant is more credible than that submitted by the Government.

United States v. J. Gary Feezor et al., 130 IBLA 146 (Aug. 4, 1994)

The determination of whether or not the Government has presented a prima facie case of invalidity in the contest of a mining claim is made solely on the basis of the evidence introduced in the Government's case-in-chief, which includes testimony elicited in cross examination. If, upon the completion of the Government's presentation, the evidence is such that, were it to remain unrebutted, a finding of invalidity would properly issue, a prima facie case has been presented and the burden devolves on the claimant to overcome this showing by a preponderance of the evidence.

Since it may generally be assumed that, given the varying economic conditions present over a period of years, a mining claim will usually be developed unless it is not commercially feasible to profitably do so, a Government showing that there has been an absence of production from a mining claim for an extended period of time is sufficient, without more, to establish a prima facie case of invalidity.

United States v. Rich Knoblock et al., 131 IBLA 48 (Oct. 18, 1994)
101 I.D. 123

ADMINISTRATIVE PROCEDURE--Continued

DECISIONS

To sustain an assessment for failure to file documents required by an order issued by an Area Manager, evidence must appear in the record to support the finding of noncompliance. Where the record is unclear as to what documents were required or whether documents filed were inadequate, the record is insufficient to support assessment of a civil penalty for noncompliance with the order.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision.

Kanawha & Hocking Coal & Coke Co., 112 IBLA 365 (Jan. 19, 1990)

When issuing a formal decision one must do more than ensure that the decision is supported by a rational basis. The basis for that decision must be stated in the written decision and demonstrated in the administrative record accompanying the decision. The recipient of the decision deserves a reasoned and factual explanation of the rationale for the decision, and must be given some basis for understanding it and accepting it or, alternatively, for appealing and disputing it.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude further consideration of the character of the land based on subsequent exploration and development.

ADMINISTRATIVE PROCEDURE--Continued

DECISIONS--Continued

When a mineral locator has filed a location certificate with BLM within 90 days of the date of the location of the claim as required by 43 U.S.C. § 1744(b) (1982), it is error for BLM to later reject the recordation of the claim. BLM's decision cannot change the fact the locator has complied with the statute. The fact the claim has been recorded with BLM, however, does not establish its validity.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

"Holding for rejection." A decision properly "holds an application for rejection" only when BLM does not actually reject the application as of the date of the decision, but indicates that it will do so if specified defects are not cured as directed. Under this procedure, the decision is rejected only after the end of the period allowed for compliance, and the appeal period does not commence until after the compliance period has run. Where BLM mischaracterizes its decision as one holding for rejection an application for mineral patent, it is properly modified on appeal.

Where a 10-day deadline for filing a mineral patent application has irrevocably passed so that the applicant can do nothing to prevent rejection of his untimely application, it is not proper for BLM to "hold the application for rejection" by providing a compliance period to allow the applicant to conform his application to specified requirements, since compliance with the time limit is impossible, and since there is no longer any application pending before BLM to be cured. In these circumstances, BLM should reject the application as untimely (subject to an immediate appeal), and advise the applicant what it would require if and when he re-executes his application or files an amended application. BLM can then adjudicate whether any new or re-executed application complies with its filing requirements.

G. Donald Massey, 114 IBLA 209 (Apr. 25, 1990)

ADMINISTRATIVE PROCEDURE--Continued

DECISIONS--Continued

Where BLM issues a decision denying the assignment of a salt water disposal right-of-way and such decision is merely conclusory in nature, the record is barren of any supporting rationale, and other unaddressed issues are presented, the decision will be set aside and the case remanded for BLM to reassess assignment of the right-of-way and determine what steps are necessary for the protection of the Federal mineral interest in the land in question.

Burnett Oil Co., Inc., 122 IBLA 330 (Mar. 11, 1992)

A letter signed by a BIA official in which the official states that he or she cannot make a decision in a pending matter because of insufficient or inadequate information is subject to administrative review under 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Pinoleville Indian Community Governing Council v. Sacramento Area Director, Bureau of Indian Affairs, 22 IBIA 176 (July 16, 1992)

In determining whether a change in law or in the interpretation of law should be given retroactive effect, the Board of Indian Appeals will consider: (1) the nature of the reliance placed upon the prior applications of law by the parties; (2) the harm or prejudice to those who relied upon previous principles of law; (3) the purpose of the law in light of public policy; and (4) the harm to the administration of justice or public purpose.

Severo Leon et al. v. Albuquerque Area Director, Bureau of Indian Affairs, 23 IBIA 248 (Mar. 23, 1993)

A decision declaring a mining claim abandoned and void must be mailed to each claim owner at his last address of record. Where BLM fails to serve each claim owner with a copy of a decision, the decision is not effective to adjudicate the rights and interests in the claims of those owners who were not served. A copy of the decision must be mailed even though previous correspondence has been returned to BLM. Without attempted

ADMINISTRATIVE PROCEDURE--Continued

DECISIONS--Continued

delivery of a decision and its return to BLM, there cannot be constructive service under 43 CFR 1810.2(b).

Lanny Perry, 131 IBLA 1 (Sept. 16, 1994)

A decision by BLM denying an organization "affected interest status" in grazing matters is properly set aside where BLM did not state therein why it felt the organization did not meet relevant criteria. That failure violated not only the terms of a governing BLM State Office IM, but also the more general requirement, imposed by well-established precedent, that its decision must contain a reasoned and factual explanation providing a basis for understanding and accepting the decision, or alternatively, for appealing and disputing it before this Board.

Southern Utah Wilderness Alliance, 131 IBLA 293 (Nov. 30, 1994)

HEARINGS

Mining claims located on lands closed to mineral entry are null and void ab initio and no property rights are created. Therefore, no deprivation of property rights occurs when such claims are declared null and void ab initio.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds,

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

Where an appellant seeks to rebut the presumption of regularity attending the official acts of public officers upon an offer of proof that her Native allotment application was filed, and that procedures operative in the Bureau of Indian Affairs during the mid-to-latter part of 1970 resulted in the absence of her Native allotment application from the file, a fact-finding hearing is warranted.

June I. Degnan (On Reconsideration), 114 IBLA 373 (May 24, 1990)

Where an application for review of a permit is pending before an Administrative Law Judge and the permittee and OSMRE agree to the nature of the issue remaining after settlement by them of the other issues raised by the application, such agreement will not preclude consideration of any of the settled issues at the behest of an intervenor in the proceeding, whether intervention occurred before or after the settlement.

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of that statute, if that question was not addressed by the Judge.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 115 IBLA 249 (July 19, 1990)

Sealaska Corp., 115 IBLA 257 (July 19, 1990)

Where the record is too vague to support a townsite trustee's determination that applicants for certain townsite lots did not occupy those lots prior to repeal of the Townsite Acts on Oct. 21, 1976, and hence did not qualify for trustee deeds to those lots, the Board will order a hearing pursuant to 43 CFR 4.415 to resolve questions of fact concerning applicant's alleged occupancy on the crucial date.

Larry L. Ledlow, Florence Ledlow, 116 IBLA 349 (Oct. 30, 1990)

Where the record on appeal presents unresolved questions of fact or undecided, significant legal issues, under 43 CFR 4.415 the Board of Land Appeals has discretionary authority to refer the matter for a hearing.

Jerome P. McHugh & Associates (On Reconsideration), 117 IBLA 303 (Jan. 17, 1991)

A second hearing will not be afforded if an appellant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result.

Roy E. Mehaffey v. Office of Surface Mining Reclamation & Enforcement, 117 IBLA 350 (Jan. 31, 1991)

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

The Board of Indian Appeals will not refer a case for an evidentiary hearing pursuant to 43 CFR 4.337(a) when the resolution of the factual disputes is not necessary for disposition of the case.

Jimmie L. Sanders v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 213 (Feb. 12, 1991)

Due process does not require that an evidentiary hearing under the Administrative Procedure Act be provided prior to cancellation of a lease of Indian land.

The Board of Indian Appeals will not order an evidentiary hearing under 43 CFR 4.337(a) where there is no need for further inquiry to resolve a genuine issue of material fact.

Dawn Mining Co. v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 50 (May 29, 1991)

Where the Bureau of Indian Affairs conducts a hearing under 25 CFR 211.27, it is responsible for preserving the evidence presented at the hearing.

Duncan Oil, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 131 (July 12, 1991)

A decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. When the record is not adequate for the Board to determine whether such a situation exists, it may refer the question for hearing, findings of fact, and conclusions of law.

William J. Thoman v. Bureau of Land Management, Roberts Ranch et al. (Intervenors), 120 IBLA 302 (Sept. 9, 1991)

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

The Board of Indian Appeals will not order an evidentiary hearing under 43 CFR 4.337(a) where there is no need for further inquiry to resolve a genuine issue of material fact.

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 33 (Oct. 24, 1991)

Due process does not require that an evidentiary hearing be provided prior to cancellation of a lease of Indian land.

The Board of Indian Appeals will not order an evidentiary hearing under 43 CFR 4.337(a) where there is no need for further inquiry to resolve a genuine issue of material fact. The party requesting that the Board order an evidentiary hearing must affirmatively show the existence of a controversy concerning a genuine issue of material fact, the resolution of which is necessary for a decision in the appeal.

All Materials of Montana, Inc. v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 202 (Feb. 27, 1992)

Where, after final proof of use and occupancy has been filed and equitable title has passed to the applicant, BLM determines that the land in the application is not subject to conveyance because it is mineral in character, e.g., valuable for placer gold, it may not reject the application without affording the applicant notice and an opportunity to contest the mineral-in-character classification, as required by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

Mary Johansen, 122 IBLA 344 (Mar. 11, 1992)

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

Where the record raises a question of fact regarding whether an individual, charged by BLM under 43 CFR 2920.1-2(a) with the costs of removing structures allegedly placed in trespass on public lands, was responsible for their construction or use, the case will be referred for a hearing on that question.

John H. Peterson, 125 IBLA 267 (Feb. 17, 1993)

In referring a case for a hearing, the Board will normally identify the subject matter and one or more issues. Such instructions do not preclude an ALJ from receiving evidence on and considering all relevant matters. The fact the Board does not comment on or rule upon all aspects of a case when referring it for a hearing does not mean that they are accepted as correct or made the law of the case.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

Although the Board has discretionary authority to order a hearing before an ALJ pursuant to 43 CFR 4.415, a hearing is necessary only when there is a material issue of fact requiring resolution through the introduction of testimony and other evidence.

Vanderbilt Gold Corp., 126 IBLA 72 (Apr. 19, 1993)

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 127 IBLA 22 (July 15, 1993)

Sealaska Corp., 127 IBLA 59 (July 20, 1993)

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

If the applicable statute does not expressly require a formal evidentiary hearing "on the record" and no contrary Congressional intent is evident, formal proceedings before an ALJ are not mandated. The language of 43 U.S.C. § 1732(c) (1988), allowing for revocation or suspension of a special recreation use permit after "notice and hearing," does not dictate a formal hearing before an ALJ, and a special recreation permittee's hearing rights under 43 U.S.C. § 1732(c) (1988), are satisfied when the permittee is given notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

A continuance of a hearing into the validity of a mining claim will only be granted where the mining claimant presents sufficient reason to justify the grant of an additional opportunity to present his case, i.e., where circumstances have placed a substantial constraint upon his ability to obtain or offer samples or other evidence of a discovery.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties, 127 IBLA 181 (Sept. 7, 1993)

Although the Board has discretionary authority to order a hearing before an ALJ pursuant to 43 CFR 4.415, it normally orders a hearing only when an appellant presents a material issue of fact requiring resolution through the introduction of testimony and other evidence not readily obtainable through the ordinary appeal procedure. If no oral testimony is required and an appeal can be resolved relying on documentary submissions, a request for a hearing is properly denied.

Felix F. Vigil, 129 IBLA 345 (June 2, 1994)

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

Neither the statutes nor the regulations concerning approval of conveyances of trust property by BIA mandate a hearing in these matters.

Estate of George Levi, 26 IBIA 50 (June 17, 1994)

Except to the extent expressly delineated in its decision or order, when the Board of Land Appeals remands a case to the Hearings Division for the taking of additional evidence, the ALJ to whom the matter is assigned has full authority to admit such evidence as is deemed relevant and probative and to enter such rulings as judged appropriate.

United States v. J. Gary Feezor et al., 130 IBLA 146 (Aug. 4, 1994)

BLM decisions denying applications for permits to drill oil and gas wells within the Potash Area established by the Secretary of the Interior will be set aside and the matters referred for a hearing where the record contains significant, unresolved factual issues concerning BLM's designation of the areas sought to be drilled as potash enclaves and BLM's determination that drilling the wells would make potash mining unsafe and ultimately uneconomic, thereby constituting an undue waste of the potash resource.

Yates Petroleum Corp., et al., 131 IBLA 230 (Nov. 18, 1994)

JUDICIAL REVIEW

The Board of Land Appeals has no authority to revise, amend, or clarify language of a United States District Court order defining "appropriate management levels" and "excess."

Animal Protection Institute of America et al., 118 IBLA 63 (Feb. 22, 1991)

ADMINISTRATIVE PROCEDURE--Continued

JUDICIAL REVIEW--Continued

The Board of Land Appeals exercises no supervisory authority or appellante jurisdiction over proceedings pending in the district court or over actions taken by a United States Marshal pursuant to a subpoena issued by a district court.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

When a U.S. Court of Appeals has held that a claimant is entitled to equitable adjudication of his untimely application to purchase a trade and manufacturing site and the NPS has neither submitted any evidence contradicting the facts underpinning that holding nor demonstrated that the claimant's failure to timely comply with the law indicated bad faith, BLM properly considers the purchase application on the merits under the principles of equitable adjudication.

Nat'l Park Service (Stuart G. Ramstad), 125 IBLA 335 (Mar. 29, 1993)

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

Vern T. Weiss et al., 128 IBLA 119 (Dec. 22, 1993)

RULEMAKING

The Procedure Paper on Natural Gas Liquid Products Valuation, developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1982).

Cities Service Oil & Gas Corp., 113 IBLA 255 (Mar. 9, 1990)

ADMINISTRATIVE PROCEDURE--Continued

RULEMAKING--Continued

The "Procedure Paper on Natural Gas Liquid Products Valuation," developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1988).

Shell Offshore Inc., 116 IBLA 246 (Oct. 17, 1990)

Cities Service Oil & Gas Corp., 117 IBLA 17 (Nov 26, 1990) 97 I.D. 243

A specific reference in duly promulgated regulations to the applicability of a section of the BIA Manual allows that section to be relied on, used, and cited as precedent by the agency in cases arising under those regulations.

Friends of the Wild Swan v. Portland Area Director, Bureau of Indian Affairs, 27 IBIA 8 (Nov. 14, 1994)

STANDING

Standing to appeal requires that an appellant be both a party to the decision appealed from and adversely affected by the decision. To be adversely affected, an appellant must have a legally cognizable interest in the land at issue.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

A person who is not a party to a lease of trust or restricted Indian lands lacks standing to challenge actions taken by the Bureau of Indian Affairs in the management of the lease.

HCB Industries, Inc. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 222 (Mar. 28, 1990)

ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

An individual Indian landowner's standing to bring an appeal in a matter concerning Indian lands is limited to her own ownership interest unless she has been authorized by other landowners to represent them and is a qualified representative under 43 CFR 1.3.

Cora Marion v. Billings Area Director, Bureau of Indian Affairs, 18 IBIA 395 (Aug. 15, 1990)

A non-Indian lacks standing to raise an alleged violation of the Federal trust responsibility.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

An unorganized group lacks standing to bring an appeal under 25 CFR Part 2.

Noyo River Indian Community v. Acting Sacramento Area Director, Bureau of Indian Affairs, 19 IBIA 63 (Nov. 14, 1990)

Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a), and the decisional law of the Department, and not by judicial standing determinations.

Animal Protection Institute of America, 117 IBLA 208 (Dec. 21, 1990)

A person doing business with an Indian tribe lacks standing to raise a violation of the requirements of 25 U.S.C. § 81 (1988).

Bernell Kombol, dba Grass Mountain Logging Co. v. Acting Ass't Portland Area Director (Economic Development), Bureau of Indian Affairs, 19 IBIA 123 (Dec. 26, 1990)

ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

Where a State of Alaska protest against a Native allotment under sec. 905 of the Alaska National Interest Lands Conservation Act was granted in 1982 and, as a result, the allotment was adjudicated pursuant to the Alaska Native Allotment Act of 1906, no further adjudication of the allotment was required. In the absence of a timely appeal of the decision approving the allotment, the doctrine of administrative finality precludes review of the allotment on appeal from a subsequent decision.

State of Alaska (Henry J. Ekada), 117 IBLA 373 (Feb. 7, 1991)

Determinations of judicial standing do not control adjudications of administrative standing. Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a).

Animal Protection Institute of America et al., 118 IBLA 63 (Feb. 22, 1991)

Where an appeal to the Board of Indian Appeals should have been filed by or on behalf of a partnership, a limited partner lacks standing if he would lack authority to bring a derivative action under the state law governing the partnership.

Donald S. Jacobs v. Eastern Area Director, Bureau of Indian Affairs, 20 IBIA 69 (June 10, 1991)

A party filing a notice of appeal of a decision to convey land under the Alaska Native Claims Settlement Act is required to file a statement of standing within 30 days of filing a notice of appeal. If a statement of standing is not filed, the appeal is subject to summary dismissal. Discretion to dismiss an appeal for failure to timely file a statement of standing will not be exercised when the property interest on which a party claims standing is identified in the statement of reasons and there is no showing that the procedural deficiency has prejudiced an adverse party.

Robert A. Perkins, 119 IBLA 375 (June 28, 1991)

ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

The assignee of an unapproved assignment of a right-of-way has standing to appeal from a decision increasing the rental of the right-of-way.

Uno Broadcasting Corp., 120 IBLA 380 (Sept. 23, 1991)

The State of Alaska made no showing that it was adversely affected by a BLM decision clarifying an earlier decision rejecting a townsite petition to the extent that it conflicted with a Native allotment. The clarification of the earlier administratively final decision approving the Native allotment application on its merits does not afford the State an opportunity to reopen the earlier decision without a showing that the clarification affected the State's interests.

State of Alaska (Anna Nick), 121 IBLA 155 (Oct. 31, 1991)

Where an appellant makes no colorable allegation of adverse effect, but solely alleges injury to environmental informational interests (deprivation of information guaranteed by a Federal statute), it has not established that it was adversely affected within the meaning of 43 CFR 4.410(a), and its appeal is properly dismissed for lack of standing. A mere general interest in a problem, absent colorable allegations of adverse effect, is insufficient to confer standing.

Power River Basin Resource Council, Wyoming Chapter of the Sierra Club, Wyoming Outdoor Council, 124 IBLA 83 (Sept. 15, 1992)

An organization need not be incorporated in order to have standing to appeal under 25 CFR Part 2.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992)

ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

A party will not be accorded standing to appeal from a BLM decision where it does not demonstrate that it has a legally cognizable interest which has been adversely affected by that decision. Where the party appeals a BLM record of decision that, by itself, has no consequences, actual or threatened, so far as the environment and any members of the public are concerned because no activity can take place until after preparation of site-specific environmental analyses; and where any adverse consequences would occur, if at all, only if BLM decides to lease particular parcels, the party lacks standing to appeal the ROD because it has not yet been adversely affected by such decision, that is, its appeal is premature.

Colorado Environmental Coalition, 125 IBLA 287 (Feb. 26, 1993)

Even though an appellant did not actively participate in the process leading to the issuance of the BLM ADC decision, where the appellant expressly requested leave to participate in that process and where BLM led appellant to believe that it would have an opportunity to do so, appellant was a "party to the case" as described in 43 CFR 4.410(a). Further, where the appellant makes a specific, colorable allegation in its notice of appeal that its members use an area affected by BLM's ADC plan, appellant is "adversely affected" within the meaning of 43 CFR 4.410(a). As both elements of that regulation are met, appellant has standing to appeal.

Predator Project, 127 IBLA 50 (July 20, 1993)

In order to have standing to appeal to the Board of Land Appeals, the appellant must have been adversely affected by the decision being appealed. If no right to appeal exists, a party may be granted amicus curiae status.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a), and the decisional law of the Department, and not by judicial determinations on standing.

The appeal of an administrative determination by BLM that a road is a R.S. 2477 right-of-way will be dismissed for lack of standing where the appellant makes no colorable allegation of adverse effect. That a group's organizational interest in protection of the public lands, which its members utilize, might be adversely affected by a BLM action is not subject to dispute. However, the group may not rely on that general organizational interest alone in challenging a BLM action. It must identify how the particular BLM action in question actually adversely affects its interest.

Southern Utah Wilderness Alliance, 127 IBLA 325 (Oct. 14, 1993)

A person doing business with an Indian tribe lacks standing to raise a violation of the requirements of 25 U.S.C. § 81 (1988).

The *qui tam* provision of 25 U.S.C. § 81 (1988), authorizes Federal courts to hear suits brought under that section by third parties in the name of the U.S. and, under appropriate circumstances, to order the recovery of money paid by or on behalf of an Indian tribe. The Board of Indian Appeals is not a Federal court, and the *qui tam* provision does not grant standing in an administrative proceeding before the Board.

Robert & Krista Johnson v. Acting Phoenix Area Director, Bureau of Indian Affairs, 25 IBIA 18 (Nov. 12, 1993)

A tribal member lacks standing to bring an administrative appeal for the tribe based on a personal assessment of what is or is not in the best interest of the tribe.

Thomas Swab, Jr., Eric Swab, Louise Zucco, Linda Wenzel, Sandra Jefferson Yonge, & Corina Archuleta v. Sacramento Area Director, Bureau of Indian Affairs, 25 IBIA 205 (Mar. 4, 1994)

ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

In order to have standing to appeal, an appellant must be both a party to the decision appealed and adversely affected by the decision. An organization which has not participated in the process for reviewing an EA is not a party to the case and therefore lacks standing to appeal.

Kendall's Concerned Area Residents, 129 IBLA 130 (Apr. 15, 1994)

Where an entity was not named as an "affected interest" under 43 CFR 4100.0-5 concerning a BLM decision to grant a grazing permit and where there is no indication that the entity participated in any other way in any of BLM's dealings with the granting of the permit, it lacks standing to appeal the decision to the Board of Land Appeals, as it was not a "party to the case" under 43 CFR 4.410(a).

An entity that applies for and receives status as an "affected interest" under 43 CFR 4100.0-5 prior to BLM's granting of an application for a grazing permit was a "party to the case" under 43 CFR 4.410(a). Where that entity has alleged and filed supporting evidence showing that its members frequently use and enjoy areas of the grazing allotment affected by the permit for diverse recreational, educational, scientific, and aesthetic pursuits, it has made an adequately specific, colorable allegation that it is "adversely affected" by the appealed decision, completing the showing required for standing under 43 CFR 4.410(a), so that a motion to dismiss for lack of standing is properly denied.

Oregon Natural Resources Council, Oregon Natural Desert Ass'n v. Bureau of Land Management, MC Beaty Butte Grazing Ass'n, 129 IBLA 269 (May 17, 1994)

A tribal member lacks standing to challenge BIA's approval or disapproval of an amendment to a tribe's constitution.

Thurman L. Welbourne v. Anadarko Area Director, Bureau of Indian Affairs, 26 IBIA 69 (June 20, 1994)

ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

Under 43 CFR 4.410(a), a person must be both a party to the case and adversely affected by a decision to have standing to appeal to the Board of Land Appeals.

Western Shoshone Nat'l Council, 130 IBLA 69 (July 26, 1994)

An appeal from a decision of BLM denying a protest against a BLM dependent resurvey of corners along a section line by the owners of private land that is tied to one of those corners is properly dismissed for lack of standing where the appellants' land is entirely surrounded by private land and the resurvey only determined the boundaries of distant public land, as they are not adversely affected by BLM's affirmance of the resurvey.

Ron & Margery A. Martin, 130 IBLA 238 (Aug. 5, 1994)

An appeal from a decision of BLM denying a protest against a BLM dependent resurvey of a boundary between two townships by the owners of private land that borders that boundary is properly dismissed for lack of standing where the appellants' land is entirely surrounded by private land and the resurvey only determined the boundaries of distant public land, as they are not adversely affected by BLM's affirmance of the resurvey.

James C. Boussios, Sonia Boussios, 130 IBLA 342 (Sept. 13, 1994)

The Board will dismiss an appeal from a BLM decision dismissing a protest of the section line adopted in dependent resurveys where the appellant fails to demonstrate that he has been adversely affected by such dismissal since he has no legally cognizable interest which will be affected by BLM's placement of the line.

Robert M. Sayre, 131 IBLA 337 (Dec. 27, 1994)

ADMINISTRATIVE PROCEDURE--Continued

STAYS

The effectiveness of a BLM decision to round up and remove wild horses during the pendency of an appeal to the Board of Land Appeals is controlled by 43 CFR 4770.3(c), not by 43 CFR 4.21(a) (58 FR 4942-43 (Jan. 19, 1993)). Where BLM fails to place its roundup decision into full force and effect on a specified date, pursuant to 43 CFR 4770.3(c), and a notice of appeal of that decision is timely filed, it is error for BLM to proceed with the roundup, as the effect of BLM's decision is stayed during the appeal period and pending the Board's ruling on the appeal.

Animal Protection Institute of America, 128 IBLA 90 (Dec. 10, 1993)

Revised 43 CFR 4.21(a) governs the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." The regulations governing mining plans of operation contain a "pertinent regulation" within the exception of 43 CFR 4.21(a). Under 43 CFR 3809.4(f), the filing of an appeal shall not stop the authorized officer's decision from being effective.

Western Shoshone Nat'l Council, 130 IBLA 69 (July 26, 1994)

AGENCY

Knowledge acquired by an agent in the course of his activities pursuant to the agency is properly imputed to the principal. Similarly, since all persons dealing with the Government are presumed to have knowledge of duly promulgated rules and regulations, both an agent and the principal are properly charged with knowledge of both the terms and applicability of Onshore Oil and Gas Order No. 2.

Conley P. Smith Oil Producers, 131 IBLA 313 (Dec. 13, 1994)

AIRPORTS

BLM properly declares a placer mining claim null and void ab initio where, at the time it was located, the affected land was segregated from mineral entry by the filing of an application for a public airport lease, even though such application had later been relinquished.

Boyad Tanner et al., 113 IBLA 387 (Mar. 28, 1990)

ALASKA

GENERALLY

A notice of location filed in 1902 claiming occupancy of certain lands in Alaska is not a document conveying title. All possessory rights afforded by the Act of May 17, 1884, 23 Stat. 24, 26, and other similar Acts, terminate upon the cessation of actual use or occupancy.

Heirs of Skookum John, 115 IBLA 97 (June 26, 1990)

ALASKA NATIVE CLAIMS SETTLEMENT ACT

The Department of the Interior is part of the Executive branch of Government and is duty bound to carry out instructions of Congress enacted as law. The Board of Land Appeals has no authority to declare Acts of Congress invalid, unconstitutional, without authority, or otherwise improper. The Board is bound by the provisions of the "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area" which have become law by virtue of congressional ratification.

Seldovia Native Ass'n, Inc., 113 IBLA 218 (Feb. 27, 1990)

ALASKA--Continued

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

Vern T. Weiss et al., 128 IBLA 119 (Dec. 22, 1993)

HOMESITES

BLM properly rejected a homesite purchase application where the applicant failed to show in conformity to 43 U.S.C. §§ 687a and 687a-1 (1982), that he had occupied a habitable house at his site for not less than 5 months each year for 3 years within 5 years of the date he filed his notice of claim.

Robert E. Billstrom, 129 IBLA 108 (Apr. 7, 1994)

INDIAN AND NATIVE AFFAIRS

When surveying the boundaries of an Indian reservation created in 1891 on an island off the coast of Alaska, it was not proper to include an island in the reservation that clearly was not included as the reservation was defined by the President in 1916.

State of Alaska, Forest Service, U.S. Dept. of Agriculture, 127 IBLA 1 (July 12, 1993)

IRRIGATION AND POWER

Where Congress has provided in 16 U.S.C. § 818 (1982), that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to 43 U.S.C. § 1610

ALASKA--Continued

IRRIGATION AND POWER--Continued

(1982), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

North Coast Development Co., 115 IBLA 301 (Aug. 6, 1990)

LAND GRANTS AND SELECTIONS

Oil and gas lease offers filed for land embraced in an Alaska State selection pursuant to sec. 6(b) of the Alaska Statehood Act of 1958 will be rejected when and if the selection is tentatively approved. Where an oil and gas lease has inadvertently been issued for land embraced in an outstanding selection, a decision cancelling the lease after a determination has been made to approve the selection will be affirmed on appeal.

Weston B. Andrews, 116 IBLA 41 (Aug. 28, 1990)

A State of Alaska selection application which expressly states that it excludes prior claims does not select land described by a Native allotment application previously filed with the Bureau of Land Management, and therefore does not qualify under subsec. 905(a)(4) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(4) (1988), so as to preclude legislative approval of the allotment application under subsec. 905(a)(1), 43 U.S.C. § 1634(a)(1) (1988), and require adjudication under the Native Allotment Act.

State of Alaska, 116 IBLA 301 (Oct. 24, 1990)

Under subsec. 906(c)(1) of ANILCA, 43 U.S.C. § 1635(c)(1) (1988), when land has been tentatively approved for transfer to the State of Alaska, legal title has been conveyed and the Department no longer possesses jurisdiction over the land and has no authority to affect title to it.

Eddie S. Beroldo, Robert L. Miller, Jo Ann Miller, 123 IBLA 156 (May 28, 1992)

ALASKA--Continued

LAND GRANTS AND SELECTIONS--Continued

A Native allotment application rejected because of a land description error was properly reinstated to allow the description to be corrected by heirs of the applicant.

State of Alaska (Heirs of Peter Wise), 130 IBLA 83 (July 27, 1994)

MINING CLAIMS

Under sec. 22(c) of ANCSA, 43 U.S.C. § 1621(c) (1988), BLM may convey land that is subject to unpatented mining claims located prior to Aug. 31, 1971, to Regional Native Corporations.

John B. Stone, 129 IBLA 179 (Apr. 22, 1994)

NATIVE ALLOTMENTS

A selection application filed by the Territory of Alaska pursuant to the Act of Jan. 21, 1929, formerly codified at 48 U.S.C. § 354a (1952), segregated the land from subsequent appropriations based upon settlement and location. A Native allotment application is properly rejected when the Native was born after the selection application was filed.

Patrick L. Philpott, 113 IBLA 21 (Jan. 29, 1990)

Where the record in a Native allotment case contains evidence refuting the existence of substantially continuous use and occupancy at least potentially exclusive of others, a decision approving the allotment without any analysis of the facts to support the adjudication will be set aside as unsupported by the record and a contest ordered.

State of Alaska, 113 IBLA 80 (Feb. 12, 1990)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

A timely filed state protest of a Native allotment pursuant to ANILCA, sec. 905, prevents legislative approval of the allotment from taking effect.

Where legislative approval of a Native allotment was prevented by timely and effective state protest, adjudication of the ensuing contest proceeding must conform to regulations governing contests without further application of provisions of ANILCA.

An extension of time to file an answer is permitted under Departmental regulations governing contest procedure. Where application for extension of time to answer contest complaint was timely filed with BLM by a Native allotment applicant, it was error to fail to consider and grant the request which was made in conjunction with a motion to dismiss.

William J. Felix, 114 IBLA 86 (Apr. 11, 1990)

Where an appellant seeks to rebut the presumption of regularity attending the official acts of public officers upon an offer of proof that her Native allotment application was filed, and that procedures operative in the Bureau of Indian Affairs during the mid-to-latter part of 1970 resulted in the absence of her Native allotment application from the file, a fact-finding hearing is warranted.

June I. Degnan (On Reconsideration), 114 IBLA 373 (May 24, 1990)

Sec. 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications; therefore, a protest filed more than 180 days after the enactment of ANILCA must be dismissed and such a protest does not relate back to objections made prior to ANILCA, which were considered by the Bureau of Land Management.

Thelma M. Eckert, 115 IBLA 43 (June 12, 1990)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), provides that all Native allotment applications which were pending before the Department on or before Dec. 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section. Pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), if BLM rejected a Native allotment application without first affording the applicant an opportunity for a hearing before a trier of fact, the decision to reject is not final, and the application was pending before the Department on Dec. 18, 1971. BLM erred in rejecting a request by the heirs of the applicant that the Native allotment application be reinstated and either approved or adjudicated pursuant to sec. 905(a) of ANILCA.

Heirs of Saul Sockpealuk, Heirs of Carl Takak, Heirs of Silas Sockpealuk, 115 IBLA 317 (Aug. 7, 1990)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), provides that all Native allotment applications which were pending before the Department on or before Dec. 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section. An application is pending on or before Dec. 18, 1971, where the application is filed in 1961 and closed in 1967 for failure to provide any proof of use and occupancy, but the applicant is not notified by decision of the closure. Under such circumstances, BLM erred in rejecting an applicant's request that his Native allotment application be reinstated and either approved or adjudicated pursuant to sec. 905(a) of ANILCA.

Michael Gloko, 116 IBLA 145 (Sept. 24, 1990)

The Administrative Law Judge properly determined that relinquishment of a Native allotment application was not knowing and voluntary. The language of a letter accompanying relinquishment, the request for BLM advice, and testimony at a subsequent hearing demonstrated that the relinquishing applicant did not grasp

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

the full legal consequences of executing a relinquishment.

A reinstated Native allotment application will not be legislatively approved if legislative approval would effect a taking of an asserted valid existing right without providing the holder notice and the opportunity for a hearing.

Katherine C. (Zimin) Atkins v. Bureau of Land Management, Bristol Bay Housing Authority (Intervenor), 116 IBLA 305 (Oct. 29, 1990)

Where subsequent to approval of a Native allotment but prior to issuance by BLM of the document conveying legal title to the allottee, the allottee, as grantor, grants to the State of Alaska a public highway easement across her allotment, a request by the State to have that easement excluded from or reserved in the document conveying legal title will be denied.

State of Alaska, Dept. of Transportation & Public Facilities, 116 IBLA 317 (Oct. 29, 1990)

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the claimed land for a minimum of 5 years Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the record does not establish applicant's qualifying use, the Bureau of Land Management shall initiate a Government contest so that the factual issues can be resolved at a hearing.

State of Alaska, 117 IBLA 148 (Dec. 13, 1990)

An assertion by a Native allotment applicant that he used four different parcels that are separated by significant distances during the same time period is doubtful. Where the asserted occupancy is for only 13 days (and is likely less), and no improvements were placed on the parcel, the applicant has failed to demonstrate substantially continuous use and occupancy at least potentially exclusive of others. A decision by BLM approving an allotment for the parcel is properly set aside and the

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

case remanded for initiation of a Government contest against the application for the parcel.

A BLM decision that a Native allotment applicant has satisfied the occupancy requirements of the Native Allotment Act based on (1) existence of a cabin on the parcel, and (2) the applicant's assertion that he occupied the parcel 18 days a year will be set aside and the case remanded for further investigation where the record shows that the applicant's occupancy was likely less than 18 days and there is no evidence either that the applicant owned the cabin or that the condition of the cabin was such that it did not appear to be abandoned. On remand, BLM should consider other relevant factors, as the presence of a cabin does not by itself render occupancy qualifying.

National Park Service, 117 IBLA 247 (Jan. 9, 1991)

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not described in the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a factfinding hearing in which he may attempt to show that he did, in fact, make timely application for the parcel in question.

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1988), an amendment to a Native allotment application may be filed only where the applicant is seeking land different from the land described in the original application. No amendment may be allowed where the applicant is seeking land in addition to that described in the original application.

Mitchell Allen, 117 IBLA 330 (Jan. 24, 1991)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

The party seeking reinstatement of a previously rejected Native allotment application must support that request with evidence of a significant error in the original application. A request for reinstatement of a Native allotment application will be denied if the party seeking reinstatement does no more than speculate that an error may have been committed, fails to appeal from the initial determination, and does nothing regarding the rejected application for a period of 15 years.

It is not necessary to reinstate a Native allotment application to afford an opportunity for a hearing if the initial BLM determination was based upon the applicant's declaration of material facts which demonstrate conclusively that the application must be rejected as a matter of law and the applicant fails to tender sufficient evidence of a significant error on the face of the original application. If no hearing is called for and the Native applicant had been afforded an opportunity to appeal to this Board, there is no compelling legal or equitable reason to reinstate the application merely to afford an opportunity for a hearing.

Franklin Silas, 117 IBLA 358 (Jan. 31, 1991)

Where an affidavit in support of a claim that the relinquishment of a Native allotment application was involuntary and unknowing is insufficient to raise a genuine issue of material fact, and where the record shows that the applicant relinquished his Native allotment application to obtain a portion of the same land by means of a homestead entry application and later received a patent under the homestead laws, BLM properly denied a request to reinstate the Native allotment application.

Heir of Frank Hobson, 117 IBLA 368 (Feb. 7, 1991)

Where a State of Alaska protest against a Native allotment under sec. 905 of the Alaska National Interest Lands Conservation Act was granted in 1982 and, as a result, the allotment was adjudicated pursuant to the Alaska Native Allotment Act of 1906, no further adjudication of the allotment was required. In the absence of a timely appeal of the decision approving the allotment,

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

the doctrine of administrative finality precludes review of the allotment on appeal from a subsequent decision.

State of Alaska (Henry J. Ekada), 117 IBLA 373 (Feb. 7, 1991)

A protest by the State of Alaska against a Native allotment filed under sec. 905(a)(5)(B) of ANILCA will be considered sufficient to require the adjudication of the application pursuant to the Native Allotment Act where, as supplemented by information provided to BLM and the Board, it provides information showing that the allotment probably conflicts with an existing winter trail. A BLM decision denying the State's protest on the grounds that no trail exists that conflicts with the Native allotment will be set aside where the record reveals that such a trail does exist. On remand, BLM must adjudicate the allotment, under the provisions of the Native Allotment Act of 1906, considering whether the existence of the trail affects BLM's conclusions that her use was at least potentially exclusive.

State of Alaska (Molly Tocktoo), 118 IBLA 1 (Feb. 13, 1991)

While the principal means by which a person becomes a "party to a case" within the meaning of 43 CFR 4.410(a) is to actively participate in the decision-making process which leads to the appeal, it is not the only means. Where BLM approves a Native allotment application on National Park System lands and the National Park Service files an appeal of that decision, the status of the National Park Service as the agency charged with administrative responsibilities for the management of such lands satisfies the "party to a case" requirement of 43 CFR 4.410(a).

Where the record in a Native allotment case contains conflicting evidence regarding the existence of substantially continuous use and occupancy at least potentially exclusive of others, a decision approving the allotment without any analysis of the facts to support the adjudication will be set aside as unsupported by the record and a contest ordered.

National Park Service, 118 IBLA 204 (Mar. 6, 1991)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

A Native community association asserting that it used and occupied lands later claimed as a Native allotment must protest the allotment application pursuant to sec. 905(a)(5) of ANILCA in order to have its claim adjudicated. In the absence of a timely protest, legislative approval of the allotment application occurs, and the village selection application, through which the Native community association claims reconveyance rights, must be rejected insofar as it conflicts with the allotment.

Stebbins Community Assn, 118 IBLA 334 (Mar. 12, 1991)

A decision recognizing that a Native allotment is subject to an easement for highway purposes extending 50 feet on each side of the centerline of a road conveyed to the State of Alaska by a quit-claim deed issued pursuant to the Alaska Omnibus Act, P.L. 86-70, 73 Stat. 141, will be affirmed where an easement of that width had been established under the Act of June 30, 1932, 47 Stat. 446.

Frank Sanford et al., 119 IBLA 147 (Apr. 29, 1991)

BLM properly denies reinstatement of a Native allotment application for land within the Tongass National Forest filed by a Native who did not personally use and occupy the land before it was included in the forest.

Irene K. Jimmy, 119 IBLA 226 (May 14, 1991)

Where the State challenges a BLM decision confirming legislative approval of a Native allotment application pursuant to sec. 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1988), on the basis that BLM effectively amended the description of the land claimed in the application to conform to a 1986 survey, thereby shifting the location of the allotment claim to another section, without requiring the applicant to demonstrate that this was the land she had originally intended to claim and affording the State an opportunity to file a protest, the Board will initially refer the case for a hearing to decide what land the applicant had intended

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

to claim, especially where that land may no longer exist due to erosion of the shoreline bordering that land.

State of Alaska, 119 IBLA 260 (May 22, 1991)

When the Board affirms a BLM decision dismissing a protest challenging the validity of a Native allotment application because the protest was not filed within 180 days after the effective date of ANILCA, and the Native allotment is legislatively approved pursuant to sec. 905(a)(1) of ANILCA, the doctrine of administrative finality precludes a subsequent appeal challenging the validity of the Native allotment when the decision appealed from was issued to conform the Native allotment to BLM's survey of the allotment.

Thelma M. Eckert, 120 IBLA 367 (Sept. 18, 1991)

A purported relinquishment of a Native allotment application by the widow of the deceased applicant who is not vested with authority to relinquish the interest of the applicant's heirs is legally ineffective.

The fiduciary relationship of the Department of the Interior with Alaska Natives requires reinstatement and adjudication of a Native allotment application as to those lands for which an unauthorized relinquishment was improperly accepted regardless of the subsequent selection. If the Native allotment application is found to be valid, the Department is obligated to pursue recovery of the land through negotiation with the State or litigation.

Theodore Suckling (Heir to Chief Alexander), 121 IBLA 52 (Oct. 23, 1991)

The Department may consider a request to reinstate a relinquished Native allotment application for land which has been either patented or made part of an interim conveyance to a Native corporation. If the record shows that the possibility exists that the

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

applicant involuntarily and unknowingly relinquished the application in whole or in part, or was fraudulently induced to do so, he is entitled an evidentiary hearing. If the relinquishment was not knowing and voluntary or was fraudulently procured, the Department may reinstate the application to adjudicate its validity prior to recommending the instigation of judicial proceedings to cancel conflicting interests in the land.

The relinquishment of a Native allotment application must be made voluntarily and with knowledge of the applicant's allotment rights and the consequences of the relinquishment. In determining whether there is a factual issue whether the relinquishment of a Native allotment application was knowing and voluntary so as to require a hearing, the Board will regard as true the factual allegations made in affidavits filed in support of a request for reinstatement.

Heir of Frank Hobson (On Reconsideration), 120 IBLA 66 (Oct. 25, 1991)

Reconsideration of a Departmental decision revoking approval of and rejecting an application for a Native allotment is appropriate where the record fails to demonstrate that the applicant (or heirs) received notice of the decision, had the opportunity to challenge that decision, and failed to take action to obtain review of the decision. A BLM decision denying reinstatement of a Native allotment application will be reversed where the record does not show that the applicant or his heirs received notice of the revocation/rejection decision. Similarly, a BLM decision denying reinstatement of a Native allotment application will be reversed where the case file does not contain a copy of the revocation/rejection decision sent to the applicant or his heirs and the Board is unable to determine whether that decision adequately informed the applicant of the opportunity to obtain review of the decision.

Heirs of Alexander Williams, Heirs of George Edwin, Heirs of James Butler, 121 IBLA 224 (Nov. 13, 1991)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

The State of Alaska has an interest in assuring that its citizens will have access to lands and resources owned by it, its political subdivisions, or the United States, and to public bodies of water regularly used for transportation purposes. A protest presenting colorable allegations that the State's interest will be adversely affected by a decision is sufficient to give standing to appeal dismissal of a protest. The State has a right to appeal the dismissal of a protest for procedural reasons.

BLM has authority to review the legal sufficiency of a protest filed by the State of Alaska under sub-sec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(b) (1988), and to dismiss a protest which it finds to be insufficient. Disagreement with facts asserted in a protest is not a proper basis for dismissal.

State of Alaska (Harvey Pootoogooluk), 121 IBLA 363 (Dec. 19, 1991)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1988), provides that all Native allotment applications which were pending before the Department on or before Dec. 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section. An application is pending on or before Dec. 18, 1971, where the application is filed in 1960 and closed in 1966 for failure to provide any proof of use and occupancy, but the applicant is not notified by decision of the closure and the BLM field report discloses an issue of fact as to applicant's exclusive use or occupancy. Under such circumstances, BLM erred in rejecting an applicant's request that his Native allotment application be reinstated and either approved or adjudicated pursuant to sec. 905(a) of ANILCA.

Andrew Balluta, 122 IBLA 30 (Jan. 3, 1992)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Reinstatement is properly denied for an allotment application terminated by operation of law pursuant to 43 CFR 2212.9-3(f) (1968) for failure to file proof of use and occupancy within 6 years after filing the application when the decedent's use and occupancy had begun less than 1 year before the application was filed.

A hearing is not required where rejection of a Native allotment application is made, not in reliance on a disputed question of fact, but as a matter of law.

Heirs of a Native allotment applicant may not, under sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), amend the land description in their decedent's allotment application to encompass land in addition to that originally described.

Heirs of Edward Peter, 122 IBLA 109 (Jan. 14, 1992)

The Secretary may allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska. Land is mineral in character when known conditions at the relevant time are such as to reasonably engender the belief that the land contains mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end.

The Department has held that the critical time for determination of whether the land in a nonmineral entry is mineral in character is the time when equitable title vests. With respect to Native allotments, this occurs when the Department has approved the allotment application after completion of the required period of qualifying use and occupancy.

Where an application for patent is filed by a nonmineral claimant which embraces public lands within the boundaries of mineral claims located under the mining laws, the rights of the mining claimants must be considered prior to any ultimate disposition of the land. In such a context, a hearing is properly ordered upon notice to the competing nonmineral and mining claimants for the purpose of determining the character of the land claimed.

Anne Lynn Purdy, Heirs of Arthur Purdy, Sr., 122 IBLA 209 (Feb. 12, 1992)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Where the United States completes a mineral-in-character report after equitable title has passed to the Native allotment applicant, the determinative date for that report is the date of passage of equitable title, and BLM must establish that the facts in existence at the time equitable title passed required a determination that the land was mineral in character.

Where, after final proof of use and occupancy has been filed and equitable title has passed to the applicant, BLM determines that the land in the application is not subject to conveyance because it is mineral in character, e.g., valuable for placer gold, it may not reject the application without affording the applicant notice and an opportunity to contest the mineral-in-character classification, as required by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

Mary Johansen, 122 IBLA 344 (Mar. 11, 1992)

A Native allotment application filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 - 270-3 (1970), is properly rejected when the applicant failed to establish that qualifying use and occupancy was independently initiated. Use and occupancy as a minor child in the company of and under the supervision of one's parents is not considered independent.

United States v. Mary T. Akootchook, Betty Brower, 123 IBLA 6 (Apr. 22, 1992)

A Government contest of a Native allotment application is appropriate when the application bears date-stamps well beyond the Dec. 18, 1971, filing deadline and the applicant's evidence of timeliness consists solely of a two-page BIA form letter, page 1 of which acknowledges receipt of an unspecified Native allotment application and page 2 of which consists only of the applicant's name, address, and a date within the deadline.

A Government contest of a Native allotment application is appropriate when the record reveals that a road in public use crosses lands described by the application, thus calling into question whether the

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

applicant has established notorious, exclusive, and continuous use and occupancy of the lands.

State of Alaska (Mabel S. Brown), 123 IBLA 233 (June 9, 1992)

Where a Native allotment applicant has filed a Native allotment application prior to Dec. 18, 1971, and BLM rejected the application in 1968 without affording him an opportunity for a hearing, the rejection decision is not final and the application may be reinstated. Where the application is reinstated, it is properly deemed to be "pending" before the Department on Dec. 18, 1971, within the meaning of sec. 905(a) of ANILCA.

A Native allotment application pending before the Department on Dec. 18, 1971, was not legislatively approved under sec. 905(a)(1) of ANILCA where it describes land which was validly selected by the State of Alaska pursuant to the Alaska Statehood Act on or before Dec. 18, 1971. Instead, the application must be adjudicated pursuant to the requirements of the Native Allotment Act.

Heirs of George Titus, 124 IBLA 1 (Aug. 13, 1992)

When BLM changes the location of a Native allotment claim from its originally intended location during the course of the survey of the claim boundaries to compensate for the loss of a portion of the original claim by erosion, and confirms the legislative approval of the claim in its new location, the Board will set aside the BLM decision and remand the case for resurvey and reconfirmation of the legislative approval of the claim in its original location.

Hermann T. Kroener, 124 IBLA 57 (Aug. 27, 1992)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1988), provided for legislative approval, subject to valid existing rights, of all Alaska Native allotment applications, with certain caveats, one of which was that the section applied only to applications which described land that was unreserved on Dec. 13, 1968. Where land described in a Native allotment application was reserved on Dec. 13, 1968, legislative approval does not apply.

Where the Government contests a Native allotment application, the Native is required to make satisfactory proof, by a preponderance of the evidence, of substantially continuous use and occupancy of the claimed land for a minimum of 5 years. Such use and occupancy contemplates substantial actual possession and use of the land, at least potentially exclusive of others.

Where the evidence presented at a hearing on a Government contest of a Native allotment application in support of the Native's position that he utilized the claimed lands for fishing and hunting in accordance with the customs of the Natives of the area fails to show substantial actual possession and use of the claimed land, the application is properly rejected.

Even if the evidence presented at a hearing on a Government contest of a Native allotment application could be considered as establishing substantial actual possession and use of the available claimed lands, the application will be rejected where the evidence shows that the Native's use of the land was not potentially exclusive of others because he was one of many Natives who utilized the claimed lands for subsistence activities during the period of claimed use and occupancy and there was not evidence that the applicant had recognized authority over the land during that period.

United States v. Zack Rastopsoff (Deceased), Ayakulik, Inc. (Intervenor/Appellant), 124 IBLA 294 (Nov. 4, 1992)

A Native allotment application deemed pending before the Department on Dec. 18, 1971, because it was rejected in 1927 without affording the applicant's heirs an opportunity for a hearing on a disputed question of fact underlying the rejection was not legislatively approved by sec. 905(a) of ANILCA but instead must be adjudicated pursuant to the Act of May 17, 1906 as amended, because the land was validly selected by the

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

State before Dec. 18, 1971, and was not withdrawn pursuant to sec. 11(a)(1)(A) of ANCSA.

Ellen Frank, 124 IBLA 349 (Dec. 2, 1992)

Where, after a Native initiates use and occupancy of certain lands and files an allotment application but prior to the completion of 5 years' use and occupancy, rights-of-way are sought and granted by BLM across such lands, subject to valid existing rights, the completion of the requisite 5 years vests the inchoate preference right arising from use and occupancy. That right relates back to the initiation of use and occupancy, thereby taking precedence over the intervening rights-of-way, which are properly declared null and void.

State of Alaska, Dept. of Transportation & Public Facilities, 124 IBLA 386 (Dec. 10, 1992)

Where, after a Native initiates use and occupancy of certain lands, a right-of-way is sought and granted by BLM across such lands, subject to valid existing rights, the later filing of the allotment application vests the inchoate preference right arising from use and occupancy, and that right relates back to the initiation of use and occupancy, thereby taking precedence over the intervening right-of-way, which is properly declared null and void.

State of Alaska, 125 IBLA 21 (Dec. 21, 1992)

An ALJ's conclusion that a Native allotment applicant commenced qualifying use and occupancy of the claimed land prior to the effective date of a withdrawal of the land will be upheld on appeal where the conclusion is based upon a review of all the evidence presented at a hearing and the Judge's resolution of disputed facts is necessarily influenced by his consideration of the credibility of the witnesses testifying at the hearing.

A Government contest of a Native allotment application based on a charge of failure to use and occupy the land to the potential exclusion of others is properly dismissed where the Native shows by a preponderance

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

of the evidence, presented through his testimony and that of numerous witnesses, that his use and occupancy of various improvements on the site for fall hunting purposes were, in fact, at least potentially exclusive of others.

United States v. Edward N. O'Leary, 125 IBLA 235 (Feb. 11, 1993)

A Native allotment was not subject to an amended right-of-way grant for a Federal-Aid Highway because the amendment was subject to valid existing rights and was made after initiation of the Native claim.

State of Alaska Dept. of Transportation & Public Facilities, 125 IBLA 291 (Mar. 9, 1993)

Under sec. 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), any individual objecting to the approval of a Native allotment application must file a protest within the period established by ANILCA and must allege that the land described in the application is the situs of improvements claimed by the person filing the protest. Where an individual files a protest after the statutory deadline, the protest is properly dismissed.

Marshall McManus, 126 IBLA 168 (May 11, 1993)

The timely filing of a valid protest against a Native allotment under 43 U.S.C. § 1634(a)(5)(B) (1988), is sufficient to prevent legislative approval, even where that protest is subsequently withdrawn. A BLM decision denying the State's protest on the ground that no trail exists that conflicts with the Native allotment will not be affirmed where the record reveals that an easement has been granted for a trail and that the easement probably crosses the allotment.

Where a Native allotment applicant never objected during her life to BLM's placement of her allotment parcel on the ground, and where her heirs have not subsequently objected, BLM's placement of the parcel will be affirmed on appeal in the absence of irrefragable showing beyond question that the parcel that BLM

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

approved is not the land the applicant intended to claim.

State of Alaska, Heirs of Lucy Charlie, 126 IBLA 204 (May 20, 1993)

A BLM decision finding a right-of-way for an electric distribution line null and void to the extent it conflicts with a Native allotment application is reversed and remanded to permit issuance of the Native allotment subject to the right-of-way where the record shows occupancy of the land by the power line was approved, and it was constructed and operated for 4 years before the Native allotment applicant began use and occupancy of his allotment.

Naknek Electric Ass'n, Inc., 126 IBLA 256 (June 2, 1993)

To the extent that pending Native allotment applications describe lands previously conveyed out of Federal ownership, these applications were not subject to legislative approval by sec. 905 of ANILCA, 43 U.S.C. § 1634 (1988).

An interim conveyance is similar to a patent in that it conveys legal title to the land described. In the absence of legal title, DOI lacks jurisdiction to adjudicate entitlement of an applicant for a tract of land. Where the applicant is a Native American, the fiduciary duty of DOI may justify a review of the application to determine whether to seek reconveyance of the land.

With respect to lands which have been conveyed out of Federal ownership, a decision accepting a Native allotment application as amended is not an adversarial adjudication of entitlement of the applicant to an allotment which is dispositive of the rights of the applicant or adverse parties since DOI lacks jurisdiction to make such a ruling in the absence of legal title. In this context, an appeal by an adverse party is properly dismissed as premature. If the land is reconveyed, any decision adjudicating the amended location will be subject to appeal.

Bay View, Inc., 126 IBLA 281 (June 7, 1993)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

In approving a Native allotment application, BLM properly reserved a 100-foot-wide easement across the allotment for an existing public road constructed along the route of a relinquished railroad right-of-way where the land had, prior to the Native's use and occupancy, been established by the Secretary of the Interior as part of a 100-foot-wide public highway pursuant to the Act of June 30, 1932, ch. 320, 47 Stat. 446, and then been quitclaimed to the State of Alaska. Reservation of an easement conforming to the width of the relinquished right-of-way was not required because that right-of-way ceased to exist when the relinquishment was accepted.

State of Alaska, Dept. of Transportation & Public Facilities, 127 IBLA 137 (Aug. 25, 1993)

When a Native allotment applicant amends the land description of her allotment application to move the location of the land sought, she has the burden of establishing that the amended description correctly describes the land that she originally intended to claim. BLM may not approve such an amendment without giving notice of the amendment to parties. BLM also may not approve such an amendment without requiring the applicant to demonstrate that the land in the amended description was the land she originally claimed based upon her use and occupancy of it that was potentially exclusive of others.

Alyeska Pipeline Service Co., State of Alaska, 127 IBLA 156 (Aug. 26, 1993)

Sec. 905(b) of ANILCA authorizes the Secretary of the Interior to adjust land descriptions to eliminate conflicts between two Native allotment applications by altering the allotment boundaries to achieve an adjustment that is consistent with prior use of the allotted land. Although the statute encourages Departmental implementation of adjustments proposed by the parties concerned, where they have attempted but failed to resolve their conflicting claims, a hearing will be ordered to resolve the dispute.

Anna S. Moxie, 127 IBLA 175 (Sept. 2, 1993)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

In a Government contest of an Alaska Native allotment application, the contestant bears the burden of presenting sufficient evidence to establish a prima facie case of ineligibility and the Native applicant bears the burden of proof by a preponderance of the evidence should a prima facie case be established. While a limited field examination presenting no significant evidence will not support a prima facie case, the applicant's statements, which if unrebutted would contradict the applicant's use of the allotment lands, may constitute a prima facie case.

The ultimate burden of proof in an Alaska Native allotment application is on the applicant to establish compliance with the use and occupancy requirements of the Native Allotment Act. Where the evidence has been reviewed and the allotment approved, an appellant before the Board is to show by a preponderance of the evidence that the challenged decision is in error. Thus, the parties in an appeal from a decision approving a Native allotment application must seek to establish their respective positions at some point by a preponderance of the evidence, which means that there must be a showing that something is more likely than not.

Under the authority of sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), the description in a Native allotment application may be amended where it designates land other than that which the applicant intended to claim at the time of the application.

Use of the land which does not leave physical evidence of use may be sufficient to establish entitlement to an Alaska Native allotment provided the applicant demonstrates by a preponderance of the evidence substantiality and exclusivity. Where witnesses for the applicant testify to his regular use of the land in question for subsistence hunting and other activities which do not always alter the appearance of the land, the requirement of substantial use is satisfied. The existence of other indicia of hunting attributed to the applicant, such as a campsite or trap sites, corroborates use of the land. In considering whether the use was exclusive of others, the Native customs and mode of living may be taken into consideration. The posting of the land and the testimony of witnesses that the applicant had affirmatively declared the area as his allotment are sufficient in the absence of contrary evidence to preponderate on the issue of exclusivity. A challenge to use of the subject land as intermittent or discontinued based on statements of the applicant that

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

he had been to the subject lands only a few times over several years is adequately rebutted by testimony explaining the statements and verifying regular use of the land.

United States v. The Heirs of David F. Berry, 127 IBLA 196 (Sept. 14, 1993)

A Native allotment application was pending before the DOI on Dec. 18, 1971, if it was filed in any bureau, division, or agency of the Department on or before that date. Where evidence shows that an application was delivered to the BIA before that date, the application was timely.

An Alaskan Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. Such use and occupancy comtemplates substantial actual possession or use of the land, at least potentially exclusive of others, and not merely intermittent use.

The right to a Native allotment vests only upon the completion of 5 years' use or occupancy of land and the filing of an application therefor. Absent the timely filing of an allotment application, where a Native, who has completed the requisite 5 years' use, ceases to use or occupy the land and permits the land to return to an unoccupied state, the right to an allotment of that land also terminates, regardless of the subjective intent of the Native.

United States v. Palakia Melgenak, 127 IBLA 224 (Sept. 24, 1993)

A BLM decision to accept a revised Native allotment application covering lands previously conveyed out of Federal ownership lacked finality and consequently was not an appealable action.

State of Alaska, 127 IBLA 276 (Oct. 4, 1993)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

In cases where the amount of land originally applied for in a Native allotment application is at issue, the proper standard of proof to be applied is the preponderance of the evidence.

Under sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), a Native allotment application may not be amended to describe land in addition to that described in the original application.

United States v. Heirs of Ambrose Kozevnikoff, 128 IBLA 130 (Dec. 30, 1993)

The critical date for determination of the mineral character of public land within a nonmineral land application is the date when equitable title to the land passes to the applicant. This is the point when the applicant has done all that is required to obtain title to the land under the authorizing statute. In the case of a Native allotment application, this ordinarily occurs when the application has been filed, the required period of use and occupancy has been completed, and acceptable proof of use and occupancy has been filed.

Anne Lynn Purdy, Heirs of Arthur Purdy, Sr., 128 IBLA 161 (Jan. 13, 1994)

The right to a Native allotment vests only upon completion of 5 years' use or occupancy of the land and the filing of an application therefor. Absent the timely filing of an allotment application, where a Native, who has completed the requisite 5 years' use, ceases to use or occupy the land and permits the land to return to an unoccupied state, the right to an allotment of that land also terminates, regardless of the subjective intent of the Native.

United States v. Heirs of Elsie Hansen Wilson, 128 IBLA 252 (Mar. 2, 1994)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

A Native allotment application that was rejected in 1925 without giving the applicant an opportunity for hearing on a disputed question of fact was properly reinstated in 1980. Because neither the applicant nor his heirs ever amended the application, it was correct to reinstate the 160-acre tract originally claimed although the Department had surveyed a smaller tract in 1921 and though, immediately following reinstatement, the smaller tract was noted on the master title plat.

Forest Service, U.S. Dept. of Agriculture (Heirs of Archie Lawrence), 128 IBLA 393 (Mar. 11, 1994)

It is proper for BLM to reject a petition for reconsideration of an earlier decision rejecting an Alaska Native allotment when the petitioner has not submitted sufficient evidence of an error in the original application, and there are no compelling legal or equitable reasons for allowing a second opportunity to appeal the merits of that decision 15 years after the expiration of time for appeal from the initial decision.

Franklin Silas (On Judicial Remand), 129 IBLA 15 (Mar. 14, 1994)

In a private contest initiated by a state following a BLM decision holding a Native allotment for approval, the state must show by a preponderance of the evidence that the Native allotment application is not valid. A private contest is properly dismissed where a state, as contestant, fails to present a prima facie case that the Native allotment applicant has not used his allotment in conformity with applicable law.

If, after a Native initiates use and occupancy of certain lands, an amended right-of-way grant for a Federal-Aid Highway is sought and granted by BLM across such lands subject to valid existing rights, completion of 5 years of use and occupancy coupled with timely filing of a Native allotment application vests an inchoate preference right arising from use and occupancy. That right relates back to the time when use and

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

occupancy began, and takes precedence over the intervening amended right-of-way grant, which is properly declared null and void.

State of Alaska v. William T. Bryant, 129 IBLA 35 (Mar. 21, 1994)

The amendment provision of sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), is only available to Alaska Native allotment applicants and may not be used to appropriate land in addition to that originally claimed by a Native allotment applicant.

Acceptance by a Native allotment claimant of half the lands described in her application did not establish a waiver of her claim to the remainder. Since half the allotment described by her application was eliminated administratively without her knowledge or consent her entire application was pending before the Department on Dec. 18, 1971, because the elimination occurred without a hearing on a disputed question of fact underlying the action taken.

Matilda S. Johnson, 129 IBLA 82 (Apr. 1, 1994)

A request for reconsideration of a prior decision and reinstatement of a previously rejected Native allotment application must be supported by evidence of an error in the original application. The request is properly denied if the party seeking reinstatement has tendered little more than allegations that use and occupancy had commenced before the date stated on the original application, has failed to appeal the initial decision rejecting the application, and has allowed 14 years to pass before seeking reconsideration and reinstatement.

Lena Baker Maples, 129 IBLA 167 (Apr. 21, 1994)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Legislative approval of Native allotment applications granted by sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1988), is subject to specific exceptions and restrictions. One of the restrictions imposed by Congress was the requirement that the applications must describe "land that was unreserved on December 13, 1968." If the land sought was not unreserved on Dec. 13, 1968, the Native allotment application must be adjudicated pursuant to the Native Allotment Act and applicable regulations.

Qualifying use and occupancy must be initiated when the land is open to appropriation under the Native Allotment Act. If it can be shown that qualifying use and occupancy was initiated during that period, the applicant would hold a vested right at the time of a subsequent withdrawal. If no qualifying use and occupancy was initiated prior to withdrawal, the withdrawal will attach, the applicant will gain no vested rights, and subsequent use and occupancy will not satisfy the regulatory requirement.

Evidence of independent use is necessary to satisfy the 43 CFR 2561.0-5(a) requirement that there must be substantial actual possession and use of the land, at least potentially exclusive of others. Adult use of land is assumed to be independent, even though the use is concurrent with other members of the family. No distinction is drawn between use in the company of older family members and use in the company of children. There is no similar assumption that a minor child is exercising independent use of the land when in the company of parents or other adults responsible for the child's welfare. There must be specific proof that the minor child acted independently.

United States v. Sergie Alexanderoff, 129 IBLA 279 (May 20, 1994)

Native allotment applicants failed to establish qualifying use and occupancy of their claims were independently initiated by offering evidence that, before withdrawal of the land claimed by them from appropriation, they had used and occupied it while they were

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

minor children in the company of and under the supervision of their parents.

United States v. Daniel & George Akootchook, 130 IBLA 5 (July 5, 1994)

A Native allotment application bearing a BLM datestamp of Dec. 27, 1971, and a BIA certification of Dec. 22, 1971, will be regarded as timely filed prior to the Dec. 18, 1971, deadline imposed by sec. 18(a) of ANSCA, 43 U.S.C. § 1617(a) (1988), where the record supports a finding that the application was timely filed with BIA. An affidavit of an individual who states that she assisted the applicant in completing the application on Dec. 31, 1970, and regularly mailed such applications within a few weeks of completion; evidence that applications were not routinely datestamped upon receipt by BIA; and the fact that the application bears a metes and bounds description of the allotment parcel, coupled with the fact that such descriptions were generally prepared by BIA officials, supports a finding that the application was timely filed.

Prior to passage of sec. 905(a)(3) of ANILCA, 43 U.S.C. § 1634(a)(3) (1988), lands containing valuable deposits of gravel were considered to be mineral lands unavailable for Native allotment. The preference right which vests upon the completion of 5 years of qualifying use and occupancy and the timely filing of an application for a Native allotment will not relate back to the initiation of use and occupancy to preempt an intervening material site right-of-way for gravel when mineral lands were unavailable for allotment at the time.

Statutory approval of a Native allotment pursuant to sec. 905 of ANILCA, 43 U.S.C. § 1634 (1988), is subject to valid existing rights, including a prior material site right-of-way issued for mineral lands. A decision declaring such a right-of-way null and void to the extent the lands are embraced in a Native allotment is properly reversed on appeal.

State of Alaska, Dept. of Transportation & Public Facilities, 131 IBLA 121 (Oct. 25, 1994)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Where lands covered by a Native allotment application are not the situs of improvements claimed by a party, that party's protest under ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), did not prevent legislative approval of the allotment.

Erma M. Webster, 131 IBLA 329 (Dec. 16, 1994)

NAVIGABLE WATERS

Generally

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

POSSESSORY RIGHTS

A notice of location filed in 1902 claiming occupancy of certain lands in Alaska is not a document conveying title. All possessory rights afforded by the Act of May 17, 1884, 23 Stat. 24, 26, and other similar Acts, terminate upon the cessation of actual use or occupancy.

Heirs of Skookum John, 115 IBLA 97 (June 26, 1990)

REINDEER

The Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), was not repealed by the Alaska Statehood Act, 72 Stat. 339.

The legislative history of the Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), makes it

ALASKA--Continued

REINDEER--Continued

clear that Congress intended to reserve the reindeer industry in Alaska for the exclusive benefit of Alaska Natives.

Courts commonly give deference to the construction of a statute by the agency charged with its administration, particularly one which was contemporaneous with the statute and has been consistently followed by the agency.

Ambiguities in the Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), must be construed in favor of the Alaska Natives who are the intended beneficiaries of the Act.

In a case where the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters, the intention of the drafters, rather than the strict language, controls.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992)
99 I.D. 219

STATEHOOD ACT

The Board will affirm BLM's rejection of State selection applications filed for land which, at the time of selection, was withdrawn by a public land order from State selection pursuant to sec. 17(d)(1) of the Alaska Native Claims Settlement Act, where the question of the validity of the order was determined as a result of the dismissal with prejudice of a prior judicial proceeding in which the order was expressly challenged, and as a result of an agreement between the appellant and the United States not to challenge the order in the future.

State of Alaska, 113 IBLA 86 (Feb. 13, 1990)

BLM properly declared a group of unpatented mining claims null and void ab initio because official land status records of the Department noted that the land was, when the claims were located, encompassed by a State selection, valid on its face, which thereby segregated the land from mineral entry even though the

ALASKA--Continued

STATEHOOD ACT--Continued

selection was void or voidable, since the land was within a national forest.

Hyak Mining Co., 119 IBLA 1 (Mar. 15, 1991)

Pursuant to sec. 906(f)(2) of ANILCA, 43 U.S.C. § 1635(f)(2) (1988), the State of Alaska may relinquish any selection of land filed under the Alaska Statehood Act prior to tentative approval, except for land conveyed pursuant to subsec. (g). A protest against the relinquishment of such a selection is properly denied where the unrelinquishment portion of the selection is in conformity with the requirements of pertinent statutes and regulations.

Ed Ellis, 118 IBLA 350 (Mar. 14, 1991)

Pursuant to sec. 906(c) of ANILCA, 43 U.S.C. § 1635(c) (1988), all right, title, and interest of the United States in and to selected lands is deemed to have vested in the State of Alaska as of the date of tentative approval. Subsequent to such a tentative approval, the Secretary of the Interior no longer retains jurisdiction over selected lands and a dispute concerning rights to such lands is not properly before this Department.

The authority to amend conveyancing documents described at 43 U.S.C. § 1746 (1988), and 43 CFR Subpart 1865, does not include authority to amend a tentative approval which legislatively conveyed selected land to the State of Alaska, unless the State requests the amendment or concurs.

Northwest Alaska Pipeline Co. (On Reconsideration III), 9 OHA 143 (Mar. 24, 1992)

A Native allotment application pending before the Department on Dec. 18, 1971, was not legislatively approved under sec. 905(a)(1) of ANILCA where it describes land which was validly selected by the State of Alaska pursuant to the Alaska Statehood Act on or before Dec. 18, 1971. Instead, the application must be

ALASKA--Continued

STATEHOOD ACT--Continued

adjudicated pursuant to the requirements of the Native Allotment Act.

Heirs of George Titus, 124 IBLA 1 (Aug. 13, 1992)

The Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), was not repealed by the Alaska Statehood Act, 72 Stat. 339.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992)
99 I.D. 219

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

Vern T. Weiss et al., 128 IBLA 119 (Dec. 22, 1993)

ALASKA--Continued

TOWNSITES

The regulation at 43 CFR 2565.7, governing conveyance of residual townsite lots which are unoccupied at the time of subdivisional survey, provides for conveyance to the municipality upon proof of incorporation. Application of this regulation to preclude conveyance to an unincorporated Native village has been held inconsistent with the Native Townsite Act and, hence, the regulation is not properly applied to the Native townsites to bar conveyance to the Native village.

Native Village of Circle, 114 IBLA 377 (May 24, 1990)

Where the record is too vague to support a townsite trustee's determination that applicants for certain townsite lots did not occupy those lots prior to repeal of the Townsite Acts on Oct. 21, 1976, and hence did not qualify for trustee deeds to those lots, the Board will order a hearing pursuant to 43 CFR 4.415 to resolve questions of fact concerning applicant's alleged occupancy on the crucial date.

Larry L. Ledlow, Florence Ledlow, 116 IBLA 349 (Oct. 30, 1990)

Because the Alaska Townsite Trustee has no authority to withdraw land from settlement under the townsite laws in favor of a joint venture composed of two Native village corporations, such an attempted withdrawal does not preclude the timely initiation and occupancy of townsite claims by other individuals.

Where a townsite claimant stakes a claim and moves a house onto the claim and occupies it prior to revocation of the townsite laws by the Federal Land Policy and Management Act of 1976, and the record shows the claimant's expressed intent to occupy the entire claim, he has established an entitlement to that claim.

Marlin L. Virg-in, City of St. Mary's, 117 IBLA 285 (Jan. 16, 1991)

ALASKA--Continued

TOWNSITES--Continued

Where a decision of the Alaska Townsite Trustee, approving one of two conflicting applications for the same townsite lot, is based on a state divorce decree, rather than on the statutes and regulations governing townsites in Alaska, that decision will be vacated and remanded for a determination of who occupied the lot or was entitled to occupancy thereof on the date of approval of the final subdivisional survey.

Joe L. Herbert, 128 IBLA 13 (Nov. 3, 1993)

TRADE AND MANUFACTURING SITES

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has the authority to correct factual errors in patent documents at any time correction is deemed necessary or appropriate. However, only mistakes of fact may be corrected, not mistakes of law, and where a patent holder applies to have a patent corrected to eliminate an easement, that application was not erroneously included in the patent on the basis of a mistake of fact.

BLM has the authority to initiate and make corrections to a patent on its own motion, if all existing owners agree. Where the State of Alaska has an interest in the patent due to the inclusion of an easement for its benefit and, as such, is a concerned administrative agency, its objection to the reduction of the width of the easement in the patent precludes BLM from changing the patent on its own motion.

Lloyd Schade, State of Alaska, 116 IBLA 203 (Oct. 4, 1990)

When a U.S. Court of Appeals has held that a claimant is entitled to equitable adjudication of his untimely application to purchase a trade and manufacturing site and the NPS has neither submitted any evidence contradicting the facts underpinning that holding nor demonstrated that the claimant's failure to timely comply with the law indicated bad faith, BLM

ALASKA--Continued

TRADE AND MANUFACTURING SITES--Continued

properly considers the purchase application on the merits under the principles of equitable adjudication.

Although sec. 1870.33B of the BLM Manual requires BLM to contact the agency that has jurisdiction over the claimed land and request its concurrence in the allowance of an application, the refusal of the holding agency to concur in the allowance of the application does not preclude BLM from approving the application under its equitable adjudication authority.

A party appealing from a BLM decision has the burden of establishing error in the decision under appeal, and conclusory allegations of error, standing alone, do not discharge this burden.

Nat'l Park Service (Stuart G. Ramstad), 125 IBLA 335 (Mar. 29, 1993)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

GENERALLY

A timely filed state protest of a Native allotment pursuant to ANILCA, sec. 905, prevents legislative approval of the allotment from taking effect.

Where legislative approval of a Native allotment was prevented by timely and effective state protest, adjudication of the ensuing contest proceeding must conform to regulations governing contests without further application of provisions of ANILCA.

An extension of time to file an answer is permitted under Departmental regulations governing contest procedure. Where application for extension of time to answer contest complaint was timely filed with BLM by a Native allotment applicant, it was error to fail to consider and grant the request which was made in conjunction with a motion to dismiss.

William J. Felix, 114 IBLA 86 (Apr. 11, 1990)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

GENERALLY--Continued

Sec. 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications; therefore, a protest filed more than 180 days after the enactment of ANILCA must be dismissed and such a protest does not relate back to objections made prior to ANILCA, which were considered by the Bureau of Land Management.

Thelma M. Eckert, 115 IBLA 43 (June 12, 1990)

Under subsec. 906(c)(1) of ANILCA, 43 U.S.C. § 1635(c)(1) (1988), when land has been tentatively approved for transfer to the State of Alaska, legal title has been conveyed and the Department no longer possesses jurisdiction over the land and has no authority to affect title to it.

Eddie S. Beroldo, Robert L. Miller, Jo Ann Miller, 123 IBLA 156 (May 28, 1992)

Sec. 1410 of ANILCA authorizes the Secretary to withdraw lands within units of national parks and wildlife refuges to satisfy village corporation ANCSA entitlements if the land had been withdrawn during the original ANCSA selection period for selection by specific village corporation. Because lands within national parks in existence on Dec. 18, 1971 (the date of ANCSA's enactment) were excluded from the original withdrawals, such park lands may not be withdrawn now. The Secretary may withdraw park lands added to the National Park system after ANCSA's enactment.

The Secretary may withdraw wildlife refuge lands regardless of the date on which the lands were placed in the National Wildlife Refuge. However, sec. 1410 does not authorize the Secretary to withdraw park or refuge lands located outside the boundaries of the original ANCSA withdrawals.

Authority of the Secretary to Withdraw Land Within National Parks & Wildlife Refuges for Selection by Underselected Alaska Native Village Corporations, M-36972 (Oct. 16, 1991) 100 I.D. 163

GENERALLY--Continued

The provisions of sec. 1323(b) of ANILCA, 16 U.S.C. § 3210(b) (1988), do not apply with respect to access to a Federal oil and gas lease since the leasehold estate does not constitute "nonfederally owned land" within the meaning of the statute.

Southern Utah Wilderness Alliance et al., 127 IBLA 331 (Oct. 19, 1993) 100 I.D. 370

Where lands covered by a Native allotment application are not the situs of improvements claimed by a party, that party's protest under ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), did not prevent legislative approval of the allotment.

Erma M. Webster, 131 IBLA 329 (Dec. 16, 1994)

DUTY OF DEPARTMENT OF THE INTERIOR TO NATIVE ALLOTMENT APPLICANTS

A purported relinquishment of a Native allotment application by the widow of the deceased applicant who is not vested with authority to relinquish the interest of the applicant's heirs is legally ineffective.

The fiduciary relationship of the Department of the Interior with Alaska Natives requires reinstatement and adjudication of a Native allotment application as to those lands for which an unauthorized relinquishment was improperly accepted regardless of the subsequent selection. If the Native allotment application is found to be valid, the Department is obligated to pursue recovery of the land through negotiation with the State or litigation.

Theodore Suckling (Heir to Chief Alexander), 121 IBLA 52 (Oct. 23, 1991)

DUTY OF DEPARTMENT OF THE INTERIOR TO NATIVE ALLOTMENT APPLICANTS--Continued

Reconsideration of a Departmental decision revoking approval of and rejecting an application for a Native allotment is appropriate where the record fails to demonstrate that the applicant (or heirs) received notice of the decision, had the opportunity to challenge that decision, and failed to take action to obtain review of the decision. A BLM decision denying reinstatement of a Native allotment application will be reversed where the record does not show that the applicant or his heirs received notice of the revocation/rejection decision. Similarly, a BLM decision denying reinstatement of a Native allotment application will be reversed where the case file does not contain a copy of the revocation/rejection decision sent to the applicant or his heirs and the Board is unable to determine whether that decision adequately informed the applicant of the opportunity to obtain review of the decision.

Heirs of Alexander Williams, Heirs of George Edwin, Heirs of James Butler, 121 IBLA 224 (Nov. 13, 1991)

Where a Native allotment applicant has filed a Native allotment application prior to Dec. 18, 1971, and BLM rejected the application in 1968 without affording him an opportunity for a hearing, the rejection decision is not final and the application may be reinstated. Where the application is reinstated, it is properly deemed to be "pending" before the Department on Dec. 18, 1971, within the meaning of sec. 905(a) of ANILCA.

Heirs of George Titus, 124 IBLA 1 (Aug. 13, 1992)

An interim conveyance is similar to a patent in that it conveys legal title to the land described. In the absence of legal title, DOI lacks jurisdiction to adjudicate entitlement of an applicant for a tract of land. Where the applicant is a Native American, the fiduciary duty of DOI may justify a review of the application to determine whether to seek reconveyance of the land.

Bay View, Inc., 126 IBLA 281 (June 7, 1993)

DUTY OF DEPARTMENT OF THE INTERIOR TO NATIVE ALLOTMENT APPLICANTS--Continued

It is proper for BLM to reject a petition for reconsideration of an earlier decision rejecting an Alaska Native allotment when the petitioner has not submitted sufficient evidence of an error in the original application, and there are no compelling legal or equitable reasons for allowing a second opportunity to appeal the merits of that decision 15 years after the expiration of time for appeal from the initial decision.

Franklin Silas (On Judicial Remand), 129 IBLA 15 (Mar. 14, 1994)

NATIVE ALLOTMENTS

A State of Alaska selection application which expressly states that it excludes prior claims does not select land described by a Native allotment application previously filed with the Bureau of Land Management, and therefore does not qualify under subsec. 905(a)(4) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(4) (1988), so as to preclude legislative approval of the allotment application under subsec. 905(a)(1), 43 U.S.C. § 1634(a)(1) (1988), and require adjudication under the Native Allotment Act.

State of Alaska, 116 IBLA 301 (Oct. 24, 1990)

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not described in the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a factfinding hearing in which he may attempt to show that he did, in fact, make timely application for the parcel in question.

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1988), an amendment to a Native allotment application may be filed only where the applicant is seeking land different from the land described in the original application. No amendment may be allowed where the applicant is seeking

NATIVE ALLOTMENTS--Continued

land in addition to that described in the original application.

Mitchell Allen, 117 IBLA 330 (Jan. 24, 1991)

A protest by the State of Alaska against a Native allotment filed under sec. 905(a)(5)(B) of ANILCA will be considered sufficient to require the adjudication of the application pursuant to the Native Allotment Act where, as supplemented by information provided to BLM and the Board, it provides information showing that the allotment probably conflicts with an existing winter trail. A BLM decision denying the State's protest on the grounds that no trail exists that conflicts with the Native allotment will be set aside where the record reveals that such a trail does exist. On remand, BLM must adjudicate the allotment, under the provisions of the Native Allotment Act of 1906, considering whether the existence of the trail affects BLM's conclusions that her use was at least potentially exclusive.

State of Alaska (Molly Tocktoo), 118 IBLA 1 (Feb. 13, 1991)

A Native community association asserting that it used and occupied lands later claimed as a Native allotment must protest the allotment application pursuant to sec. 905(a)(5) of ANILCA in order to have its claim adjudicated. In the absence of a timely protest, legislative approval of the allotment application occurs, and the village selection application, through which the Native community association claims reconveyance rights, must be rejected insofar as it conflicts with the allotment.

Stebbins Community Assn, 118 IBLA 334 (Mar. 12, 1991)

BLM properly denies reinstatement of a Native allotment application for land within the Tongass National Forest filed by a Native who did not personally use and occupy the land before it was included in the forest.

Irene K. Jimmy, 119 IBLA 226 (May 14, 1991)

NATIVE ALLOTMENTS--Continued

Where the State challenges a BLM decision confirming legislative approval of a Native allotment application pursuant to sec. 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1988), on the basis that BLM effectively amended the description of the land claimed in the application to conform to a 1986 survey, thereby shifting the location of the allotment claim to another section, without requiring the applicant to demonstrate that this was the land she had originally intended to claim and affording the State an opportunity to file a protest, the Board will initially refer the case for a hearing to decide what land the applicant had intended to claim, especially where that land may no longer exist due to erosion of the shoreline bordering that land.

State of Alaska, 119 IBLA 260 (May 22, 1991)

The Department may consider a request to reinstate a relinquished Native allotment application for land which has been either patented or made part of an interim conveyance to a Native corporation. If the record shows that the possibility exists that the applicant involuntarily and unknowingly relinquished the application in whole or in part, or was fraudulently induced to do so, he is entitled an evidentiary hearing. If the relinquishment was not knowing and voluntary or was fraudulently procured, the Department may reinstate the application to adjudicate its validity prior to recommending the instigation of judicial proceedings to cancel conflicting interests in the land.

The relinquishment of a Native allotment application must be made voluntarily and with knowledge of the applicant's allotment rights and the consequences of the relinquishment. In determining whether there is a factual issue whether the relinquishment of a Native allotment application was knowing and voluntary so as to require a hearing, the Board will regard as true the factual allegations made in affidavits filed in support of a request for reinstatement.

Heir of Frank Hobson (On Reconsideration), 120 IBLA 66 (Oct. 25, 1991)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

The State of Alaska has an interest in assuring that its citizens will have access to lands and resources owned by it, its political subdivisions, or the United States, and to public bodies of water regularly used for transportation purposes. A protest presenting colorable allegations that the State's interest will be adversely affected by a decision is sufficient to give standing to appeal dismissal of a protest. The State has a right to appeal the dismissal of a protest for procedural reasons.

BLM has authority to review the legal sufficiency of a protest filed by the State of Alaska under subsec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1988), and to dismiss a protest which it finds to be insufficient. Disagreement with facts asserted in a protest is not a proper basis for dismissal.

State of Alaska (Harvey Pootoogooluk), 121 IBLA 363 (Dec. 19, 1991)

A hearing is not required where rejection of a Native allotment application is made, not in reliance on a disputed question of fact, but as a matter of law.

Heirs of a Native allotment applicant may not, under sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), amend the land description in their decedent's allotment application to encompass land in addition to that originally described.

Heirs of Edward Peter, 122 IBLA 109 (Jan. 14, 1992)

When BLM changes the location of a Native allotment claim from its originally intended location during the course of the survey of the claim boundaries to compensate for the loss of a portion of the original claim by erosion, and confirms the legislative approval of the claim in its new location, the Board will set aside the BLM decision and remand the case for resurvey and reconfirmation of the legislative approval of the claim in its original location.

Hermann T. Kroener, 124 IBLA 57 (Aug. 27, 1992)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1988), provided for legislative approval, subject to valid existing rights, of all Alaska Native allotment applications, with certain caveats, one of which was that the section applied only to applications which described land that was unreserved on Dec. 13, 1968. Where land described in a Native allotment application was reserved on Dec. 13, 1968, legislative approval does not apply.

Where the Government contests a Native allotment application, the Native is required to make satisfactory proof, by a preponderance of the evidence, of substantially continuous use and occupancy of the claimed land for a minimum of 5 years. Such use and occupancy contemplates substantial actual possession and use of the land, at least potentially exclusive of others.

Where the evidence presented at a hearing on a Government contest of a Native allotment application in support of the Native's position that he utilized the claimed lands for fishing and hunting in accordance with the customs of the Natives of the area fails to show substantial actual possession and use of the claimed land, the application is properly rejected.

Even if the evidence presented at a hearing on a Government contest of a Native allotment application could be considered as establishing substantial actual possession and use of the available claimed lands, the application will be rejected where the evidence shows that the Native's use of the land was not potentially exclusive of others because he was one of many Natives who utilized the claimed lands for subsistence activities during the period of claimed use and occupancy and there was not evidence that the applicant had recognized authority over the land during that period.

United States v. Zack Rastopsoff (Deceased), Ayakulik, Inc. (Intervenor/Appellant), 124 IBLA 294 (Nov. 4, 1992)

A Native allotment application deemed pending before the Department on Dec. 18, 1971, because it was rejected in 1927 without affording the applicant's heirs an opportunity for a hearing on a disputed question of fact underlying the rejection was not legislatively approved by sec. 905(a) of ANILCA but instead must be adjudicated pursuant to the Act of May 17, 1906 as amended, because the land was validly selected by the

State before Dec. 18, 1971, and was not withdrawn pursuant to sec. 11(a)(1)(A) of ANCSA.

Ellen Frank, 124 IBLA 349 (Dec. 2, 1992)

An ALJ's conclusion that a Native allotment applicant commenced qualifying use and occupancy of the claimed land prior to the effective date of a withdrawal of the land will be upheld on appeal where the conclusion is based upon a review of all the evidence presented at a hearing and the Judge's resolution of disputed facts is necessarily influenced by his consideration of the credibility of the witnesses testifying at the hearing.

A Government contest of a Native allotment application based on a charge of failure to use and occupy the land to the potential exclusion of others is properly dismissed where the Native shows by a preponderance of the evidence, presented through his testimony and that of numerous witnesses, that his use and occupancy of various improvements on the site for fall hunting purposes were, in fact, at least potentially exclusive of others.

United States v. Edward N. O'Leary, 125 IBLA 235 (Feb. 11, 1993)

Under sec. 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), any individual objecting to the approval of a Native allotment application must file a protest within the period established by ANILCA and must allege that the land described in the application is the situs of improvements claimed by the person filing the protest. Where an individual files a protest after the statutory deadline, the protest is properly dismissed.

Marshall McManus, 126 IBLA 168 (May 11, 1993)

NATIVE ALLOTMENTS--Continued

The timely filing of a valid protest against a Native allotment under 43 U.S.C. § 1634(a)(5)(B) (1988), is sufficient to prevent legislative approval, even where that protest is subsequently withdrawn. A BLM decision denying the State's protest on the ground that no trail exists that conflicts with the Native allotment will not be affirmed where the record reveals that an easement has been granted for a trail and that the easement probably crosses the allotment.

Where a Native allotment applicant never objected during her life to BLM's placement of her allotment parcel on the ground, and where her heirs have not subsequently objected, BLM's placement of the parcel will be affirmed on appeal in the absence of irrefragable showing beyond question that the parcel that BLM approved is not the land the applicant intended to claim.

State of Alaska, Heirs of Lucy Charlie, 126 IBLA 204 (May 20, 1993)

To the extent that pending Native allotment applications describe lands previously conveyed out of Federal ownership, these applications were not subject to legislative approval by sec. 905 of ANILCA, 43 U.S.C. § 1634 (1988).

With respect to lands which have been conveyed out of Federal ownership, a decision accepting a Native allotment application as amended is not an adversarial adjudication of entitlement of the applicant to an allotment which is dispositive of the rights of the applicant or adverse parties since DOI lacks jurisdiction to make such a ruling in the absence of legal title. In this context, an appeal by an adverse party is properly dismissed as premature. If the land is reconveyed, any decision adjudicating the amended location will be subject to appeal.

Bay View, Inc., 126 IBLA 281 (June 7, 1993)

NATIVE ALLOTMENTS--Continued

When a Native allotment applicant amends the land description of her allotment application to move the location of the land sought, she has the burden of establishing that the amended description correctly describes the land that she originally intended to claim. BLM may not approve such an amendment without giving notice of the amendment to parties. BLM also may not approve such an amendment without requiring the applicant to demonstrate that the land in the amended description was the land she originally claimed based upon her use and occupancy of it that was potentially exclusive of others.

Alyeska Pipeline Service Co., State of Alaska, 127 IBLA 156 (Aug. 26, 1993)

Sec. 905(b) of ANILCA authorizes the Secretary of the Interior to adjust land descriptions to eliminate conflicts between two Native allotment applications by altering the allotment boundaries to achieve an adjustment that is consistent with prior use of the allotted land. Although the statute encourages Departmental implementation of adjustments proposed by the parties concerned, where they have attempted but failed to resolve their conflicting claims, a hearing will be ordered to resolve the dispute.

Anna S. Moxie, 127 IBLA 175 (Sept. 2, 1993)

Under the authority of sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), the description in a Native allotment application may be amended where it designates land other than that which the applicant intended to claim at the time of the application.

United States v. The Heirs of David F. Berry, 127 IBLA 196 (Sept. 14, 1993)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

A BLM decision to accept a revised Native allotment application covering lands previously conveyed out of Federal ownership lacked finality and consequently was not an appealable action.

State of Alaska, 127 IBLA 276 (Oct. 4, 1993)

In cases where the amount of land originally applied for in a Native allotment application is at issue, the proper standard of proof to be applied is the preponderance of the evidence.

Under sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), a Native allotment application may not be amended to describe land in addition to that described in the original application.

United States v. Heirs of Ambrose Kozevnikoff, 128 IBLA 130 (Dec. 30, 1993)

A Native allotment application that was rejected in 1925 without giving the applicant an opportunity for hearing on a disputed question of fact was properly reinstated in 1980. Because neither the applicant nor his heirs ever amended the application, it was correct to reinstate the 160-acre tract originally claimed although the Department had surveyed a smaller tract in 1921 and though, immediately following reinstatement, the smaller tract was noted on the master title plat.

Forest Service, U.S. Dept. of Agriculture (Heirs of Archie Lawrence), 128 IBLA 393 (Mar. 11, 1994)

The amendment provision of sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), is only available to Alaska Native allotment applicants and may not be used to appropriate land in addition to that originally claimed by a Native allotment applicant.

Acceptance by a Native allotment claimant of half the lands described in her application did not establish a waiver of her claim to the remainder. Since half the allotment described by her application was eliminated administratively without her knowledge or consent her entire application was pending before the Department on

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

Dec. 18, 1971, because the elimination occurred without a hearing on a disputed question of fact underlying the action taken.

Matilda S. Johnson, 129 IBLA 82 (Apr. 1, 1994)

Legislative approval of Native allotment applications granted by sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1988), is subject to specific exceptions and restrictions. One of the restrictions imposed by Congress was the requirement that the applications must describe "land that was unreserved on December 13, 1968." If the land sought was not unreserved on Dec. 13, 1968, the Native allotment application must be adjudicated pursuant to the Native Allotment Act and applicable regulations.

Qualifying use and occupancy must be initiated when the land is open to appropriation under the Native Allotment Act. If it can be shown that qualifying use and occupancy was initiated during that period, the applicant would hold a vested right at the time of a subsequent withdrawal. If no qualifying use and occupancy was initiated prior to withdrawal, the withdrawal will attach, the applicant will gain no vested rights, and subsequent use and occupancy will not satisfy the regulatory requirement.

Evidence of independent use is necessary to satisfy the 43 CFR 2561.0-5(a) requirement that there must be substantial actual possession and use of the land, at least potentially exclusive of others. Adult use of land is assumed to be independent, even though the use is concurrent with other members of the family. No distinction is drawn between use in the company of older family members and use in the company of children. There is no similar assumption that a minor child is exercising independent use of the land when in the company of parents or other adults responsible for the child's welfare. There must be specific proof that the minor child acted independently.

United States v. Sergie Alexanderoff, 129 IBLA 279 (May 20, 1994)

NATIVE ALLOTMENTS--Continued

A Native allotment application rejected because of a land description error was properly reinstated to allow the description to be corrected by heirs of the applicant.

State of Alaska (Heirs of Peter Wise), 130 IBLA 83 (July 27, 1994)

Statutory approval of a Native allotment pursuant to sec. 905 of ANILCA, 43 U.S.C. § 1634 (1988), is subject to valid existing rights, including a prior material site right-of-way issued for mineral lands. A decision declaring such a right-of-way null and void to the extent the lands are embraced in a Native allotment is properly reversed on appeal.

State of Alaska, Dept. of Transportation & Public Facilities, 131 IBLA 121 (Oct. 25, 1994)

STATE SELECTIONS

A State of Alaska selection application which expressly states that it excludes prior claims does not select land described by a Native allotment application previously filed with the Bureau of Land Management, and therefore does not qualify under subsec. 905(a)(4) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(4) (1988), so as to preclude legislative approval of the allotment application under subsec. 905(a)(1), 43 U.S.C. § 1634(a)(1) (1988), and require adjudication under the Native Allotment Act.

State of Alaska, 116 IBLA 301 (Oct. 24, 1990)

Pursuant to sec. 906(f)(2) of ANILCA, 43 U.S.C. § 1635(f)(2) (1988), the State of Alaska may relinquish any selection of land filed under the Alaska Statehood Act prior to tentative approval, except for land conveyed pursuant to subsec. (g). A protest against the relinquishment of such a selection is properly denied where the unrelinquishment portion of the selection is

STATE SELECTIONS--Continued

in conformity with the requirements of pertinent statutes and regulations.

Ed Ellis, 118 IBLA 350 (Mar. 14, 1991)

Pursuant to sec. 906(c) of ANILCA, 43 U.S.C. § 1635(c) (1988), all right, title, and interest of the United States in and to selected lands is deemed to have vested in the State of Alaska as of the date of tentative approval. Subsequent to such a tentative approval, the Secretary of the Interior no longer retains jurisdiction over selected lands and a dispute concerning rights to such lands is not properly before this Department.

The authority to amend conveyancing documents described at 43 U.S.C. § 1746 (1988), and 43 CFR Subpart 1865, does not include authority to amend a tentative approval which legislatively conveyed selected land to the State of Alaska, unless the State requests the amendment or concurs.

Northwest Alaska Pipeline Co. (On Reconsideration III), 9 OHA 143 (Mar. 24, 1992)

A Native allotment application pending before the Department on Dec. 18, 1971, was not legislatively approved under sec. 905(a)(1) of ANILCA where it describes land which was validly selected by the State of Alaska pursuant to the Alaska Statehood Act on or before Dec. 18, 1971. Instead, the application must be adjudicated pursuant to the requirements of the Native Allotment Act.

Heirs of George Titus, 124 IBLA 1 (Aug. 13, 1992)

VALID EXISTING RIGHTS

A Native community association asserting that it used and occupied lands later claimed as a Native allotment must protest the allotment application pursuant to sec. 905(a)(5) of ANILCA in order to have its claim adjudicated. In the absence of a timely protest, legislative approval of the allotment application occurs, and the village selection application, through which the

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

VALID EXISTING RIGHTS--Continued

Native community association claims reconveyance rights, must be rejected insofar as it conflicts with the allotment.

Stebbins Community Assn, 118 IBLA 334 (Mar. 12, 1991)

A Native allotment application pending before the Department on Dec. 18, 1971, was not legislatively approved under sec. 905(a)(1) of ANILCA where it describes land which was validly selected by the State of Alaska pursuant to the Alaska Statehood Act on or before Dec. 18, 1971. Instead, the application must be adjudicated pursuant to the requirements of the Native Allotment Act.

Heirs of George Titus, 124 IBLA 1 (Aug. 13, 1992)

ALASKA NATIVE CLAIMS SETTLEMENT ACT

GENERALLY

Unpatented mining claims located on land conveyed to Doyon, Ltd., an Alaska Native corporation, pursuant to provision of sec. 22 of ANCSA, may no longer be administered by the Department, because the filing and recording provisions of sec. 314 of FLPMA apply only to public lands of the United States and do not permit continued administration of lands conveyed out of Federal ownership.

Margaret L. Mespelt & Theodore J. Almasy, 118 IBLA 60 (Feb. 21, 1991)

Sec. 1410 of ANILCA authorizes the Secretary to withdraw lands within units of national parks and wildlife refuges to satisfy village corporation ANCSA entitlements if the land had been withdrawn during the original ANCSA selection period for selection by specific village corporation. Because lands within national parks in existence on Dec. 18, 1971 (the date

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

GENERALLY--Continued

of ANCSA's enactment) were excluded from the original withdrawals, such park lands may not be withdrawn now. The Secretary may withdraw park lands added to the National Park system after ANCSA's enactment.

Authority of the Secretary to Withdraw Land Within National Parks & Wildlife Refuges for Selection by Underselected Alaska Native Village Corporations, M-36972 (Oct. 16, 1991) 100 I.D. 163

ADMINISTRATIVE PROCEDURE

Decision to Issue Conveyance

A party filing a notice of appeal of a decision to convey land under the Alaska Native Claims Settlement Act is required to file a statement of standing within 30 days of filing a notice of appeal. If a statement of standing is not filed, the appeal is subject to summary dismissal. Discretion to dismiss an appeal for failure to timely file a statement of standing will not be exercised when the property interest on which a party claims standing is identified in the statement of reasons and there is no showing that the procedural deficiency has prejudiced an adverse party.

In relation to a decision to convey land under sec. 12 of ANCSA, 43 U.S.C. § 1611 (1988), the phrase "land affected by the decision" in 43 CFR 4.410(b) refers to the land to be conveyed. Land which is near or adjacent to the land to be conveyed is not "land affected by the decision." Because the reason for reserving a public easement under subsec. 17(b)(1) of ANCSA is to provide access to lands not conveyed, a different rule applies to decisions concerning easements.

Robert A. Perkins, 119 IBLA 375 (June 28, 1991)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

APPEALS

Standing

A party filing a notice of appeal of a decision to convey land under the Alaska Native Claims Settlement Act is required to file a statement of standing within 30 days of filing a notice of appeal. If a statement of standing is not filed, the appeal is subject to summary dismissal. Discretion to dismiss an appeal for failure to timely file a statement of standing will not be exercised when the property interest on which a party claims standing is identified in the statement of reasons and there is no showing that the procedural deficiency has prejudiced an adverse party.

In relation to a decision to convey land under sec. 12 of ANCSA, 43 U.S.C. § 1611 (1988), the phrase "land affected by the decision" in 43 CFR 4.410(b) refers to the land to be conveyed. Land which is near or adjacent to the land to be conveyed is not "land affected by the decision." Because the reason for reserving a public easement under subsec. 17(b)(1) of ANCSA is to provide access to lands not conveyed, a different rule applies to decisions concerning easements.

Robert A. Perkins, 119 IBLA 375 (June 28, 1991)

CONVEYANCES

Cemetery Sites and Historical Places

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. A cemetery site application is properly rejected under 43 CFR 2653.5 when there is no evidence that the site is the burial place of one or more Natives.

A party challenging BLM's rejection of a cemetery site selection application under sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Cemetery Sites and Historical Places--Continued

necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 115 IBLA 249 (July 19, 1990)

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. BLM properly rejects a selection application for a historical place when the record fails to establish that the site has historic significance for Native history or culture and the site does not meet the criteria set forth at 43 CFR 2653.5.

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 115 IBLA 257 (July 19, 1990)

Sec. 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1988), provides the Secretary may withdraw and convey fee title to existing cemetery sites and historical places to the appropriate regional corporation. If a regional corporation files an application under sec. 14(h)(1), the Secretary may give favorable consideration to the application provided that the Secretary determines that the criteria in the regulations are met. 43 CFR 2653.5(a). For a historical place, this means that it must be a distinguishable tract of land or area where a significant Native historical event

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Cemetery Sites and Historical Places--Continued

occurred or which was subject to sustained Native historical activity.

When the evidence of record about a potential historical place is inconclusive, but the evidence offers sufficient indications of possible sustained Native historical activity, the rejection of an application for a historical place may be set aside and the case remanded for further investigation.

Sealaska Corp., 126 IBLA 383 (July 6, 1993)

Sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), provides the Secretary may withdraw and convey fee title to existing cemetery sites and historical places to the appropriate regional corporation. If a regional corporation files an application under sec. 14(h)(1), the Secretary may give favorable consideration to the application provided that the Secretary determines that the criteria in the regulations are met. 43 CFR 2653.5(a). For a historical place, this means that it must be a distinguishable tract of land or area where a significant Native historical event occurred or which was subject to sustained Native historical activity.

BLM properly rejects a selection application for a historical place under sec. 14(h)(1) of ANCSA when the record fails to establish that the site has historic significance for Native history or culture and the site does not meet the criteria set forth at 43 CFR 2653.5.

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of ANCSA bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 127 IBLA 22 (July 15, 1993)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Cemetery Sites and Historical Places--Continued

Sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. BLM properly grants an application for a historical place when the record establishes that the site is a distinguishable tract of land or area upon which occurred a significant Native historical event, which is importantly associated with Native historical cultural events or persons, and meets the criteria set forth at 43 CFR 2653.5.

Sealaska Corp., 127 IBLA 40 (July 15, 1993)

Sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. BLM properly rejects a selection application for a historical place when the site does not meet the criteria set forth at 43 CFR 2653.5.

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 127 IBLA 59 (July 20, 1993)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Easements

In relation to a decision to convey land under sec. 12 of ANCSA, 43 U.S.C. § 1611 (1988), the phrase "land affected by the decision" in 43 CFR 4.410(b) refers to the land to be conveyed. Land which is near or adjacent to the land to be conveyed is not "land affected by the decision." Because the reason for reserving a public easement under subsec. 17(b)(1) of ANCSA is to provide access to lands not conveyed, a different rule applies to decisions concerning easements.

Robert A. Perkins, 119 IBLA 375 (June 28, 1991)

Interim Conveyance

Where Congress has provided in 16 U.S.C. § 818 (1982), that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to 43 U.S.C. § 1610 (1982), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

North Coast Development Co., 115 IBLA 301 (Aug. 6, 1990)

Native Groups

A Native group locality is the area where houses and other structures have been constructed, amenities are present, and daily life takes place. The term refers to not only the land on which group members live but also land in the same area on which others reside. It must encompass the greater area in which other residents live in relative proximity, as compared with the population density of lands beyond the area so designated.

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Native Groups--Continued

BIA improperly determines a Native group locality when it identifies the locality as the smallest legally describable area which includes the member's residences and other improvements.

The fact that land is withdrawn and may be unavailable for conveyance to a Native group is unrelated to the factual determination of the group's locality.

Absent evidence that anyone lived in an area on or about Apr. 1, 1970, it cannot be part of the area in which residents lived in relative proximity for the purpose of determining a Native group's locality.

A member of a Native group must actually reside in the group's locality on Apr. 1, 1970, to be counted as a resident. The exception provided in 43 CFR 2653.6(a)(4) for children "who are temporarily elsewhere for purposes of education" does not require that a child who is attending school be under a particular age, but that the child be the son or daughter of someone residing in and maintaining a home within the locality so that the child may be counted as a member of the parent's household.

Non-Natives are not eligible for enrollment in a Native group and may not be counted as members of a group for purposes of determining whether group members constitute a majority of the residents of the group's locality.

Minchumina Homeowners Ass'n et al., State of Alaska (Intervenor) v. Minchumina Natives, Inc. & The Bureau of Indian Affairs, 122 IBLA 375 (Apr. 2, 1992)

Reconveyances

A Native community association asserting that it used and occupied lands later claimed as a Native allotment must protest the allotment application pursuant to sec. 905(a)(5) of ANILCA in order to have its claim adjudicated. In the absence of a timely protest, legislative approval of the allotment application occurs, and the village selection application, through which the Native community association claims reconveyance rights,

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Reconveyances--Continued

must be rejected insofar as it conflicts with the allotment.

Stebbins Community Assn, 118 IBLA 334 (Mar. 12, 1991)

Regional Conveyances

Under sec. 22(c) of ANCSA, 43 U.S.C. § 1621(c) (1988), BLM may convey land that is subject to unpatented mining claims located prior to Aug. 31, 1971, to Regional Native Corporations.

John B. Stone, 129 IBLA 179 (Apr. 22, 1994)

Valid Existing Rights

Third-Party Interests

Under sec. 22(c) of ANCSA, 43 U.S.C. § 1621(c) (1988), BLM may convey land that is subject to unpatented mining claims located prior to Aug. 31, 1971, to Regional Native Corporations.

John B. Stone, 129 IBLA 179 (Apr. 22, 1994)

Under sec. 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1988), which provides that "[w]here, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement * * * has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him," BLM must issue coal preference right leases before granting regional selection applications covering the same lands.

Morgan Coal Co., 129 IBLA 386 (June 20, 1994)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

DEFINITIONS

Generally

A Native group locality is the area where houses and other structures have been constructed, amenities are present, and daily life takes place. The term refers to not only the land on which group members live but also land in the same area on which others reside. It must encompass the greater area in which other residents live in relative proximity, as compared with the population density of lands beyond the area so designated.

BIA improperly determines a Native group locality when it identifies the locality as the smallest legally describable area which includes the member's residences and other improvements.

Non-Natives are not eligible for enrollment in a Native group and may not be counted as members of a group for purposes of determining whether group members constitute a majority of the residents of the group's locality.

Minchumina Homeowners Ass'n et al., State of Alaska (Intervenor) v. Minchumina Natives, Inc. & The Bureau of Indian Affairs, 122 IBLA 375 (Apr. 2, 1992)

Public lands

"Public lands" available for selection by a Native village corporation under the Alaska Native Claims Settlement Act do not include the smallest practicable tract of land actually used by a Federal agency in connection with the administration of an installation or facility. 43 U.S.C. § 1602(e) (1982). The excepted land must be in actual use on Dec. 18, 1971, and throughout the selection period. Pursuant to 43 CFR 2655.2(b)(3)(v), a tract of land used by a non-Governmental entity is properly excluded from conveyance if the use of the land has a direct, necessary, and substantial connection to the purpose of the holding agency and the lands are not used primarily to derive revenue. A decision to exclude a tract may be reversed where it appears from the record

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

DEFINITIONS--Continued

Public Lands--Continued

that use of the tract was no longer required by the purposes of the Federal agency.

Eyak Corp., 113 IBLA 334 (Mar. 20, 1990)

EASEMENTS

Access

The State of Alaska has an interest in assuring that its citizens will have access to lands and resources owned by it, its political subdivisions, or the United States, and to public bodies of water regularly used for transportation purposes. A protest presenting colorable allegations that the State's interest will be adversely affected by a decision is sufficient to give standing to appeal dismissal of a protest. The State has a right to appeal the dismissal of a protest for procedural reasons.

BLM has authority to review the legal sufficiency of a protest filed by the State of Alaska under subsec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1988), and to dismiss a protest which it finds to be insufficient. Disagreement with facts asserted to a protest is not a proper basis for dismissal.

State of Alaska (Harvey Pootoogooluk), 121 IBLA 363 (Dec. 19, 1991)

Decision to Reserve

In relation to a decision to convey land under sec. 12 of ANCSA, 43 U.S.C. § 1611 (1988), the phrase "land affected by the decision" in 43 CFR 4.410(b) refers to the land to be conveyed. Land which is near or adjacent to the land to be conveyed is not "land affected by the decision." Because the reason for reserving a public easement under subsec. 17(b)(1) of ANCSA is to provide access to lands not conveyed, a different rule applies to decisions concerning easements.

Robert A. Perkins, 119 IBLA 375 (June 28, 1991)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

NATIVE LAND SELECTIONS

Selection Limitations

"Public lands" available for selection by a Native village corporation under the Alaska Native Claims Settlement Act do not include the smallest practicable tract of land actually used by a Federal agency in connection with the administration of an installation or facility. 43 U.S.C. § 1602(e) (1982). The excepted land must be in actual use on Dec. 18, 1971, and throughout the selection period. Pursuant to 43 CFR 2655.2(b)(3)(v), a tract of land used by a non-Governmental entity is properly excluded from conveyance if the use of the land has a direct, necessary, and substantial connection to the purpose of the holding agency and the lands are not used primarily to derive revenue. A decision to exclude a tract may be reversed where it appears from the record that use of the tract was no longer required by the purposes of the Federal agency.

Eyak Corp., 113 IBLA 334 (Mar. 20, 1990)

State-Selected Lands

A State of Alaska selection application which expressly states that it excludes prior claims does not select land described by a Native allotment application previously filed with the Bureau of Land Management, and therefore does not qualify under subsec. 905(a)(4) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(4) (1988), so as to preclude legislative approval of the allotment application under subsec. 905(a)(1), 43 U.S.C. § 1634(a)(1) (1988), and require adjudication under the Native Allotment Act.

State of Alaska, 116 IBLA 301 (Oct. 24, 1990)

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

NATIVE LAND SELECTIONS--Continued

State-Selected Lands--Continued

law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

Vern T. Weiss et al., 128 IBLA 119 (Dec. 22, 1993)

Village Selections

The Department of the Interior is part of the Executive branch of Government and is duty bound to carry out instructions of Congress enacted as law. The Board of Land Appeals has no authority to declare Acts of Congress invalid, unconstitutional, without authority, or otherwise improper. The Board is bound by the provisions of the "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area" which have become law by virtue of congressional ratification.

Seldovia Native Ass'n, Inc., 113 IBLA 218 (Feb. 27, 1990)

Where Congress has provided in 16 U.S.C. § 818 (1982), that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to 43 U.S.C. § 1610 (1982), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

North Coast Development Co., 115 IBLA 301 (Aug. 6, 1990)

Conveyance of lands previously withdrawn under the authority of sec. 24 of the Federal Power Act, 16 U.S.C. § 818 (198), to a Native village pursuant to a selection made under the provisions provided by sec. 24 (1988),

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

NATIVE LAND SELECTIONS--Continued

Village Selections--Continued

was subject to reservations provided by sec. 24 of the Federal Power Act.

"High-water mark." The "high-water mark" of a body of water is the line which the water impresses on the soil by covering it for sufficient periods to deprive it of vegetation. Where a reservoir is excepted from a conveyance of the surrounding lands by reference to its high-water mark, the boundary of the lands conveyed is identifiable by observing multiple factors indicating the extent of the normal impoundment of water.

Alaska Power Administration, 119 IBLA 301 (June 11, 1991)

The Secretary has determined that lands involved in powersites were withdrawn by sec. 11(a)(1) of ANSCA, 43 U.S.C. § 1610(a)(1) (1988), and are selectable by Native corporations without the reservation provided under sec. 24 of the Federal Power Act, 16 U.S.C. § 818 (1988). This determination applies to lands within previously opened powersites and to land remaining in powersite withdrawals when ANCSA was enacted.

Alaska Power Administration (On Reconsideration), 123 IBLA 109 (May 18, 1992)

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

Vern T. Weiss et al., 128 IBLA 119 (Dec. 22, 1993)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

WITHDRAWALS AND RESERVATIONS

Generally

The fact that land is withdrawn and may be unavailable for conveyance to a Native group is unrelated to the factual determination of the group's locality.

Minchumina Homeowners Ass'n et al., State of Alaska (Intervenor) v. Minchumina Natives, Inc. & The Bureau of Indian Affairs, 122 IBLA 375 (Apr. 2, 1992)

Withdrawals for Native Selection

Generally

Where Congress has provided in 16 U.S.C. § 818 (1982), that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to 43 U.S.C. § 1610 (1982), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

North Coast Development Co., 115 IBLA 301 (Aug. 6, 1990)

State-Selected Lands

The Board will affirm BLM's rejection of State selection applications filed for land which, at the time of selection, was withdrawn by a public land order from State selection pursuant to sec. 17(d)(1) of the Alaska Native Claims Settlement Act, where the question of the validity of the order was determined as a result of the dismissal with prejudice of a prior judicial proceeding in which the order was expressly challenged, and as a result of an agreement between the appellant and the United States not to challenge the order in the future.

State of Alaska, 113 IBLA 86 (Feb. 13, 1990)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

WITHDRAWALS AND RESERVATIONS--Continued

Withdrawals for Native Selection--Continued

State-Selected Lands--Continued

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

Vern T. Weiss et al., 128 IBLA 119 (Dec. 22, 1993)

AMERICAN INDIAN RELIGIOUS FREEDOM ACT

Where the Montana State Historic Preservation Office is aware that an area may possess traditional cultural values, owing to the presence of Native American fasting and vision questing sites there, but nevertheless concludes that no properties eligible for inclusion on the National Register of Historic Places were identified in the area, BLM is not required to comply with sec. 106 of the National Historic Preservation Act. Rather, it is adequate for BLM to address effects of gold mining on cultural values through its compliance with the American Indian Religious Freedom Act. BLM complies with the latter Act where it actively solicits the opinions of Native Americans, both individually and in tribal groups, and considers reasonable mitigating measures.

Red Thunder, Inc., et al., 124 IBLA 267 (Nov. 3, 1992)

ANIMAL DAMAGE CONTROL

Even though an appellant did not actively participate in the process leading to the issuance of the BLM ADC decision, where the appellant expressly requested leave to participate in that process and where BLM led appellant to believe that it would have an opportunity to do so, appellant was a "party to the case" as

ANIMAL DAMAGE CONTROL--Continued

described in 43 CFR 4.410(a). Further, where the appellant makes a specific, colorable allegation in its notice of appeal that its members use an area affected by BLM's ADC plan, appellant is "adversely affected" within the meaning of 43 CFR 4.410(a). As both elements of that regulation are met, appellant has standing to appeal.

Where BLM fails to submit an adequate case record in support of its record of decision authorizing ADC action, its decision is properly set aside and remanded.

Where BLM fails to establish the need for an ADC program and where the record demonstrates only an extremely low level of reported (although not confirmed) losses (four sheep lost to coyotes) from BLM lands, BLM's decision is properly set aside and remanded.

Where BLM fails to accommodate a third party's desire to participate in its decisionmaking process concerning ADC, and where BLM issues on Feb. 25, 1993, a decision authorizing ADC commencing on Oct. 1, 1992, BLM's decision may be properly set aside and remanded to allow third parties to participate to ensure that BLM's ADC decisions predate the authorized ADC activity.

Predator Project, 127 IBLA 50 (July 20, 1993)

APPEALS
(See also Administrative Procedure, Contracts, Grazing Permits & Licenses, Indian Probate, Indians, Rules of Practice, Torts, Uniform Relocation Assistance & Real Property Acquisition Policies Act of 1970)

GENERALLY

A notice of appeal from a decision of a BIA official that is not timely filed will be dismissed.

Matilda Arviso et al. v. Ass't Navajo Area Director, Bureau of Indian Affairs, 18 IBIA 118 (Jan. 18, 1990)

Perry Murdock v. Acting Phoenix Area Director, Bureau of Indian Affairs, 22 IBIA 130 (June 18, 1992)

APPEALS--Continued

GENERALLY--Continued

When a hearing is held pursuant to 43 CFR 3563.4(c), affording a sodium preference right lease applicant an opportunity to demonstrate entitlement, the applicant has both the burden of going forward and the ultimate burden of proof of showing that a valuable sodium deposit has been discovered. If there is an appeal from the Administrative Law Judge decision following the hearing, the appealing party has the burden of showing error in the Administrative Law Judge's decision.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

A notice of appeal from a decision of a Bureau of Indian Affairs official that is not timely filed will be dismissed.

Under the circumstances of this case, the time for filing a notice of appeal was tolled during the time the Bureau of Indian Affairs Superintendent and the party adversely affected by the Superintendent's decision were engaged in discussions pursuant to a request to rescind the decision.

New Mexico Highway & Transportation Dept. v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 165 (Feb. 23, 1990)

As a general rule, an administrative decision is properly set aside and remanded where it is not supported by a case record providing the Board with the evidence necessary for an objective, independent review of the basis for the decision.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)
97 I.D. 74

APPEALS--Continued

GENERALLY--Continued

Regulations promulgated by the Bureau of Indian Affairs at 25 CFR 2.10 (1988) establish a 30-day period for filing a notice of appeal.

Badger Oil Corp. & Ute Indian Tribe of the Uintah & Ouray Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 174 (Mar. 1, 1990)

This Department will not entertain review of an appeal from a determination that land located by a mineral claimant was not Federally owned where the appeal is made under circumstances indicating that an opinion is sought to facilitate issuance of a lease to the same land from the state and where appellant fails to point to error in the BLM decision appealed from.

George McDevitt, 113 IBLA 287 (Mar. 12, 1990)

Notification given to a lessee by the Bureau of Indian Affairs that a lease has expired by its own terms is an appealable action within the meaning of 25 CFR 2.2.

Bekco Oil & Gas Corp. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 202 (Mar. 26, 1990)

An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. However, the Board does not automatically dismiss every case where the action sought to be prevented by the filing of an appeal has taken place; we have recognized that dismissal of a particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal of the appeal would tend to preclude the issue from ever being reviewed. Even assuming an issue involving a timber sale could be recurring, where it is not evasive of review, a motion to dismiss for mootness may be granted.

In re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51 (Apr. 6, 1990)

APPEALS--Continued

GENERALLY--Continued

Where a decision by BLM cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest is delivered to the last address of record of the holder of the interest, and where no appeal is filed by him, BLM's decision cancelling his interest becomes final for him.

Where the record fails to establish that a copy of a BLM decision cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest was received by the interest holder, by a qualified representative of her estate, or by her heirs, a failure to appeal does not render BLM's decision final.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)
97 I.D. 137

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within 10 business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter.

A Record of Decision and Finding of No Significant Impact based on an environmental record of review or an environmental assessment prepared in response to the filing of an application for a permit to drill under 43 CFR 3162.3-1 is first subject to administrative review by a State Director of BLM in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director may appeal that decision to the Interior Board of Land Appeals.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

APPEALS--Continued

GENERALLY--Continued

An appeal brought by a person who does not qualify to practice under 43 CFR 1.3 is subject to dismissal. A person filing an appeal has the responsibility of showing that he is qualified under the regulation to represent the appellant.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)

A notice of appeal from an action or decision of a Bureau of Indian Affairs official that is not timely filed with the Board of Indian Affairs will be dismissed for lack of jurisdiction in accordance with 43 CFR 4.332(a).

Louis Sequoyah Locust v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 286 (May 8, 1990)

A document that is styled as a "protest" is nevertheless a notice of appeal where the person filing it has been a party in a dispute and challenges BLM's decision to repossess a wild horse.

In keeping with the principle that the filing of a notice of appeal vests exclusive authority over the matter under appeal with the Board of Land Appeals, BLM must forward the case (as represented by BLM's case file) to the Board within no more than 10 working days so that it may exercise its authority to resolve the dispute.

Thana Conk, 114 IBLA 263 (May 9, 1990)

When an appellant attempts to remedy the defects which led to a BLM decision rejecting a nationwide oil and gas geophysical exploration bond rider by providing additional information on appeal, the Board may affirm the rejection decision but remand the matter to BLM for adjudication of the acceptability of the rider in light of the additional information.

Frontier Exploration, Inc., Frontier Geophysical Co., 114 IBLA 280 (May 9, 1990)

APPEALS--Continued

GENERALLY--Continued

Unlike the failure to timely file a notice of appeal, failure to timely file a statement of reasons does not deprive the Board of jurisdiction. Under 43 CFR 4.402, failure to file a statement of reasons within the required time makes the appeal subject to summary dismissal. The Board avoids procedural dismissals when there has been no showing that the delay in filing the statement of reasons prejudiced the adverse party.

Standing to appeal requires that an appellant be a party to the case adversely affected by the decision appealed. A cultural resources permittee is not a party to a case with standing to appeal a decision adjudicating a right-of-way holder's compliance with a stipulation to the right-of-way requiring mitigation of impacts to cultural resources.

Specific procedures for review of adjudication of a cultural resource use permit are found in the regulations at 43 CFR Part 7, Subpart B. These provisions give the permittee a right to request a conference to discuss a disputed decision relating to issuance, denial, modification, suspension, or revocation of a permit or the inclusion of specific terms and conditions in a permit. 43 CFR 7.36(a). Such decisions are properly distinguished from a decision adjudicating a right-of-way holder's compliance with a stipulation requiring mitigation of damage to cultural resources and denial of a conference in the latter context entails no reversible error.

James C. Mackey, 114 IBLA 308 (May 14, 1990)

A decision by a BLM officer which does not fall within any of the exceptions enumerated in 43 CFR 4.410 or provided by other duly promulgated regulation is subject to appeal to the Board of Land Appeals and a BLM official is without authority to state otherwise.

An appeal from a decision approving geophysical exploration on land within and adjacent to a wilderness study area will not be dismissed as moot even though the challenged action had occurred, where issues raised by the appeal are capable of repetition, and where failure

APPEALS--Continued

GENERALLY--Continued

to decide the appeal would cause substantial issues to evade review.

BLM is required to transmit the relevant case file within no more than 10 business days after receipt of a notice of appeal.

When a protest against a notice of intent to conduct geophysical operations has been filed or an appeal has been filed from a decision to allow such operations, BLM is obliged to inform the party filing the notice of intent that the notice cannot be processed until the protest and any appeal therefrom has been resolved.

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. However, the Board does not automatically dismiss every case where the action sought to be prevented by the filing of an appeal has taken place; we have recognized that dismissal of a particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal of the appeal would tend to preclude the issue from ever being reviewed.

San Juan Citizens Alliance, Western Colorado Congress, 114 IBLA 366 (May 24, 1990)

In an appeal from a decision by an Administrative Law Judge on motion for summary judgment after argument by the parties, the appellant has the burden of showing the existence of an issue of material fact which might alter the outcome of the proceedings or an error of law in the decision.

Pete Stamatakis v. Bureau of Land Management, 115 IBLA 69 (June 15, 1990)

APPEALS--Continued

GENERALLY--Continued

While during the pendency of an appeal from a decision of the Minerals Management Service dismissing an appeal as untimely, the regulations are amended to provide that a delay in filing a notice of appeal to the Director, Minerals Management Service, will be waived if the notice of appeal is filed not later than 10 days after it was required to be filed and it is determined that the notice of appeal was transmitted to the proper office before the end of the time required for filing by 30 CFR 290.3(a)(1), the Board may, in the absence of intervening rights of others or prejudice to the interests of the United States, apply the amendment to pending cases.

Conoco, Inc., 115 IBLA 105 (June 27, 1990)

The regulations at 43 CFR 3162.1(a) and 43 CFR 3161.2 reflect BLM's broad authority to issue orders governing operations at lease sites. Challenges to the scope of BLM's authority and the manner in which it is exercised are properly raised by a party adversely affected by appeal to the Board of Land Appeals, after administrative review by the State Director.

Luff Exploration Co., 115 IBLA 134 (June 28, 1990)

Associations of users of the California Desert Conservation Area who have participated in decisionmaking have standing to appeal a decision establishing motor vehicle travel routes in and around the Afton Canyon area of critical environmental concern.

High Desert Multiple-Use Coalition, Inc., California Assn of 4WD Clubs, Inc., California Off-Road Vehicle Assn, Inc., 116 IBLA 47 (Sept. 5, 1990)

Pursuant to 43 CFR Subpart 4160, a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed

APPEALS--Continued

GENERALLY--Continued

decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

An appeal from a decision denying an application for a grazing permit will not be dismissed as moot even though the relevant grazing season has passed, where issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan first approved in writing or prescribed by the authorized officer, as required by regulation 43 CFR 3152.3-4(a). Where the record establishes that the Secretary's technical experts have evaluated unapproved plugging and abandonment work performed by an operator and have found such work deficient, the Secretary is entitled to rely on their professional opinion, absent a showing of error by a preponderance of the evidence.

Daniel C. Wychgram, 116 IBLA 89 (Sept. 17, 1990)

Provision of the Department of the Interior and Related Agencies Appropriations Act, 1989, 102 Stat. 1774 (Sept. 27, 1988), restricting "judicial review" to "particular activities" does not affect the authority of the Board of Land Appeals to consider timber sale appeals.

An appeal from a decision denying a protest against a timber sale will not be dismissed as moot even though the protested action has occurred, where issues raised by the appeal are capable of repetition and where failure to decide the appeal would cause substantial issues to evade review.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)

APPEALS--Continued

GENERALLY--Continued

If, during the course of an appeal to the Board of Indian Appeals, the Bureau of Indian Affairs determines that the decision on appeal was incorrect, it can: (1) request that the decision be vacated and the matter remanded in order to grant the relief the appellant requests, (2) confess error and ask the Board to reverse the decision, or (3) enter into a settlement with the appellant. Each of these actions are taken through the filing of an appropriate document with the Board.

Bernadette L. Raymond v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 41 (Oct. 25, 1990)

The Board has discretion not to dismiss an appeal for failure to serve copies of appeal documents on an adverse party, as the regulations state merely that such failure will "subject the appeal to dismissal." In the absence of a showing of prejudice on the adverse party, a motion to dismiss for failure to serve is properly denied.

Even though an appellant corporation is not incorporated until after the date of issuance by BLM of the decision it seeks to appeal, its appeal is not properly dismissed for lack of standing if it appears (1) that the appellant corporation succeeded to the interests of an entity that participated in the decisionmaking process and, thus, became a party to the case, and (2) that both the appellant corporation and the earlier entity are adversely affected by BLM's decision.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)
97 I.D. 263

The Board of Indian Appeals is not required to consider issues and arguments that are raised for the first time on appeal.

Bernell Kombol, dba Grass Mountain Logging Co. v. Acting Ass't Portland Area Director (Economic Development), Bureau of Indian Affairs, 19 IBIA 123 (Dec. 26, 1990)

APPEALS--Continued

GENERALLY--Continued

The interpretation announced by MMS in its Procedure Paper concerning valuation of NGLP did not constitute a sudden change in policy such that its application violated appellant's due process rights and was arbitrary and capricious.

Phillips Petroleum Co., 117 IBLA 255 (Jan. 10, 1991)

Where a State of Alaska protest against a Native allotment under sec. 905 of the Alaska National Interest Lands Conservation Act was granted in 1982 and, as a result, the allotment was adjudicated pursuant to the Alaska Native Allotment Act of 1906, no further adjudication of the allotment was required. In the absence of a timely appeal of the decision approving the allotment, the doctrine of administrative finality precludes review of the allotment on appeal from a subsequent decision.

State of Alaska (Henry J. Ekada), 117 IBLA 373 (Feb. 7, 1991)

Duly promulgated Departmental regulations provide parties to an Indian probate proceeding with a right to appeal to the Board of Indian Appeals. An Indian probate Administrative Law Judge lacks authority to restrict or cut off that right of appeal by saying that his or her orders are final.

Estate of Henry Houle, 19 IBIA 222 (Feb. 12, 1991)

An appeal may properly be dismissed as moot where the Board can grant no further relief because of events occurring subsequent to the appeal.

Animal Protection Institute of America, 118 IBLA 20 (Feb. 15, 1991)

APPEALS--Continued

GENERALLY--Continued

Where BLM issues a single multiple-use decision regarding both adjustment of livestock grazing privileges, which has been appealed to an ALJ pursuant to 43 CFR 4.470, and wild horse removal, which has been appealed to the Board under 43 CFR 4770.3, the wild horse appeal may properly be referred to the ALJ to the extent it involves factual issues for hearing and consideration together with the grazing appeal.

Animal Protection Institute of America, Roy Shurtz, 118 IBLA 345 (Mar. 13, 1991)

An appeal is properly dismissed as moot if, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant and no reasonable expectation or demonstrated probability that the same controversy will again occur involving the same complaining party. Where an appeal was taken in reliance on a provision of law appearing in an annual appropriations act prohibiting export of unprocessed timber from Federal lands, but the provision appearing in the appropriations act was later replaced by a more detailed statute, the probability the same controversy will be repeated is slight.

Oregon Cedar Products Co., 119 IBLA 89 (Apr. 9, 1991)

An appeal brought by a person who has not shown that he is qualified under 43 CFR 1.3 to represent the party issued and adversely affected by a trespass notice is properly dismissed.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

The existence of a BLM decision, adverse to a party to a case, is necessary to provide standing to appeal to the Board of Land Appeals under 43 CFR 4.410(a). An appealable decision takes or prohibits some action. A letter restating and summarizing Departmental policy that was put into effect by prior planning documents is not an appealable decision. An appeal from such a letter will be dismissed.

Joe Trow, 119 IBLA 388 (July 3, 1991)

APPEALS--Continued

GENERALLY--Continued

When a Bureau of Indian Affairs Area Director fails to issue a decision in a matter appealed to him, the Superintendent's decision cannot properly be said to be "final" for the Department of the Interior.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board of Land Appeals). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with the Board, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

When the Board affirms a BLM decision dismissing a protest challenging the validity of a Native allotment application because the protest was not filed within 180 days after the effective date of ANILCA, and the Native allotment is legislatively approved pursuant to sec. 905(a)(1) of ANILCA, the doctrine of administrative finality precludes a subsequent appeal challenging the validity of the Native allotment when the decision appealed from was issued to conform the Native allotment to BLM's survey of the allotment.

Thelma M. Eckert, 120 IBLA 367 (Sept. 18, 1991)

The Board of Indian Appeals lacks jurisdiction to review decisions rendered by the Ass't Secretary--Indian Affairs except when those decisions are specifically referred to it by the Secretary or the Ass't Secretary, or when a right of review is established in regulations.

The Board of Indian Appeals is not required to consider issues and arguments that are raised for the first time on appeal.

When the parties in a case before the Board of Indian Appeals are identical to those in a case decided by the Ass't Secretary--Indian Affairs, the case raises the same issues, and the issues arise from the same transaction, the Board, as a matter of comity, will defer to the Ass't Secretary's decision because the

APPEALS--Continued

GENERALLY--Continued

appellant has already received a decision by a Secretarial-level official of the Department.

Bob Begay v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 248 (Sept. 20, 1991)

A decision issued by a BIA official cannot properly be said to be "final" when a notice of appeal was filed from that decision, but was not acted upon as required by relevant regulations.

Zonnie Bahe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 255 (Sept. 23, 1991)

43 CFR 3165.4(c) prevents the suspension on appeal of a notice of violation or assessment or an instruction, order, or decision or a notice of proposed penalty. In accordance with 43 CFR 4.21(a), a timely appeal to the Interior Board of Land Appeals suspends the effect of a decision approving an Application for Permit to Drill pending the decision on appeal.

Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, 121 IBLA 1 (Oct. 4, 1991) 98 I.D. 267

If, during the course of an appeal to the Board of Indian Appeals, the BIA determines that the decision on appeal was incorrect, it can: (1) request that the decision be vacated and the matter remanded in order to grant the relief the appellant requests, (2) confess error and ask the Board to reverse the decision, or (3) enter into a settlement with the appellant. Each of these actions is taken through the filing of an appropriate document with the Board.

Five Sandoval Indian Pueblos, Inc. v. Deputy Comm'r of Indian Affairs, 21 IBIA 17 (Oct. 10, 1991)

APPEALS--Continued

GENERALLY--Continued

When the record does not confirm that a lessee has been assigned or assumed legal responsibility for making royalty payments on behalf of co-lessees, an MMS decision directing the lessee to recalculate the royalties for all co-lessees will be set aside and the case remanded for recalculation by the appropriate party or parties.

Phillips Petroleum Co., Phillips 66 Natural Gas Co., 121 IBLA 278 (Nov. 19, 1991)

As a general rule, the effect of a decision is stayed pending an opportunity for administrative review of the decision pursuant to the appeal regulation at 43 CFR 4.21(a). An exception is recognized with respect to decisions regarding the readjusted terms (including royalty rate) of coal leases where the relevant regulation provides that the decision shall be effective as of the lease anniversary date regardless of whether an appeal is filed.

Atlantic Richfield Co., et al., 121 IBLA 373 (Dec. 19, 1991) 98 I.D. 429

In order to establish standing to appeal under 43 CFR 4.410, an individual or organization must show that he or she is a party to a case and that a legally cognizable interest has been adversely affected by the appealed decision.

Where, in the course of analysis and adjudication, a proposal is changed so much that those potentially adversely affected do not have fair notice of its contents, the decision of the ALJ on the proposal will be set aside and the matter remanded so that BLM may issue a new proposed decision based on analysis of the redefined proposal.

Glenn Grenke v. Bureau of Land Management, 122 IBLA 123 (Jan. 24, 1992)

APPEALS--Continued

GENERALLY--Continued

The Board of Indian Appeals is not required to consider issues and arguments that are raised for the first time on appeal.

All Materials of Montana, Inc. v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 202 (Feb. 27, 1992)

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Acting Portland Area Director, Bureau of Indian Appeals, 22 IBIA 22 (Apr. 13, 1992)

A ROD and FONSI issued by a BLM Area Manager, which is based on an environmental record of review or an EA prepared in response to the filing of an APD an oil and gas well under 43 CFR 3162.3-1, is first subject to administrative review by a BLM State Director in accordance with 43 CFR 3165.3(b). An appeal to this Board of such a decision that has not been the subject of State Director review will be dismissed and the case remanded for referral to the appropriate State Director.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 283 (Mar. 5, 1992)

Unless otherwise specified, a decision of the Board of Indian Appeals remanding a matter to an official of the BIA restores that official's full authority to consider the matter.

Stone Trucking v. Portland Area Director, Bureau of Indian Affairs, 22 IBIA 52 (May 5, 1992)

An appeal from an order establishing a reclamation bond for a mining operation becomes moot if, during appeal, the plan expires or is modified.

Jim D. Wills, Reggie N. Wills, 123 IBLA 74 (May 11, 1992)

APPEALS--Continued

GENERALLY--Continued

The Board of Indian Appeals lacks jurisdiction to review decisions rendered by the Assistant Secretary--Indian Affairs except when those decisions are specifically referred to it by the Secretary or the Assistant Secretary, or when a right of review is established in regulations.

State of South Dakota & Town of Oacoma v. Aberdeen Area Director, Bureau of Indian Affairs, 22 IBIA 126 (June 12, 1992)

A decision approving an application for permit to drill an oil and gas well under 43 CFR 3162.3-1 is first subject to administrative review by the appropriate BLM State Director in accordance with 43 CFR 3165.3(b). Where an appeal to this Board from such a decision has not been the subject of State Director review, it will be dismissed.

Wyoming Wildlife Federation, 123 IBLA 392 (Aug. 7, 1992)

When BIA believes that, because of a decision regarding a lease of trust or restricted property, immediate action is necessary to protect trust resources or to mitigate damages that might accrue against the lessee of that property, the best practice would be for the official to whom an appeal is taken, or to whom an appeal could be taken, to place the decision into immediate effect pursuant to 25 CFR 2.6(a).

Doyle French v. Aberdeen Area Office, Bureau of Indian Affairs, 22 IBIA 211 (Aug. 11, 1992)

Where an appellant makes no colorable allegation of adverse effect, but solely alleges injury to environmental informational interests (deprivation of information guaranteed by a Federal statute), it has not established that it was adversely affected within the meaning of 43 CFR 4.410(a), and its appeal is properly dismissed for lack of standing. A mere general interest in a problem,

APPEALS--Continued

GENERALLY--Continued

absent colorable allegations of adverse effect, is insufficient to confer standing.

Power River Basin Resource Council, Wyoming Chapter of the Sierra Club, Wyoming Outdoor Council, 124 IBLA 83 (Sept. 15, 1992)

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal or that appellant had actual notice of the decision for more than 30 days before notice of appeal was filed.

Facsimile transmission of a document does not comply with the service requirements of 43 CFR 4.401(c).

Animal Protection Institute of America, 124 IBLA 231 (Oct. 28, 1992)

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

A party will not be accorded standing to appeal from a BLM decision where it does not demonstrate that it has a legally cognizable interest which has been adversely affected by that decision. Where the party appeals a BLM record of decision that, by itself, has no consequences, actual or threatened, so far as the environment and any members of the public are concerned because no activity can take place until after preparation of site-specific environmental analyses; and where any adverse consequences would occur, if at all, only if BLM decides to lease particular parcels, the party lacks standing to appeal the ROD because it has

APPEALS--Continued

GENERALLY--Continued

not yet been adversely affected by such decision, that is, its appeal is premature.

Colorado Environmental Coalition, 125 IBLA 287 (Feb. 26, 1993)

Even though an appellant did not actively participate in the process leading to the issuance of the BLM ADC decision, where the appellant expressly requested leave to participate in that process and where BLM led appellant to believe that it would have an opportunity to do so, appellant was a "party to the case" as described in 43 CFR 4.410(a). Further, where the appellant makes a specific, colorable allegation in its notice of appeal that its members use an area affected by BLM's ADC plan, appellant is "adversely affected" within the meaning of 43 CFR 4.410(a). As both elements of that regulation are met, appellant has standing to appeal.

Predator Project, 127 IBLA 50 (July 20, 1993)

Failure of the operator to appeal assessment decisions for incidents of noncompliance issued for violations of the oil and gas operations regulations renders those decisions and the findings contained therein final for the Department and precludes the operator from challenging the merits of the violations or the amounts assessed in a subsequent appeal of a decision demanding payment.

CCCo., 127 IBLA 291 (Oct. 7, 1993)

When, on appeal from a decision on State Director review affirming a Decision Record and FONSI approving an APD to drill a natural gas well, the appellant seeks to raise additional issues which it did not present for State Director review and which were not addressed in the decision, the Board need not adjudicate such issues, but may confine its review to matters addressed in that decision.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

APPEALS--Continued

GENERALLY--Continued

An individual's request "to add her name" to a timely filed appeal by an organization is properly denied if not filed within the 30-day timeframe established by regulation. Where the individual indicates that she has been an interested party to Wyoming's management of wild horses for several years, she may either provide input to the organization so that it may incorporate her views or may request permission to appeal as amicus curiae.

Animal Protection Institute of America, 128 IBLA 90 (Dec. 10, 1993)

A notice of appeal from a decision of a BIA official that is not timely filed will be dismissed.

Where the Board of Indian Appeals has not received a notice of appeal alleged to have been timely filed, the burden is on the appellant to show that the notice was timely mailed or delivered to the Board at its correct address.

American Land Development Corp. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 25 IBIA 120 (Jan. 12, 1994)

An administrative decision is properly set aside and remanded if it is not supported by a case record providing this Board the information necessary for an objective, independent review of the basis for decision.

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

Under 43 CFR 4.410(a), the first prerequisite for an appeal to the Board of Land Appeals is that there be a written "decision" by BLM. However, the written form used by BLM in announcing its actions is not controlling on whether or not the Board will consider it to be a "decision" for purposes of entertaining an appeal.

Mesa Sand & Rock, Inc., 128 IBLA 243 (Mar. 2, 1994)

APPEALS--Continued

GENERALLY--Continued

In order to establish standing to appeal under 43 CFR 4.410, an organization must show that it is a party to a case and that it has been adversely affected by the appealed decision. Where an appellant has participated before BLM during its consideration of the decision under appeal, it is a party to the case. Where appellant makes a specific, colorable allegation that its members use an area affected by a BLM decision, it is "adversely affected" within the meaning of 43 CFR 4.410(a).

Audubon Society of Portland et al., 128 IBLA 370 (Mar. 11, 1994)

Although a BIA Director has authority to place a Superintendent's decision into immediate effect under 25 CFR 2.6(a), an Area Director does not have authority to make his or her own decision final for the Department when Departmental regulations provide a right of appeal to the Board of Indian Appeals.

Dean Wallace v. Aberdeen Area Director, Bureau of Indian Affairs, 26 IBIA 150 (Aug. 2, 1994)

Hearings and appeals concerning civil penalties assessed by BIA under the Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm (1988), are governed by the procedures established in 43 CFR Part 7.

Arizona Silica Sand Co. v. Acting Navajo Area Director, Bureau of Indian Affairs, 26 IBIA 249 (Sept. 28, 1994)

An administrative decision is properly set aside and remanded where it is not supported by a case record providing the Board with the evidence necessary for an objective, independent review of the basis for the decision.

Confidential Communications Co., 131 IBLA 188 (Nov. 7, 1994)

APPEALS--Continued

GENERALLY--Continued

An appeal will normally be dismissed as moot where, prior to the filing of a notice of appeal, the action being challenged has already occurred and there is no effective relief which can be afforded the appellant. While the Board will decline to dismiss an appeal for mootness where it involves issues which are "capable of repetition but evading review," this exception is not applicable where such recurrence would not be evasive of review.

Wildlife Damage Review, 131 IBLA 353 (Dec. 29, 1994)

JURISDICTION

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within 10 business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter.

A Record of Decision and Finding of No Significant Impact based on an environmental record of review or an environmental assessment prepared in response to the filing of an application for a permit to drill under 43 CFR 3162.3-1 is first subject to administrative review by a State Director of BLM in accordance with 43 CFR 3165.3(b). Any party adversely affected by the

APPEALS--Continued

JURISDICTION--Continued

decision of the State Director may appeal that decision to the Interior Board of Land Appeals.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

The Board has no jurisdiction to review Bureau of Land Management procedures outlined in a manual in the absence of a decision applying such procedures to dispose of a case to which appellant is a party.

James C. Mackey, 114 IBLA 308 (May 14, 1990)

Imposition of an assessment to compel compliance with regulations implementing the Mineral Leasing Act is an exercise of the Department's regulatory power which is not stayed by the filing of a bankruptcy petition by an oil and gas lessee or operator.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

Pursuant to 43 CFR 1610.5-2(b) approval or amendment of resource management plans are not appealable to the Board of Land Appeals and an appeal is properly dismissed to the extent that it seeks review of such a plan.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

The Copco timber sale is reviewable as a specific action proposed to implement part of the Jackson-Klamath Sustained Yield Units Ten Year Management Plan.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)

APPEALS--Continued

JURISDICTION--Continued

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a Bureau of Indian Affairs official, the Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

Bernadette L. Raymond v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 41 (Oct. 25, 1990)

A statute establishing time limitations for commencement of civil actions for damages by the United States does not apply to limit administrative review within DOI.

Mobil Exploration & Producing U.S., Inc., 119 IBLA 76 (Apr. 5, 1991) 98 I.D. 207

Refusal to accept personal delivery of a BLM decision does not vitiate service of the decision. A notice of appeal transmitted more than 30 days after personal service of the decision being appealed is untimely and the appeal must be dismissed.

Humane Society of Southern Nevada, 119 IBLA 216 (May 13, 1991)

The Board of Land Appeals lacks jurisdiction to review appeals from decisions establishing resource management plans. If it is not alleged and the record does not show that there has been a decision implementing such a plan, an appeal challenging the plan will be dismissed.

Joe Trow, 119 IBLA 388 (July 3, 1991)

APPEALS--Continued

JURISDICTION--Continued

43 CFR 3165.4(c) prevents the suspension on appeal of a notice of violation or assessment or an instruction, order, or decision or a notice of proposed penalty. In accordance with 43 CFR 4.21(a), a timely appeal to the Interior Board of Land Appeals suspends the effect of a decision approving an Application for Permit to Drill pending the decision on appeal.

Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, 121 IBLA 1 (Oct. 4, 1991) 98 I.D. 267

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a BIA official, the Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

Five Sandoval Indian Pueblos, Inc. v. Deputy Comm'r of Indian Affairs, 21 IBIA 17 (Oct. 10, 1991)

Cherokee Nation of Oklahoma, Chickasaw Nation, & Choctaw Nation of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 22 IBIA 240 (Aug. 24, 1992)

When, in submitting a claim to the contracting officer in excess of $50,000, the contractor failed to certify that "the supporting data are accurate and complete to the best of his knowledge and belief," the certification did not meet the requirements of the Contract Disputes Act of 1978. The facts that the Board suspected the omission was due to typographical error, and that the contractor otherwise certified to more than was necessary, were irrelevant. The Board could not supply the missing certification requirement by inference. Due to the defective certification, the Board did not possess jurisdiction to entertain the contractor's appeal from the contracting officer's failure to render a decision on the claim.

Appeal of Rock Point Community School Board, IBCA-2953 (Oct. 29, 1991) 98 I.D. 355

APPEALS--Continued

JURISDICTION--Continued

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within DOI.

Anadarko Petroleum Corp., 122 IBLA 141 (Feb. 3, 1992)

Benson-Montin-Greer Drilling Corp., 123 IBLA 341 (July 15, 1992) 99 I.D. 115

Texaco, Inc., 129 IBLA 46 (Mar. 23, 1994)

In deciding a motion to dismiss, the Board will consider the uncontroverted facts alleged by the appellant to be correct and will construe its allegations favorably to it, but the appellant is required to establish jurisdiction. If the appellant has made a prima facie showing that jurisdiction exists, however, the Government must present some evidence to refute that showing. An unsubstantiated allegation will not suffice.

When the certification requirements of the Contract Disputes Act are met, the Board has jurisdiction to entertain an appeal from a contracting officer's decision denying a claim brought and certified on behalf of a dissolved joint venture, and the appeal may be pursued in the name of the joint venture.

The Board found that a corporation properly could be substituted as the appellant because it was the real party in interest in the appeal. The substitution did not violate the anti-assignment statutes, because they did not apply. The Board based its conclusion upon the facts that the appeal originally was filed correctly on behalf of the joint venture contracting entity; 3 months before the completion of the 2-1/2-year contract term the venture dissolved, but the corporate member of the venture, which was a contract signatory and the venture's managing party for the contract, remained intact, continued to perform, and attended to the completion of the contract work; before the appeal was filed, all of the venture's interests and obligations were merged into the corporation; and there was no prejudice to the Government.

The Board found that the corporate member of a joint venture contracting entity had the authority to certify a claim on behalf of the joint venture and, in

APPEALS--Continued

JURISDICTION--Continued

any event, was the equivalent of the "general partner" of the venture with overall responsibility for the conduct of its affairs. The latter factor alone qualified the corporation under the contract's Disputes clause to certify the claim. The corporate president, in turn, clearly was authorized to sign for the corporation. Accordingly, his signature bound the joint venture. He also had implied authority to bind the joint venture because he signed the contract on behalf of both of its members. The certification otherwise met all of the requirements of the Disputes clause and the Board had jurisdiction to entertain the appeal.

Appeal of Ball, Ball, & Brosamer, Inc., IBCA-2103-N (Feb. 5, 1992) 99 I.D. 1

A ROD and FONSI issued by a BLM Area Manager, which is based on an environmental record of review or an EA prepared in response to the filing of an APD an oil and gas well under 43 CFR 3162.3-1, is first subject to administrative review by a BLM State Director in accordance with 43 CFR 3165.3(b). An appeal to this Board of such a decision that has not been the subject of State Director review will be dismissed and the case remanded for referral to the appropriate State Director.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 283 (Mar. 5, 1992)

A decision approving an application for permit to drill an oil and gas well under 43 CFR 3162.3-1 is first subject to administrative review by the appropriate BLM State Director in accordance with 43 CFR 3165.3(b). Where an appeal to this Board from such a decision has not been the subject of State Director review, it will be dismissed.

Wyoming Wildlife Federation, 123 IBLA 392 (Aug. 7, 1992)

APPEALS--Continued

JURISDICTION--Continued

Pursuant to 43 CFR 4.1282(a), notice of appeal is filed with the office of the OSM official whose decision is appealed and a copy is at the same time filed with the Board of Land Appeals. Nonetheless, 43 CFR 4.1107(c) requires that notice of appeal need only be filed with the Board. This apparent conflict between rules governing notices of appeal from OSM decisions is resolved in favor of the appellant who files only with the Board.

An appeal from an OSM decision mailed to this Board within 30 days after issuance of the decision at issue is timely filed pursuant to 43 CFR 4.1107(g).

Marion A. Taylor, 124 IBLA 80 (Sept. 14, 1992)

A decision that is approved by the Secretary of the Interior is not subject to review by the Board of Land Appeals.

Power River Basin Resource Council, Wyoming Chapter of the Sierra Club, Wyoming Outdoor Council, 124 IBLA 83 (Sept. 15, 1992)

A statute establishing time limitations for the commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within DOI.

Bolling Construction Co. & Bob Bolling, 125 IBLA 303 (Mar. 16, 1993)

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

APPEALS--Continued

JURISDICTION--Continued

Respect for tribal self-government requires that tribal remedies be exhausted before a Federal forum may entertain a challenge to tribal actions or authority. This is particularly true where the matter at issue involves tribal membership.

Janie Jovita Flores et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12, 1993)

When, on appeal from a decision on State Director review affirming a Decision Record and FONSI approving an APD to drill a natural gas well, the appellant seeks to raise additional issues which it did not present for State Director review and which were not addressed in the decision, the Board need not adjudicate such issues, but may confine its review to matters addressed in that decision.

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

The Board of Land Appeals is without jurisdiction to review the merits of a decision that is not timely appealed. A decision to designate appellant as a principal user of a communication site right-of-way and to fix rent for this right-of-way is not reviewable absent a timely appeal.

King Broadcasting Co., 129 IBLA 265 (May 16, 1994)

APPEALS--Continued

JURISDICTION--Continued

An appeal taken pursuant to 43 CFR 4.1280 from a decision requiring payment of additional reclamation fees will be dismissed where the decision did not specifically grant a right of appeal to the Board.

Terry Eagle Coal Co., 129 IBLA 367 (June 7, 1994)

Challenges to the approval or amendment of a RMP and its related EIS are accorded administrative review only in conformity with the protest procedures prescribed by 43 CFR Part 1600. Such challenges are properly distinguished from an appeal challenging implementing actions undertaken without preparation of a supplemental EIS which may be appealed to the Board of Land Appeals.

Colorado Environmental Coalition, 130 IBLA 61 (July 22, 1994)

The Tribal aboriginal title of the Western Shoshone has been extinguished pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 1055 (1946).

Western Shoshone Nat'l Council, 130 IBLA 69 (July 26, 1994)

In accepting a right-of-way grant for salt water disposal, the grantee agrees to be bound by all applicable State and Federal laws, including those related to water quality. Where the U.S. EPA determines that the grantee is polluting waters of the United States in violation of Federal law and orders the grantee to cease and desist, this Board has no jurisdiction to review such an order.

Laguna Gatuna, Inc., 131 IBLA 169 (Nov. 2, 1994)

APPEALS--Continued

JURISDICTION--Continued

BLM properly declines to allow a DLE and returns the DLE application where the lands sought, situated within the California Desert Conservation Area, have been classified in a land-use plan, issued pursuant to secs. 202 and 601 of FLPMA, 43 U.S.C. §§ 1712 and 1781 (1988), so as to preclude agricultural uses. The propriety of the land-use classification set forth in the plan is not subject to review by the Board.

David R. Hinkson, 131 IBLA 251 (Nov. 22, 1994)

BLM properly refuses to allow a DLE and returns the DLE application where the land sought to be entered, located within the California Desert Conservation Area, has been classified as unavailable for agricultural use in the land-use plan promulgated for the area in accordance with 43 U.S.C. §§ 1712 and 1781 (1988). The Board has no authority to review such a land-use plan or the classifications contained therein.

Max Wilson, 131 IBLA 306 (Dec. 5, 1994)

APPLICATION FOR PERMIT TO DRILL

Where, on appeal, the principal objection to issuance of an application for permit to drill a coal-bed methane well is the failure to consider the cumulative impacts of drilling the well in question in conjunction with other proposed coal-bed methane drilling in the same area, the appeal may be dismissed as moot, where the record shows that the well has been drilled and the surface managing agency and BLM have undertaken an environmental analysis designed to assess the cumulative impacts of such proposed drilling.

San Juan Citizens Alliance, Western Colorado Congress, 114 IBLA 366 (May 24, 1990)

APPLICATION FOR PERMIT TO DRILL--Continued

When, on appeal from a decision on State Director review affirming a Decision Record and FONSI approving an APD to drill a natural gas well, the appellant seeks to raise additional issues which it did not present for State Director review and which were not addressed in the decision, the Board need not adjudicate such issues, but may confine its review to matters addressed in that decision.

Although an appellant bears the burden of demonstrating error where BLM has determined that a proposed action is not likely to affect a threatened or endangered species, the record on appeal must support BLM's action, and where BLM concludes that the drilling of a natural gas well will not affect the bald eagle because no active eyries or nests were located during the survey of the area, but the record fails to show that searches for bald eagles were conducted in the winter and early spring when bald eagles are known to inhabit the area, BLM's determination will be set aside and the case remanded.

Where, in response to a challenge to approval of an APD to drill a natural gas well, BLM states that no special status plant species, including threatened and endangered plants, were found during a survey of the proposed project area, such a determination must be supported by the record. When the record on appeal contains no evidence of who conducted the survey, any field report, or any description of the methodology employed in making the determination, that determination will be set aside and the case remanded.

A determination by BLM that approval of an APD to drill a natural gas well will not eliminate a river from eligibility for potential inclusion within the National Wild and Scenic River System, pursuant to sec. 5(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1276(d) (1988), is supported by the record where there is no evidence in the record that drilling the well in question would adversely affect all the river's outstandingly remarkable values so as to render it ineligible for consideration.

A determination that approval of an APD to drill a natural gas well will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a

APPLICATION FOR PERMIT TO DRILL--Continued

substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

APPLICATIONS AND ENTRIES

GENERALLY

The lands listed as subject to lease under the "Hardrock Minerals Leasing" regulations at 43 CFR 3560.3 and 43 CFR Part 3580 are the only areas which have been made subject to hardrock mineral leasing as a result of either the exercise of Secretarial discretion or Congressional directive. BLM may properly reject an application for a prospecting permit for hardrock minerals when the lands described in the application are not subject to the issuance of a hardrock mineral lease.

Gold and silver on public domain lands are generally not subject to mineral leasing, but may be claimed only under the authority of the Mining Act of 1872, subject to the availability of the lands to mineral entry.

William Bade, 112 IBLA 312 (Jan. 10, 1990)

BLM may properly reject a noncompetitive oil and gas lease offer for lands which received a minimum bid at a competitive oil and gas lease sale, even though the bidder subsequently withdrew the bid.

Donald J. Eckelberg, 117 IBLA 390 (Feb. 13, 1991)

The Secretary of the Interior has the discretionary authority to grant an application to purchase public lands under the Recreation and Public Purposes Act, 43 U.S.C. §§ 869 to 869-4 (1988). A decision rejecting such an application for land to be used as a bicycle rest area will be set aside where BLM fails to provide a rational basis for its determination that the proposed

APPLICATIONS AND ENTRIES--Continued

GENERALLY--Continued

use of the land as shown in the development and management plans for the project does not justify disposal of the land to appellant.

The City of Chico, 119 IBLA 136 (Apr. 23, 1991)

BLM properly rejected a homesite purchase application where the applicant failed to show in conformity to 43 U.S.C. §§ 687a and 687a-1 (1982), that he had occupied a habitable house at his site for not less than 5 months each year for 3 years within 5 years of the date he filed his notice of claim.

Robert E. Billstrom, 129 IBLA 108 (Apr. 7, 1994)

When BLM finds that a tract of land has no significant mineral potential, approves conveyance of the Federal Government's mineral interest in the tract pursuant to sec. 209(b)(1) of FLPMA, 43 U.S.C. § 1716(b)(1) (1988), and calls for payment for the Government's mineral estate at its fair market value, the Government's fair market value determination must be supported by the record.

Todd L. Nicholson, 129 IBLA 213 (Apr. 28, 1994)

FILING

A Government contest of a Native allotment application is appropriate when the application bears date-stamps well beyond the Dec. 18, 1971, filing deadline and the applicant's evidence of timeliness consists solely of a two-page BIA form letter, page 1 of which acknowledges receipt of an unspecified Native allotment application and page 2 of which consists only of the applicant's name, address, and a date within the deadline.

State of Alaska (Mabel S. Brown), 123 IBLA 233 (June 9, 1992)

APPLICATIONS AND ENTRIES--Continued

RELINQUISHMENT

BLM properly declares a placer mining claim null and void ab initio where, at the time it was located, the affected land was segregated from mineral entry by the filing of an application for a public airport lease, even though such application had later been relinquished.

Boyad Tanner et al., 113 IBLA 387 (Mar. 28, 1990)

The Administrative Law Judge properly determined that relinquishment of a Native allotment application was not knowing and voluntary. The language of a letter accompanying relinquishment, the request for BLM advice, and testimony at a subsequent hearing demonstrated that the relinquishing applicant did not grasp the full legal consequences of executing a relinquishment.

Katherine C. (Zimin) Atkins v. Bureau of Land Management, Bristol Bay Housing Authority (Intervenor), 116 IBLA 305 (Oct. 29, 1990)

Where an affidavit in support of a claim that the relinquishment of a Native allotment application was involuntary and unknowing is insufficient to raise a genuine issue of material fact, and where the record shows that the applicant relinquished his Native allotment application to obtain a portion of the same land by means of a homestead entry application and later received a patent under the homestead laws, BLM properly denied a request to reinstate the Native allotment application.

Heir of Frank Hobson, 117 IBLA 368 (Feb. 7, 1991)

The Department may consider a request to reinstate a relinquished Native allotment application for land which has been either patented or made part of an interim conveyance to a Native corporation. If the record shows that the possibility exists that the applicant involuntarily and unknowingly relinquished the application in whole or in part, or was fraudulently induced to do so, he is entitled an evidentiary hearing. If the relinquishment was not knowing and voluntary or was fraudulently procured, the Department may reinstate the application to adjudicate its validity prior to

APPLICATIONS AND ENTRIES--Continued

RELINQUISHMENT--Continued

recommending the instigation of judicial proceedings to cancel conflicting interests in the land.

The relinquishment of a Native allotment application must be made voluntarily and with knowledge of the applicant's allotment rights and the consequences of the relinquishment. In determining whether there is a factual issue whether the relinquishment of a Native allotment application was knowing and voluntary so as to require a hearing, the Board will regard as true the factual allegations made in affidavits filed in support of a request for reinstatement.

Heir of Frank Hobson (On Reconsideration), 120 IBLA 66 (Oct. 25, 1991)

Acceptance by a Native allotment claimant of half the lands described in her application did not establish a waiver of her claim to the remainder. Since half the allotment described by her application was eliminated administratively without her knowledge or consent her entire application was pending before the Department on Dec. 18, 1971, because the elimination occurred without a hearing on a disputed question of fact underlying the action taken.

Matilda S. Johnson, 129 IBLA 82 (Apr. 1, 1994)

VALID EXISTING RIGHTS

BLM's refusal to approve an application to make a DLE does not constitute a compensable taking of private property since the filing of a DLE application for public land does not create any present right or title in the land in the applicant, but only a right to have the application considered.

Max Wilson, 131 IBLA 306 (Dec. 5, 1994)

APPLICATIONS AND ENTRIES--Continued

VESTED RIGHTS

A mineral entry final certificate is prepared by BLM for a mining claim after it has determined on the basis of the documents submitted that the claim is apparently valid in that: the land was available at the time of location; acts necessary to keep it in force including annual assessment work have been done; no adverse claim exists; and the applicant has paid the purchase price. However, a mineral examination to establish the discovery of a locatable valuable mineral deposit on the claim is still required to support a patent and, as long as title remains in the United States, mining activities are properly regulated pursuant to relevant statutes and regulations to protect the surface resources.

Internat'l Silica Corp., 124 IBLA 155 (Sept. 30, 1992)

BLM's refusal to approve an application to make a DLE does not constitute a compensable taking of private property since the filing of a DLE application for public land does not create any present right or title in the land in the applicant, but only a right to have the application considered.

Max Wilson, 131 IBLA 306 (Dec. 5, 1994)

APPRAISALS

When BLM adjusts a linear right-of-way rental, in accordance with the rental fee schedule set forth at 43 CFR 2803.1-2(c)(1)(i), and the grantee files an appeal completely agreeing with that action, but complaining that BLM failed to adjust the rental for prior years, the grantee has failed to point out error in the action taken by BLM or to show how he has been adversely affected by the decision, and the appeal will be dismissed.

Jesse H. Johnson, 112 IBLA 369 (Jan. 19, 1990)

APPRAISALS--Continued

Provision of 43 CFR 2803.1-2 allows a rental increase to be paid in graduated increments with the full amount of the increase being deferred until the third year after the increase is effective. This provision only applies, however, where there was payment at a lower rate. It does not apply where there was never a lower rental rate, nor can a rental deposit be considered to have been a rental rate for purposes of obtaining the delayed increase allowed by the regulation.

Keith P. Carpenter (On Reconsideration), 113 IBLA 27 (Jan. 30, 1990)

The appraised value of a communication site right-of-way pertains to each individual user and is not to be prorated among site users.

In establishing the fair market rental value for a communication site right-of-way, BLM shall not be limited by the estimated value at the time of issuance of the right-of-way.

An appraisal of fair market rental value for a communication site right-of-way may be set aside and the case remanded where the record on appeal shows insufficient analysis of the leases considered in the appraisal.

Lone Pine Television, Inc., 113 IBLA 264 (Mar. 9, 1990)

An appraisal of fair market rental value for an agricultural lease site will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charge is excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Phyllis E. Lewis, 113 IBLA 376 (Mar. 28, 1990)

APPRAISALS--Continued

An appraisal of fair market rental value will be affirmed unless an appellant either demonstrates error in the appraisal method or presents convincing evidence that the charges are excessive. Generally, it is proper to use the comparable lease appraisal method for determining fair market rental value of nonlinear land use. However, a comparable lease appraisal may be set aside and the case remanded if it appears from the record that the use of the lands designated as comparable significantly differs from the intended use of the subject site.

Thomas L. Sawyer, 114 IBLA 135 (Apr. 18, 1990)

A Bureau of Land Management appraisal of fair market value will not be set aside for failure to include five comparable electronic communication sites alleged to afford similar coverage to the appraised site, where no alternative appraisal or evidence is submitted to demonstrate that the allegedly comparable sites afford similar coverage, access, power, and terms to the subject site, or that inclusion of the five allegedly comparable sites would support a different conclusion than that reached by the Bureau of Land Management.

Randy L. Power dba ProComm, 114 IBLA 205 (Apr. 24, 1990)

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

Wapato Orchard Partnership v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 254 (Apr. 24, 1990)

BLM properly cancels a communications site right-of-way where the holder fails to pay the annual rental charges for the first and second years of the grant following several 30-day notifications by BLM of the fair market rental amount due for those years, as determined by appraisal.

Roy L. Parrish, 114 IBLA 336 (May 22, 1990)

APPRAISALS--Continued

A BLM increase in the annual rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way by the comparable lease method of appraisal.

Union Pacific Railroad Co., 114 IBLA 399 (May 30, 1990)

The Board will not overturn a BLM appraisal of a communication site right-of-way by the comparable lease method of appraisal where the appellant fails to establish by a preponderance of the evidence either that the appraisal method was erroneous or that the appraised value is excessive. Specifically, the appraisal will be affirmed where appellant does not establish that BLM improperly eliminated certain private and Government leases from comparison with the right-of-way, or that BLM improperly failed to adjust for differences both in the cost of obtaining access to the communication sites and between BLM rights-of-way and private leases.

MCI Telecommunications Corp., 115 IBLA 117 (June 27, 1990)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Southern Pacific Transportation Co., 115 IBLA 239 (July 18, 1990)

An appraisal will be affirmed where no error was shown in the appraisal which used market data to establish annual fair market rental value for an

APPRAISALS--Continued

irrigation pond right-of-way where it was not proved that the appraised rental was excessive.

James E. Payne & Evon Payne, 115 IBLA 294 (July 26, 1990)

Generally, the proper appraisal method for determining the fair market value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Southern Pacific Transportation Co., 116 IBLA 164 (Sept. 26, 1990)

A BLM appraisal of fair market rental value of a communication site lease will be upheld unless an appellant can show error in the appraisal methods used and demonstrate by convincing evidence that the rental charge is excessive. In the absence of a preponderance of evidence that the appraisal is erroneous, an appraisal generally may be rebutted only by another appraisal.

Gila Electronics, 117 IBLA 51 (Nov. 27, 1990)

Where BLM establishes the rental for an access road right-of-way granted under sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1988), in accordance with the schedule adopted pursuant to 43 CFR 2803.1-2(c)(1), and appellant fails to demonstrate error, BLM's rental determination will be affirmed.

Mr. & Mrs. Gerald H. Murray, 117 IBLA 138 (Dec. 6, 1990)

APPRAISALS--Continued

A road right-of-way issued in 1960 pursuant to the Act of Jan. 21, 1895, is subject to administration and assessment of rental pursuant to current Departmental regulations published at 43 CFR Part 2800. Assessment of increased annual rental under Departmental regulations does not require a hearing.

Western Nuclear, Inc., 117 IBLA 281 (Jan. 16, 1991)

Sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), authorizes the Secretary to lease public lands for various uses including the development of small trade or manufacturing concerns. 43 CFR 2920.0-6(a) requires that land-use authorizations be issued only at fair market value. An appraisal of fair market value for a commercial-use lease will not be set aside on appeal if appellant fails to show error in the appraisal method used or fails to show by convincing evidence that the charge is excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

A decision determining back rental for a period of unauthorized use of a site used as an oil well servicing facility will be set aside and remanded where the record fails to establish how BLM arrived at the determination of past annual fair market rental value.

Sierra Production Service, 118 IBLA 259 (Mar. 11, 1991)

A BLM increase in the annual rental charge for a communications site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market value of the right-of-way by the comparable lease method of appraisal.

Questar Service Corp., 119 IBLA 65 (Mar. 29, 1991)

APPRAISALS--Continued

BLM's appraisal of the value of the land to be involved in an exchange pursuant to sec. 206 to FLPMA, as amended, 43 U.S.C. § 1716 (1988), will not be overturned where the protestant fails to submit any evidence of a contrary value or that BLM erred in its appraisal method or results.

Burton A. & Mary H. McGregor et al., 119 IBLA 95 (Apr. 15, 1991)

Where BLM granted appellant a communication site right-of-way under Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1988), subject to a future appraisal, application of 43 CFR 2803.1-2(c)(3)(ii), providing that BLM may establish an estimated rental fee, collect a deposit in advance, and adjust the advance deposit upon receipt of an approved fair market appraisal, was not a prohibited imposition of a retroactive rental.

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Oregon Broadcasting Co., 119 IBLA 241 (May 15, 1991)

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including rights-of-way for solar evaporation ponds and related facilities, is the comparable lease method of appraisal. An appraisal may be set aside and the case remanded where the record on appeal shows insufficient analysis of other leases considered in the appraisal to verify their comparability with the right-of-way appraised.

AMAX Magnesium, 119 IBLA 281 (June 6, 1991)

APPRAISALS--Continued

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

Where BLM is precluded by statutory proviso from expending funds in fiscal year 1991 to increase the fees charged for communication site rights-of-way, a decision reappraising the fair market rental value of the right-of-way may be vacated in part to reflect the lack of authority to collect the reappraised rental prior to Oct. 1, 1991.

Communications Enterprises, Inc., 120 IBLA 146 (July 16, 1991)

The Board will affirm a BLM decision issuing a communication site right-of-way where on appeal the grantee complains that the rental for the right-of-way is too high, but the record shows that the rental was based on an appraisal of the fair market rental value utilizing the comparable lease method of appraisal and the appellant fails to show either that the appraisal method was erroneous or that the appraised value is excessive.

Idaho Wireless Corp., 120 IBLA 172 (July 23, 1991)

Fair market rental value may be assessed from a flat rate fee schedule established by BLM appraisal staff.

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)

Where BLM has set the annual rental charge for a communication site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charge and remand

APPRAISALS--Continued

for a reappraisal and any necessary recalculation of such charges.

First Broadcasting of Nevada, Inc., 120 IBLA 240 (Aug. 9, 1991)

Under the relevant regulation, the comparable lease method of appraisal is the preferred method for determining the fair market value of a nonlinear right-of-way such as a communication site. Under this method, the rentals charged for similar sites in the area are reviewed and adjustments are made for variations in the features of the sites and the rights obtained under the leases. An appraisal based simply on application of the consumer price index to a prior appraisal without any analysis of comparable leases is properly remanded as inconsistent with the regulatory standard.

KSEI, Inc., 120 IBLA 266 (Aug. 21, 1991)

The assignee of an unapproved assignment of a right-of-way has standing to appeal from a decision increasing the rental of the right-of-way.

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

Where BLM is precluded by statutory proviso from expending funds in fiscal year 1991 to increase the fees charged for communication site rights-of-way, a decision reappraising the fair market rental value of the right-of-way may be vacated in part to reflect the lack of authority to collect the reappraised rental prior to Oct. 1, 1991.

Uno Broadcasting Corp., 120 IBLA 380 (Sept. 23, 1991)

APPRAISALS--Continued

Where BLM has granted a power line right-of-way subject to future determination of rental, and BLM later determines a rental on the basis of an erroneous calculation of acreage within the grant, BLM is not precluded from revising the rental on the basis of the correct acreage, and requiring the holder of the right-of-way to pay the revised rental from the date that the right-of-way was first granted.

Salt River Project, 121 IBLA 185 (Nov. 5, 1991)

Where the current fair market value of a cabin site has been determined in accordance with accepted appraisal procedures and appellant fails to establish by positive, substantial evidence that the appraisal is in error, adjustment of the annual rental to the current fair market value rental will be affirmed.

Norman P. Steiner, William A. Phillips, M.D., Gloria M. Williams, Robert A. Smith, & Grace E. Fullerton, 9 OHA 108 (Nov. 12, 1991)

The holder of a right-of-way grant for a salt water disposal site is required to pay annually, in advance, the fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices. In accordance with 43 CFR 2803.1-2(c)(3)(i), rental for non-linear right-of-way grants must be based on a market survey of comparable rentals or on a value determination for specific parcels.

A BLM decision adjusting the rental for a salt water disposal site right-of-way from a per acre fee to a fee per barrel of disposed water will be affirmed where the adjusted rental is based on a market survey of comparable salt water disposal leases which indicates that a per barrel fee is utilized in the market place to determine rentals, and the appellant has neither demonstrated error in that methodology nor shown that the rental charges are excessive.

Laguna Gatuna, Inc., 121 IBLA 302 (Dec. 3, 1991)

APPRAISALS--Continued

Sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), authorizes the Secretary to lease public lands for various uses including agriculture. 43 CFR 2920.0-6(a) requires that land-use authorizations be issued only at fair market value. An appraisal of fair market rental value for an agricultural lease will be affirmed on appeal where an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charge is excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Russell A. Beaver, J. F. Beaver, 121 IBLA 386 (Dec. 26, 1991)

Absent a demonstration that BLM's method for appraising the value of the linear and site components of a right-of-way granted for a hydroelectric power facility is erroneous or the rental is clearly excessive, a BLM decision adjusting the rental is properly affirmed.

Bear Creek Hydro, 122 IBLA 200 (Feb. 10, 1992)

BLM's appraisal of the values of land involved in a proposed exchange under sec. 206 of FLPMA, 43 U.S.C. § 1716 (1988), as amended, will not be overturned when an independent appraisal does not establish its methodology or results were in error.

W. J. & Betty Lo Wells, 122 IBLA 250 (Feb. 28, 1992)

An appraisal of a right-of-way will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market rental value or the appellant shows that the resulting charges are excessive. Absent error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

KPVI Channel 6, 122 IBLA 263 (Mar. 3, 1992)

APPRAISALS--Continued

An appraisal of the fair market rental value of a reservoir right-of-way will be upheld on appeal where no error is shown in the appraisal method used by BLM and the appellant fails to show by convincing evidence that the annual rental charge is excessive.

A decision initially advising the holder of a right-of-way of the fair market rental value of the grant and billing that amount more than 6 years after issuance of the right-of-way may be set aside and remanded for consideration of whether in the public interest the rental charge should be reduced on the basis of undue hardship to the holder under the regulation at 43 CFR 2803.1-2(b)(2)(iv) where the reservoir authorized by the right-of-way was never constructed.

V. Irene Wallace, 122 IBLA 349 (Mar. 12, 1992)

A rental rate adjustment for a right-of-way for a hydroelectric power plant under 43 CFR 2803.1-2 will be set aside and remanded so that the BLM Manual may apply policies and procedures that are being developed for determining rentals for such rights-of-way.

Bear Creek Hydro (On Reconsideration), 124 IBLA 225 (Oct. 27, 1992)

BLM properly requires the holder of a communications site right-of-way to pay rental charges, in addition to those originally estimated at the time of issuance of the right-of-way grant, based upon an appraisal of the fair market rental value of the right-of-way.

Voice Ministries of Farmington, Inc., 124 IBLA 358 (Dec. 4, 1992)

The role of the Board of Indian Appeals in reviewing a BIA determination of fair rental value is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence.

An appellant who challenges a BIA rental adjustment for a lease of Indian land bears the burden of proving that the adjustment is unreasonable.

APPRAISALS--Continued

A determination of fair annual rental for a lease of Indian land should be made in accordance with generally accepted appraisal principles.

John Strain v. Portland Area Director, Bureau of Indian Affairs et al., 23 IBIA 114 (Dec. 18, 1992)

When the right-of-way grant specifically provided for periodic rental adjustments to bring the right-of-way rental in line with fair market rental values it is proper for BLM to increase the annual rental to conform the rental amount to the current fair market rental value of the right-of-way.

Valley Pioneers Water Co., Inc., 125 IBLA 326 (Mar. 25, 1993)

An appraisal will not be set aside unless an appellant shows error in the method of appraisal or shows by convincing evidence that the charges are excessive. When the decision of an ALJ does not clearly apply to this standard, the Board will review the evidence and the arguments of the parties to determine whether the result reached should be considered erroneous.

An appraiser's training and experience are properly considered in determining the weight to be given testimony. When an appraisal lacks an analysis showing why a specific value was selected from a range of values, the ALJ who presides at a hearing is in the best position to decide the weight to be accorded the appraiser's testimony.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

A BLM increase in the rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is

APPRAISALS--Continued

normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Quality Broadcasting Corp., Unicom Broadcasting, Inc., 126 IBLA 174 (May 11, 1993)

A BLM increase in the annual rental charge for a communications site right-of-way will be vacated where the record fails to demonstrate any relationship between the right-of-way subject to appraisal and a BLM master appraisal determining the market value of a "typical" BLM right-of-way, and where there is no indication that the communications site at issue matched the comparable factors in BLM's appraisal for a "typical" right-of-way.

Confidential Communications Co., 126 IBLA 349 (June 25, 1993)

An increase in the annual rental charge for a communications site right-of-way will be set aside if the record fails to demonstrate any relationship between the right-of-way subject to appraisal and a BLM master appraisal determining the market value of a "typical" BLM right-of-way, and there is no indication that the comparable factors at the communications site at issue matched the comparable factors considered in BLM's appraisal of a "typical" right-of-way.

Western Tele-Communications, Inc., 127 IBLA 313 (Oct. 12, 1993)

A protest against an exchange of public and private land was properly denied when it was not shown that the proposal was contrary to valuation requirements imposed by FLPMA sec. 206 and applicable regulations, or that it violated operative land-use plans, or that the exchange was contrary to the public interest. The fact that the exchange resolved a trespass did not establish that it was contrary to public policy.

Brent Hansen et al., 128 IBLA 17 (Nov. 4, 1993)

APPRAISALS--Continued

An area-wide appraisal assigning a value to representative sand and gravel deposits located in a BLM resource area is a master appraisal. In appraisal cases where BLM attempts to implement the comparable use method of valuation by using a master appraisal, the Board seeks to determine whether the material subject to appraisal actually conforms to the representative material. It is improper for BLM to apply a master appraisal without making a thorough comparison of various factors considered in appraising the representative material, and a BLM decision using a master appraisal to establish value of materials is insufficient where the master appraisal acknowledges that there are significant potential differences in sand and gravel found in the resource area, the record fails to demonstrate any relationship between the materials being appraised and the master appraisal, and there is no indication that the specific materials at issue matched the comparable factors identified in BLM's appraisal of the representative material.

Richard C. Nielson (dba Nielson Sand and Rock), 129 IBLA 316 (May 27, 1994)

BLM's fair market value determination will be affirmed if the appellant does not demonstrate error in the appraisal method or present convincing evidence that the fair market value determination is erroneous and the case file contains the facts or an analysis sufficiently complete to allow the Board to conclude that the fair market value determination is supported by the record.

Thousand Peaks Ranches, Inc., 129 IBLA 397 (June 30, 1994)

Where BLM granted a communication site right-of-way, subject to a future fair market value appraisal, application of 43 CFR 2803.1-2(c)(3)(ii), providing that BLM may establish an estimated rental fee, collect a deposit in advance, and adjust the advance deposit upon receipt of an approved fair market appraisal, was not a prohibited imposition of a retroactive rental.

Where a right-of-way holder charges that the fair market rental value determined by BLM is in error, but shows no error in BLM's appraisal method and provides no

APPRAISALS--Continued

evidence to establish that BLM's appraisal is excessive, the Board will affirm BLM's determination.

Alaskan M.D.S., Inc., 130 IBLA 13 (July 6, 1994)

Where a right-of-way holder charges that the fair market value determined by BLM is in error, but shows no error in BLM's appraisal method and provides no evidence to establish that BLM's appraisal is excessive, the Board will affirm BLM's determination.

London Bridge Broadcasting, Inc., 130 IBLA 73 (July 26, 1994)

APPROPRIATIONS
(See also Expenditures, Funds)

A BIA decision distributing program funds among several tribes is a decision based on the exercise of discretion. In reviewing such decisions, the Board does not substitute its judgment for that of the Bureau but, rather, seeks to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Sault Ste. Marie Tribe of Chippewa Indians v. Minneapolis Area Director, Bureau of Indian Affairs, 25 IBIA 236 (Mar. 16, 1994)

The allocation of funds from a lump-sum appropriation is committed to agency discretion.

Fort Peck Waterusers Ass'n, Dwight A. & Carol J. Sibley v. Billings Area Director, Bureau of Indian Affairs, 26 IBIA 90 (July 6, 1994)

ARCHAEOLOGICAL RESOURCES PROTECTION ACT

Hearings and appeals concerning civil penalties assessed by BIA under the Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm (1988), are governed by the procedures established in 43 CFR Part 7.

Arizona Silica Sand Co. v. Acting Navajo Area Director, Bureau of Indian Affairs, 26 IBIA 249 (Sept. 28, 1994)

ATTORNEY FEES

GENERALLY

Under 25 CFR 89.41, a decision whether to authorize the expenditure of appropriated funds to pay tribal attorney's fees is a decision based on the exercise of discretion.

Walker River Paiute Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 109 (Jan. 17, 1990)

An appellant may be a prevailing party even if its award in the underlying litigation is based on contract principles unrelated to the theory of the case propounded by its attorney. Where only one claim is involved, the appellant can be a prevailing party for the purposes of the EAJA regardless of the basis of the Board's award.

The test of substantial justification of the Government's position for EAJA purposes is not its traditional view or the consistency of its position but how fair and reasonable it was in its evaluation of the appellant's claim.

Reasonable and necessary expenses of an attorney incurred or paid in preparation for the adjudication of the specific case before the Board, which expenses are those customarily charged to the client where the case is tried, are allowable expenses under the EAJA. The quantum and method of proof of each allowable expense is discretionary with the Board.

Expenses incurred before a contracting officer's decision denying a claim, and therefore prior to the appeal, may be awarded under the EAJA if they are primarily related to, intended for, and necessary in the

ATTORNEY FEES--Continued

GENERALLY--Continued

subsequent adversary adjudication, rather than intended primarily in support of the claim initially presented to the contracting officer.

Application for Attorney Fees, R&R Enterprises, IBCA-2664-F (June 14, 1990) 97 I.D. 185

EQUAL ACCESS TO JUSTICE ACT

Generally

An appellant may be a prevailing party even if its award in the underlying litigation is based on contract principles unrelated to the theory of the case propounded by its attorney. Where only one claim is involved, the appellant can be a prevailing party for the purposes of the EAJA regardless of the basis of the Board's award.

The test of substantial justification of the Government's position for EAJA purposes is not its traditional view or the consistency of its position but how fair and reasonable it was in its evaluation of the appellant's claim.

Reasonable and necessary expenses of an attorney incurred or paid in preparation for the adjudication of the specific case before the Board, which expenses are those customarily charged to the client where the case is tried, are allowable expenses under the EAJA. The quantum and method of proof of each allowable expense is discretionary with the Board.

Expenses incurred before a contracting officer's decision denying a claim, and therefore prior to the appeal, may be awarded under the EAJA if they are primarily related to, intended for, and necessary in the subsequent adversary adjudication, rather than intended primarily in support of the claim initially presented to the contracting officer.

Application for Attorney Fees, R&R Enterprises, IBCA-2664-F (June 14, 1990) 97 I.D. 185

ATTORNEY FEES--Continued

EQUAL ACCESS TO JUSTICE ACT--Continued

Generally--Continued

Under 25 U.S.C. § 450m-1(c) (1988), the EAJA applies to administrative appeals filed by tribal organizations regarding contracts under the Indian Self-Determination Act.

Under the Department's regulations implementing the EAJA, an application for attorney fees and expenses must demonstrate that the applicant meets the definition of "party" in 5 U.S.C. § 504(b)(1)(B) (1988).

Under 43 CFR 4.608(f), an application for attorney fees and expenses under the EAJA must be signed by the applicant or an authorized officer of the applicant.

Tohatchi Special Education & Training Center, Inc. v. Navajo Area Director, Bureau of Indian Affairs, 26 IBIA 138 (July 25, 1994)

Adversary Adjudication

Reasonable and necessary expenses of an attorney incurred or paid in preparation for the adjudication of the specific case before the Board, which expenses are those customarily charged to the client where the case is tried, are allowable expenses under the EAJA. The quantum and method of proof of each allowable expense is discretionary with the Board.

Expenses incurred before a contracting officer's decision denying a claim, and therefore prior to the appeal, may be awarded under the EAJA if they are primarily related to, intended for, and necessary in the subsequent adversary adjudication, rather than intended primarily in support of the claim initially presented to the contracting officer.

Application for Attorney Fees, R&R Enterprises, IBCA-2664-F (June 14, 1990) 97 I.D. 185

ATTORNEY FEES--Continued

EQUAL ACCESS TO JUSTICE ACT--Continued

Prevailing Party

An appellant may be a prevailing party even if its award in the underlying litigation is based on contract principles unrelated to the theory of the case propounded by its attorney. Where only one claim is involved, the appellant can be a prevailing party for the purposes of the EAJA regardless of the basis of the Board's award.

Application for Attorney Fees, R&R Enterprises, IBCA-2664-F (June 14, 1990) 97 I.D. 185

Substantially Justified

The test of substantial justification of the Government's position for EAJA purposes is not its traditional view or the consistency of its position but how fair and reasonable it was in its evaluation of the appellant's claim.

Application for Attorney Fees, R&R Enterprises, IBCA-2664-F (June 14, 1990) 97 I.D. 185

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

In order for one who participates in an administrative proceeding reviewing an enforcement action to receive an award of costs and expenses under 43 CFR 4.1294(a)(1), there must be a determination that (1) a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed; (2) the participant made a substantial contribution to the full and fair determination of the issues; and (3) the contribution was separate and distinct from the contribution made by the person initiating the proceeding.

Where a participating party seeking an award of costs and expenses, including attorneys' fees, under 43 CFR 4.1294(a)(1), alleges that it made a separate and distinct contribution but fails to describe with specificity what that separate and distinct contribution was and the case record does not demonstrate such a contribution, the request for an award will be denied.

Where the contribution of an intervenor is different than that of OSM, it still may not be considered

ATTORNEY FEES--Continued

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

"separate and distinct" under 43 CFR 4.1294(a)(1), when that contribution relates to a subsidiary issue that is decided favorably to the permittee, and the intervenor's contribution to the ultimate issue for resolution is minimal or merely cumulative to that of OSM.

Where a person intervenes in support of OSM in an administrative proceeding reviewing an enforcement action, and, thereafter, takes a position opposed to OSM, that person must be a prevailing party on that issue in order to be eligible for an award of costs and expenses, including attorneys' fees, for that issue from the permittee under 43 CFR 4.1294(a)(1).

Save Our Cumberland Mountains, Bledsoe County Chapter, 127 IBLA 245 (Sept. 28, 1993)

ATTORNEYS

An individual participating in a Departmental Indian probate proceeding without an attorney is still required to raise all issues and arguments at the hearing.

Estate of Gus Four Eyes, Jr., aka Gilford Fireshaker, 20 IBIA 22 (May 6, 1991)

BANKRUPTCY CODE

GENERALLY

An appellant's claim that its debt to BLM for rental for a communication site right-of-way was discharged by the confirmation of its reorganization plan in its Chapter 11 bankruptcy proceeding will be rejected where the rental debt to BLM was neither listed nor scheduled as required by the Bankruptcy Code, and, although BLM apparently had actual notice of the bankruptcy proceeding, the appellant fails to demonstrate

BANKRUPTCY CODE--Continued

GENERALLY--Continued

that the U.S. Attorney also received the notice mandated by Bankruptcy Rule 2002(j)(4).

Quality Broadcasting Corp., Unicom Broadcasting, Inc., 126 IBLA 174 (May 11, 1993)

AUTOMATIC STAY

An oil and gas lease in its extended term by reason of production which embraces a well capable of producing oil or gas in paying quantities expires by operation of law when production ceases and, thereafter, the lessee fails to produce the well upon 60 days' notice to place the well in production. Termination of the lease in such circumstances occurs by operation of law and does not involve any judicial or administrative proceeding. Accordingly, the termination of the lease does not involve an action or proceeding against the debtor or an act to obtain property of the debtor which would be barred by the automatic stay provided by the Bankruptcy Code, 11 U.S.C. § 362(a) (1988), upon the filing of a petition in bankruptcy.

Great Western Petroleum & Refining Co., 124 IBLA 16 (Aug. 19, 1992)

The automatic stay of the Bankruptcy Code invoked upon the filing of a petition in bankruptcy applies to the commencement or continuation of administrative or judicial proceedings against the debtor or the debtor's assets. As a general rule, the stay does not bar proceedings against a guarantor or surety on a coal lease bond securing the debtor's obligations under the lease. Hence, a motion on reconsideration to vacate the decision of the Board adjudicating the royalty due on a coal lease on the ground that the lessee came within the jurisdiction of the bankruptcy court prior to issuance of the Board's decision is properly denied where the decision is being relied upon to support a claim against the third party surety and not against the debtor/lessee.

Lone Star Steel Co. (On Reconsideration), 124 IBLA 144 (Sept. 30, 1992)

BANKRUPTCY CODE--Continued

CONFIRMATION OF PLAN

Confirmation by the bankruptcy court of a plan of reorganization under Chapter 11 of the Bankruptcy Code is binding on both the debtor and the creditors. Although BLM has the authority by regulation to increase the amount of bond coverage required of an oil and gas operator, an order of the bankruptcy court confirming the plan of reorganization of a Federal oil and gas lessee which expressly bars an increase in bond coverage as a condition of production is binding on the Department in the absence of modification thereof. A finding that an oil and gas lease in its extended term by reason of production terminated automatically for failure to produce lease wells within 60 days of notice to do so will be remanded where production was conditioned upon increased bond coverage expressly barred by order of the bankruptcy court.

Great Western Petroleum & Refining Co., 124 IBLA 16 (Aug. 19, 1992)

BOARD OF INDIAN APPEALS

GENERALLY

The Board of Indian Appeals will not consider the merits of a moot appeal where there is no showing that it involves a potentially recurring question raised by a short term order, capable of repetition, yet evading review.

The Board of Indian Appeals undertakes to interpret tribal law only where there is a clear necessity for it to do so.

Erin Forrest v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 372 (July 19, 1990)

The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a

BOARD OF INDIAN APPEALS--Continued

GENERALLY--Continued

short-term order capable of repetition, yet evading review.

Shoshone-Paiute Tribes of the Duck Valley Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 423 (Sept. 13, 1990)

Cherokee Nation of Oklahoma, Chickasaw Nation, & Choctaw Nation of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 22 IBIA 240 (Aug. 24, 1992)

Where an Indian tribe resolves an election dispute in a valid tribal forum, neither the Bureau of Indian Affairs nor the Board of Indian Appeals may disregard the resolution reached by that forum.

Beverly A. Smalley et al. v. Eastern Area Director, Bureau of Indian Affairs, 18 IBIA 459 (Sept. 27, 1990)

The Board of Indian Appeals serves to provide independent, objective administrative review of decisions of Bureau of Indian Affairs' officials and to prevent the politicization of those decisions.

Lyle D. & Donna J. Griffith v. Acting Portland Area Director, Bureau of Indian Affairs, 19 IBIA 14 (Oct. 19, 1990)

An unorganized group lacks standing to bring an appeal under 25 CFR Part 2.

Novo River Indian Community v. Acting Sacramento Area Director, Bureau of Indian Affairs, 19 IBIA 63 (Nov. 14, 1990)

The Board of Indian Appeals will not order an evidentiary hearing under 43 CFR 4.337(a) where there is no need for further inquiry to resolve a genuine issue of material fact.

Dawn Mining Co. v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 50 (May 29, 1991)

BOARD OF INDIAN APPEALS--Continued

GENERALLY--Continued

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 33 (Oct. 24, 1991)

Where an appeal to the Board of Indian Appeals should have been filed by or on behalf of a partnership, a limited partner lacks standing if he would lack authority to bring a derivative action under the state law governing the partnership.

Donald S. Jacobs v. Eastern Area Director, Bureau of Indian Affairs, 20 IBIA 69 (June 10, 1991)

The Board of Indian Appeals will not order an evidentiary hearing under 43 CFR 4.337(a) where there is no need for further inquiry to resolve a genuine issue of material fact. The party requesting that the Board order an evidentiary hearing must affirmatively show the existence of a controversy concerning a genuine issue of material fact, the resolution of which is necessary for a decision in the appeal.

All Materials of Montana, Inc. v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 202 (Feb. 27, 1992)

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional.

Estate of Guadalupe Almanza Conger, 21 IBIA 244 (Mar. 17, 1992)

The Board of Indian Appeals undertakes to interpret tribal law only where there is a clear necessity for it to do so. It therefore does not consider moot issues where, in order to render a decision on the merits, it would be required to interpret tribal law.

Parmenton Decorah et al. v. Minneapolis Area Director, Bureau of Indian Affairs, 22 IBIA 98 (June 10, 1992)

BOARD OF INDIAN APPEALS--Continued

GENERALLY--Continued

Under Board of Indian Appeals procedures, an appellant is not required to file an opening brief and may choose to rely on materials already in the record. However, an appellant who waives his opportunity to file an opening brief is not entitled to present his case in chief in a reply brief filed after the answer briefs of opposing parties have been filed.

Tiger Outdoor Advertising, Inc. v. Eastern Area Director, Bureau of Indian Affairs, 22 IBIA 280 (Sept. 9, 1992)

An organization need not be incorporated in order to have standing to appeal under 25 CFR Part 2.

An intervenor in an appeal before the Board of Indian Appeals is normally limited to the issues raised by the appellant.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992)
99 I.D. 219

The role of the Board of Indian Appeals in reviewing a BIA determination of fair rental value is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence.

The Board of Indian Appeals normally will not consider arguments raised for the first time in an appellant's reply brief.

John Strain v. Portland Area Director, Bureau of Indian Affairs et al., 23 IBIA 114 (Dec. 18, 1992)

When an election is contested under 25 CFR 81.22, the grounds for the contest must be presented to BIA within 3 days after the election. The Board of Indian Appeals cannot consider arguments based on grounds presented for the first time in an appeal to the Board.

Thurman L. Welbourne v. Anadarko Area Director, Bureau of Indian Affairs, 26 IBIA 69 (June 20, 1994)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract for one of the Five Civilized Tribes is final for the Department and is not subject to appeal within the Department.

Principal Chief, Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 105 (Jan. 17, 1990)

The Board of Indian Appeals lacks jurisdiction to review decisions of the Assistant Secretary--Indian Affairs unless the matter is referred to it under 43 CFR 4.330(a)(2).

Under 25 CFR 89.41, a decision whether to authorize the expenditure of appropriated funds to pay tribal attorney's fees is a decision based on the exercise of discretion.

Walker River Paiute Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 109 (Jan. 17, 1990)

Decisions concerning whether to approve an application for a grant under the Indian Business Development Program are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Honaghaahnii Marketing & Public Relations, Inc. v. Navajo Area Director, Bureau of Indian Affairs, 18 IBIA 144 (Feb. 14, 1990)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Death Valley Timbi-Sha Shoshone Tribe v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 196 (Mar. 16, 1990)

Yomba Tribal Council, Yomba Shoshone Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 243 (Apr. 16, 1990)

La Jolla Band of Mission Indians v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 263 (Apr. 26, 1990)

Sauk-Suiattle Indian Tribe v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 238 (Sept. 6, 1991)

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

McCoy Industries, Inc. v. Eastern Area Director, Bureau of Indian Affairs, 18 IBIA 234 (Apr. 11, 1990)

Home Respiratory Services, Inc. & The Will Rogers Bank & Trust Co. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 299 (May 24, 1990)

Robert Gauthier v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 303 (May 24, 1990)

Aubertin Logging & Lumber Enterprises v. Acting Portland Area Director, Bureau of Indian Affairs, 18 IBIA 307 (May 31, 1990)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Helen Polzer et al. v. Minneapolis Area Director, Bureau of Indian Affairs, 20 IBIA 158 (Aug. 5, 1991)

Decisions to approve or disapprove conveyances of Indian trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

Sonney Thornburg v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 239 (Apr. 13, 1990)

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional.

Thomas Leslie Redleaf v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 268 (Apr. 30, 1990)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against the Bureau of Indian Affairs.

Sherry Wilson Price v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 272 (May 1, 1990)

Decisions of Bureau of Indian Affairs officials concerning whether to seek legislation affecting Indian allotments on the public domain are decisions based on the exercise of discretionary authority. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau.

Cora Marion v. Billings Area Director, Bureau of Indian Affairs, 18 IBIA 395 (Aug. 15, 1990)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Decisions concerning whether a loan application under the Indian Loan Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, the Board of Indian Appeals does not substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Linda C. McDonald v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 399 (Aug. 21, 1990)

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid.

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against the Bureau of Indian Affairs or any other party.

Linda Mashunkashey Kays v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 431 (Sept. 17, 1990)

The Board of Indian Appeals has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to issue advisory opinions.

Grand Traverse Band of Ottawa & Chippewa Indians v. Acting Deputy to the Ass't Secretary--Indian Affairs (Tribal Services), 18 IBIA 450 (Sept. 24, 1990)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

The Board of Indian Appeals has jurisdiction to review a decision of a Bureau of Indian Affairs official declining to approve or disapprove an Indian group's attorney contract on the basis that the group is not a Federally recognized Indian tribe.

Edwards, McCoy & Kennedy & Western Shoshone Business Council of the Duck Valley Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 454 (Sept. 24, 1990)

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure the proper consideration was given to all legal prerequisites to the exercise of discretion.

Johnnie Louis McAlpine v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 2 (Oct. 10, 1990)

Once an appeal is properly docketed by the Board of Indian Appeals in accordance with 43 CFR 4.336, the Board can be divested of jurisdiction only by the Secretary of the Interior or the Director of the Office of Hearings and Appeals, pursuant to 43 CFR 4.5, or by the Board's finding pursuant to 43 CFR 4.337(b) that an issue or issues raised in the appeal require the exercise of discretion committed to the Bureau of Indian Affairs.

The Board of Indian Appeals has held that it lacks authority to substitute its judgment for that of the Bureau of Indian Affairs when the Bureau has been granted discretion over the subject matter of an appeal; i.e., when there is "no law to apply." The Board has jurisdiction to determine whether a BIA decision is properly characterized as discretionary and whether all legal prerequisites to the exercise of discretion have been met.

In general, decisions concerning whether a request for a loan guaranty or grant under one of the business

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

development programs operated by the Bureau of Indian Affairs are committed to the discretion of the Bureau. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Lyle D. & Donna J. Griffith v. Acting Portland Area Director, Bureau of Indian Affairs, 19 IBIA 14 (Oct. 19, 1990)

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a Bureau of Indian Affairs official, the Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

If, during the course of an appeal to the Board of Indian Appeals, the Bureau of Indian Affairs determines that the decision on appeal was incorrect, it can: (1) request that the decision be vacated and the matter remanded in order to grant the relief the appellant requests, (2) confess error and ask the Board to reverse the decision, or (3) enter into a settlement with the appellant. Each of these actions are taken through the filing of an appropriate document with the Board.

Bernadette L. Raymond v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 41 (Oct. 25, 1990)

Decisions governing the granting of a farming lease of trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine aboriginal title to land.

Noyo River Indian Community v. Acting Sacramento Area Director, Bureau of Indian Affairs, 19 IBIA 63 (Nov. 14, 1990)

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Yavapai-Prescott Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 19 IBIA 107 (Dec. 3, 1990)

Washoe Tribe of Nevada & California v. Acting Phoenix Area Director, Bureau of Indian Affairs, 19 IBIA 190 (Feb. 5, 1991)

The Board of Indian Appeals lacks jurisdiction to consider an argument that a homesite lease violated regulations of the Department of Housing and Urban Development.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

Decisions concerning the approval of a mortgage of Indian trust or restricted land under 25 U.S.C. § 483a (1988), are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Caroline D. & James D. Tyler v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 144 (Jan. 8, 1991)

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Jack & Shirley Baker v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 164 (Jan. 25, 1991) 98 I.D. 5

Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 296 (Apr. 17, 1991)

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the distion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Fred A. Reed v. Minneapolis Area Director, Bureau of Indian Affairs, 19 IBIA 249 (Mar. 5, 1991)

The Board of Indian Appeals lacks jurisdiction over appeals from decisions of officials of the General Land Office or the Bureau of Land Management concerning Indian allotments on the public domain.

James Robert Burchard v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 254 (Mar. 8, 1991)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Decisions concerning whether a request for a U.S. Direct Loan should be approved are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

David Pourier v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 266 (Mar. 21, 1991)

The Board of Indian Appeals does not have jurisdiction over contract disputes arising under an Indian Self-Determination Act contract.

Larry Martin v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 279 (Apr. 4, 1991) 98 I.D. 200

A Bureau of Indian Affairs decision concerning the eligibility of a tribe for a Core Management grant under 25 CFR 278.22(a)(1) is a decision based on a legal conclusion and is subject to review by the Board of Indian Appeals.

Pawnee Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs, 20 IBIA 39 (May 21, 1991)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to order restitution.

Dawn Mining Co. v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 50 (May 29, 1991)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against the BIA or an Indian tribe.

U.S. Fish Corp. v. Eastern Area Director, Bureau of Indian Affairs, 20 IBIA 93 (June 25, 1991)

The Board of Indian Appeals is not a court of general jurisdiction. It has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine tort claims against the United States.

John P. Taylor, dba Taylor Logging v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 101 (July 5, 1991)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of a trust patent issued by BLM or to determine aboriginal title to land.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

Decisions concerning whether an application for a loan under the Indian Revolving Loan Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

S&H Concrete Construction, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 176 (Aug. 13, 1991)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to grant equitable relief against an Indian tribe.

Bulletproofing, Inc., & Richard Medlin (President) v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 179 (Aug. 13, 1991)

The Board of Indian Appeals lacks jurisdiction to review decisions rendered by the Ass't Secretary--Indian Affairs except when those decisions are specifically referred to it by the Secretary or the Ass't Secretary, or when a right of review is established in regulations.

When the parties in a case before the Board of Indian Appeals are identical to those in a case decided by the Ass't Secretary--Indian Affairs, the case raises the same issues, and the issues arise from the same transaction, the Board, as a matter of comity, will defer to the Ass't Secretary's decision because the appellant has already received a decision by a Secretarial-level official of the Department.

Bob Begay v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 248 (Sept. 20, 1991)

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid.

Mildred Frazier v. Acting Portland Area Director, Bureau of Indian Affairs, 21 IBIA 11 (Oct. 8, 1991)

Diedre Wilson v. Acting Portland Area Director, Bureau of Indian Affairs, 21 IBIA 188 (Feb. 14, 1992)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a BIA official, the Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

If, during the course of an appeal to the Board of Indian Appeals, the BIA determines that the decision on appeal was incorrect, it can: (1) request that the decision be vacated and the matter remanded in order to grant the relief the appellant requests, (2) confess error and ask the Board to reverse the decision, or (3) enter into a settlement with the appellant. Each of these actions is taken through the filing of an appropriate document with the Board.

Five Sandoval Indian Pueblos, Inc. v. Deputy Comm'r of Indian Affairs, 21 IBIA 17 (Oct. 10, 1991)

When a lease of trust or restricted land provides that arbitration "may" be used to resolve disputes arising between the parties, arbitration is not the exclusive remedy available to the parties. The BIA and the Board of Indian Appeals have authority to consider disputes arising under such a lease when the parties do not agree to the use of arbitration.

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 33 (Oct. 24, 1991)

The approval of requests to acquire land in restricted fee status for Osage Indians is committed to the discretion of the BIA. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Nancy Tillman Keil v. Muskogee Area Director, Bureau of Indian Affairs, 21 IBIA 126 (Dec. 19, 1991)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Decisions concerning whether or not to grant a lease of trust or restricted land are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Darrell Rathkamp v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 144 (Jan. 9, 1992)

Theresa Jerry Moses et al. v. Acting Portland Area Director, Bureau of Indian Affairs, 24 IBIA 233 (Sept. 29, 1993)

Decisions concerning whether a tribe's application for a Technical Assistance grant should be funded are committed to the discretion of the BIA. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

The Board of Indian Appeals has jurisdiction to review an allegation that raises questions as to whether the BIA followed its own guidelines for a financial assistance program.

Oneida Indian Nation v. Deputy Comm'r of Indian Affairs, 21 IBIA 215 (Feb. 28, 1992)

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the BIA. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

John Ross, Jr. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 21 IBIA 251 (Mar. 18, 1992)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

The Board of Indian Appeals is not a court of general jurisdiction. It has only that authority which has been delegated to it by the Secretary of the Interior. It has not been delegated authority to determine whether title to land is properly in the United States in trust for an Indian tribe or individual as opposed to being in fee ownership.

Phil Foutz v. Acting Navajo Area Director, Bureau of Indian Affairs, 21 IBIA 273 (Mar. 27, 1992)

The Board of Indian Appeals lacks jurisdiction to review decisions rendered by the Assistant Secretary--Indian Affairs except when those decisions are specifically referred to it by the Secretary or the Assistant Secretary, or when a right of review is established in regulations.

State of South Dakota & Town of Oacoma v. Aberdeen Area Director, Bureau of Indian Affairs, 22 IBIA 126 (June 12, 1992)

The Board of Indian Appeals has no authority to review acts or decisions of the Secretary of the Interior, except as referred to the Board by the Secretary under 43 CFR 4.330(a)(2).

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional.

Perry Murdock v. Acting Phoenix Area Director, Bureau of Indian Affairs, 22 IBIA 130 (June 18, 1992)

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional or a duly promulgated Departmental regulation invalid.

Estates of Evan Gillette, Sr., & Lizzie Gillette/Yellow Bird/Bellanger/Paint/Bedell, aka Elizabeth Burdell, 22 IBIA 133 (June 18, 1992)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal lprerequisites to the exercise of discretion.

Navajo Precision Built Systems, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 22 IBIA 153 (June 26, 1992)

A letter signed by a BIA official in which the official states that he or she cannot make a decision in a pending matter because of insufficient or inadequate information is subject to administrative review under 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Pinoleville Indian Community Governing Council v. Sacramento Area Director, Bureau of Indian Affairs, 22 IBIA 176 (July 16, 1992)

A decision distributing funds among several tribes, for purposes of contracting under the Indian Self-Determination Act, is a decision based on the exercise of discretion. In reviewing such decisions, the Board of Indian Appeals does not substitute its judgment for that of the Bureau but, rather, seeks to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Ponca Tribe of Oklahoma, Pawnee Tribe of Oklahoma, & Otoe-Missouria Tribe v. Acting Anadarko Area Director, Bureau of Indian Affairs, 22 IBIA 199 (Aug. 7, 1992)

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a BIA official, the

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

Cherokee Nation of Oklahoma, Chickasaw Nation, & Choctaw Nation of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 22 IBIA 240 (Aug. 24, 1992)

The Board of Indian Appeals has no authority to declare a Federal statute violative of the United States Constitution or in conflict with a state constitution.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992)
99 I.D. 219

Decisions to approve or disapprove conveyances of Indian trust or restricted land are committed to the discretion of BIA. In reviewing such decisions, the Board does not substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of title to Indian land.

Severo Leon et al. v. Albuquerque Area Director, Bureau of Indian Affairs, 23 IBIA 248 (Mar. 23, 1993)

When a claim for "finder's fees" arises within the context of a probate proceeding, seeks recovery from the IIM account of an heir or devisee, and is based on a contract that requires Departmental approval but has not been approved, the ALJ is an "authorized representative" of the Secretary of the Interior within the meaning of 25 CFR 115.9 for the purpose of considering whether the contract should be approved.

Estate of John Charlie, 24 IBIA 253 (Oct. 20, 1993)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

The Board of Indian Appeals has jurisdiction over decisions issued by BIA officials under 25 CFR Chapter I. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

Arthur J. Welmas & Linda Streeter Dukic, Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 264 (Oct. 20, 1993)

Decisions concerning whether or not to grant a lease of trust or restricted land are committed to the discretion of BIA. It is not the Board's function, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Vincent Blackhawk v. Billings Area Director, Bureau of Indian Affairs, 24 IBIA 275 (Oct. 21, 1993)

Decisions concerning whether or not to approve a lease of trust or restricted land are committed to the discretion of BIA. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Novak Brothers et al. v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 25 IBIA 104 (Jan. 5, 1994)

Decisions concerning whether or not to grant a trader's license or peddler's permit are committed to the discretion of BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Jane Rush v. Acting Navajo Area Director, Bureau of Indian Affairs, 25 IBIA 198 (Mar. 4, 1994)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

A BIA decision distributing program funds among several tribes is a decision based on the exercise of discretion. In reviewing such decisions, the Board does not substitute its judgment for that of the Bureau but, rather, seeks to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Sault Ste. Marie Tribe of Chippewa Indians v. Minneapolis Area Director, Bureau of Indian Affairs, 25 IBIA 236 (Mar. 16, 1994)

The decisions of BIA officials in election contests under 25 CFR 81.22 may be appealed under 25 CFR Part 2.

Thurman L. Welbourne v. Anadarko Area Director, Bureau of Indian Affairs, 26 IBIA 69 (June 20, 1994)

Although a BIA Director has authority to place a Superintendent's decision into immediate effect under 25 CFR 2.6(a), an Area Director does not have authority to make his or her own decision final for the Department when Departmental regulations provide a right of appeal to the Board of Indian Appeals.

Dean Wallace v. Aberdeen Area Director, Bureau of Indian Affairs, 26 IBIA 150 (Aug. 2, 1994)

The Assistant Secretary--Indian Affairs lacks authority to assume jurisdiction over an appeal filed with the Board of Indian Appeals when the timeframes established in 25 CFR 2.20(c) and 43 CFR 4.332(b) have passed.

When BIA shows that it is working on a response to a request for action under 25 CFR 2.8, the Board of Indian Appeals will dismiss without prejudice an appeal based on the failure to respond to the request.

Shaahook Group of Capitan Grande Band of Diegueno Mission Indians v. Director, Office of Tribal Services, Bureau of Indian Affairs, 27 IBIA 43 (Nov. 29, 1994)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Under the circumstances of this case, the Board of Indian Appeals finds no reason why self-governance decisions signed by the Deputy Commissioner of Indian Affairs should be immune from the general right of review by the Board. If these decisions are actually decisions of the Assistant Secretary--Indian Affairs, they should be signed by the Assistant Secretary, not by the Deputy Commissioner or any other subordinate official.

Mille Lacs Band of Ojibwe v. Acting Deputy Commissioner of Indian Affairs, 27 IBIA 94 (Dec. 21, 1994)

BOARD OF LAND APPEALS

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

The Department of the Interior is part of the Executive branch of Government and is duty bound to carry out instructions of Congress enacted as law. The Board of Land Appeals has no authority to declare Acts of Congress invalid, unconstitutional, without authority, or otherwise improper. The Board is bound by the provisions of the "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area" which have become law by virtue of congressional ratification.

Seldovia Native Ass'n, Inc., 113 IBLA 218 (Feb. 27, 1990)

BOARD OF LAND APPEALS--Continued

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within 10 business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter.

A Record of Decision and Finding of No Significant Impact based on an environmental record of review or an environmental assessment prepared in response to the filing of an application for a permit to drill under 43 CFR 3162.3-1 is first subject to administrative review by a State Director of BLM in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director may appeal that decision to the Interior Board of Land Appeals.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

Challenges to the validity of a national rule promulgated by the Secretary under the Surface Mining Control and Reclamation Act of 1977 may only be brought to the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1982). The Board of Land Appeals does not have jurisdiction to rule on such a challenge. The Board is bound by a duly promulgated regulation of the Secretary and is not authorized to declare it invalid.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

Unlike the failure to timely file a notice of appeal, failure to timely file a statement of reasons does not deprive the Board of jurisdiction. Under 43 CFR 4.402, failure to file a statement of reasons within the required time makes the appeal subject to summary dismissal. The Board avoids procedural dismissals when there has been no showing that the delay

BOARD OF LAND APPEALS--Continued

in filing the statement of reasons prejudiced the adverse party.

The Board has no jurisdiction to review Bureau of Land Management procedures outlined in a manual in the absence of a decision applying such procedures to dispose of a case to which appellant is a party.

James C. Mackey, 114 IBLA 308 (May 14, 1990)

Imposition of an assessment to compel compliance with regulations implementing the Mineral Leasing Act is an exercise of the Department's regulatory power which is not stayed by the filing of a bankruptcy petition by an oil and gas lessee or operator.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

The regulations at 43 CFR 3162.1(a) and 43 CFR 3161.2 reflect BLM's broad authority to issue orders governing operations at lease sites. Challenges to the scope of BLM's authority and the manner in which it is exercised are properly raised by a party adversely affected by appeal to the Board of Land Appeals, after administrative review by the State Director.

Luff Exploration Co., 115 IBLA 134 (June 28, 1990)

Pursuant to 43 CFR 1610.5-2(b) approval or amendment of resource management plans are not appealable to the Board of Land Appeals and an appeal is properly dismissed to the extent that it seeks review of such a plan.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

BOARD OF LAND APPEALS--Continued

Provision of the Department of the Interior and Related Agencies Appropriations Act, 1989, 102 Stat. 1774 (Sept. 27, 1988), restricting "judicial review" to "particular activities" does not affect the authority of the Board of Land Appeals to consider timber sale appeals.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)

The Board of Land Appeals generally applies the elements of estoppel described in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970); i.e., that estoppel is an extraordinary remedy, especially as it relates to public lands; and that estoppel against the Government must be based upon affirmative misconduct.

Martin Faley, 116 IBLA 398 (Nov. 14, 1990)

A Federal oil and gas lease does not require notice and an opportunity to be heard prior to a decision to assess royalties based on a value of production which is higher than the price received by the lessee. The Department is not bound by the price reported by a lessee and has authority to determine for royalty purposes that the value of gas produced was different than the amount received by the lessee. A lessee is entitled to a reasoned and factual explanation supporting a decision setting a different value and an opportunity to challenge it and obtain review.

Phillips Petroleum Co., 117 IBLA 230 (Dec. 21, 1990)

The interpretation announced by MMS in its Procedure Paper concerning valuation of NGLP did not constitute a sudden change in policy such that its application violated appellant's due process rights and was arbitrary and capricious.

Phillips Petroleum Co., 117 IBLA 255 (Jan. 10, 1991)

BOARD OF LAND APPEALS--Continued

The Board of Land Appeals may assess damages for trespass in the exercise of its de novo review authority which includes the right to determine any factual or legal question necessary to adjudicate an appeal. Where the record on appeal establishes the proper measure of damages but the amount of material taken is shown to be less than was assessed, the current amount of damages is assessed by the Board.

John Aloe & Liberty Masonry, Inc., 117 IBLA 298 (Jan. 17, 1991)

Silence by Departmental officials cannot support a claim of estoppel against the Department. Where officials of BLM issued a notice of drainage to an operator in 1982, but took no further action to enforce the notice until 1985, the Department was not estopped to assess compensatory royalty.

Kerr-McGee Corp., 118 IBLA 119 (Mar. 6, 1991)

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in U.S. v. Georgia-Pacific, 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct. The existence of a crucial misstatement of material fact upon which another party relied to its asserted detriment is a prerequisite to the invocation of estoppel.

United States v. Willie White et al., 118 IBLA 266 (Mar. 12, 1991) 98 I.D. 129

A statute establishing time limitations for commencement of civil actions for damages by the United States does not apply to limit administrative review within DOI.

Mobil Exploration & Producing U.S., Inc., 119 IBLA 76 (Apr. 5, 1991) 98 I.D. 207

BOARD OF LAND APPEALS--Continued

Under 30 U.S.C. § 209 (1988), BLM is authorized to reduce the royalty rate and waiver rentals for a coal lease for the purpose of encouraging the greatest ultimate recovery of Federal coal and in the interest of conservation of natural resources, if it determines either that such relief is necessary to promote development, or the Federal lease cannot be operated successfully under its existing terms. A BLM decision denying a royalty rate reduction and waiver of rentals may be set aside and remanded where that decision is based on BLM guidelines that do not address the unique circumstances of a not-for-profit, captive mine, which sells its entire production at cost to one of its owners, a not-for-profit electric generation and transmission cooperative, and which is an integral part of a rural electric power project financed by loans guaranteed by the Rural Electrification Administration, and on appeal, the Board of Land Appeals determines that such circumstances are appropriate for consideration.

Western Fuels-Utah, Inc., 119 IBLA 231 (May 14, 1991)

The Board of Land Appeals exercises no supervisory authority or appellante jurisdiction over proceedings pending in the district court or over actions taken by a United States Marshal pursuant to a subpoena issued by a district court.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

The existence of a BLM decision, adverse to a party to a case, is necessary to provide standing to appeal to the Board of Land Appeals under 43 CFR 4.410(a). An appealable decision takes or prohibits some action. A letter restating and summarizing Departmental policy that was put into effect by prior planning documents is not an appealable decision. An appeal from such a letter will be dismissed.

The Board of Land Appeals lacks jurisdiction to review appeals from decisions establishing resource management plans. If it is not alleged and the record does not show that there has been a decision implementing such a plan, an appeal challenging the plan will be dismissed.

Joe Trow, 119 IBLA 388 (July 3, 1991)

If an appellant's notice of appeal did not include a SOR for the appeal, the appellant must file such a statement with the Board of Land Appeals within 30 days after the notice of appeal was filed. Where no SOR is ever filed and no reason is offered for the failure to file, the appeal is properly dismissed.

Sybil W. Taylor, 120 IBLA 193 (July 30, 1991)

43 CFR 3165.4(c) prevents the suspension on appeal of a notice of violation or assessment or an instruction, order, or decision or a notice of proposed penalty. In accordance with 43 CFR 4.21(a), a timely appeal to the Interior Board of Land Appeals suspends the effect of a decision approving an Application for Permit to Drill pending the decision on appeal.

Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, 121 IBLA 1 (Oct. 4, 1991) 98 I.D. 267

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within DOI.

Anadarko Petroleum Corp., 122 IBLA 141 (Feb. 3, 1992)

Benson-Montin-Greer Drilling Corp., 123 IBLA 341 (July 15, 1992) 99 I.D. 115

A ROD and FONSI issued by a BLM Area Manager, which is based on an environmental record of review or an EA prepared in response to the filing of an APD an oil and gas well under 43 CFR 3162.3-1, is first subject to administrative review by a BLM State Director in accordance with 43 CFR 3165.3(b). An appeal to this Board of such a decision that has not been the subject of State Director review will be dismissed and the case remanded for referral to the appropriate State Director.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 283 (Mar. 5, 1992)

The Board does not make initial adjudication of the existence of valid existing rights to mine that has not first been submitted to and decided by OSM, the agency with jurisdiction of the subject matter involved, nor does the Board render advisory opinions.

Gabriel Energy Corp. v. Office of Surface Mining Reclamation & Enforcement, 122 IBLA 316 (Mar. 11, 1992)

A decision approving an application for permit to drill an oil and gas well under 43 CFR 3162.3-1 is first subject to administrative review by the appropriate BLM State Director in accordance with 43 CFR 3165.3(b). Where an appeal to this Board from such a decision has not been the subject of State Director review, it will be dismissed.

Wyoming Wildlife Federation, 123 IBLA 392 (Aug. 7, 1992)

Pursuant to 43 CFR 4.1282(a), notice of appeal is filed with the office of the OSM official whose decision is appealed and a copy is at the same time filed with the Board of Land Appeals. Nonetheless, 43 CFR 4.1107(c) requires that notice of appeal need only be filed with the Board. This apparent conflict between rules governing notices of appeal from OSM decisions is resolved in favor of the appellant who files only with the Board.

Marion A. Taylor, 124 IBLA 80 (Sept. 14, 1992)

A decision that is approved by the Secretary of the Interior is not subject to review by the Board of Land Appeals.

Power River Basin Resource Council, Wyoming Chapter of the Sierra Club, Wyoming Outdoor Council, 124 IBLA 83 (Sept. 15, 1992)

BOARD OF LAND APPEALS--Continued

Under the provisions of 43 CFR 3101.7-3. a third-party objecting to issuance of an oil and gas lease on land within the National Forest System, pursuant to the consent of the FS, has standing to appeal to the Interior Board of Land Appeals. However, to the extent that the third-party raises objections to the conformity of actions undertaken by the FS with respect to its own internal operating procedures or with laws solely applicable to the FS, the Board will not review such contentions where the FS has provided its own appeal system for the resolution of such issues.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within DOI.

Bolling Construction Co. & Bob Bolling, 125 IBLA 303 (Mar. 16, 1993)

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

The failure to file a SOR subjects an appeal to summary dismissal. 43 CFR 4.402(a). If no SOR or reason for the failure to file a SOR is filed, the appeal is properly dismissed.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

BOARD OF LAND APPEALS--Continued

When, on appeal from a decision on State Director review affirming a Decision Record and FONSI approving an APD to drill a natural gas well, the appellant seeks to raise additional issues which it did not present for State Director review and which were not addressed in the decision, the Board need not adjudicate such issues, but may confine its review to matters addressed in that decision.

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

Under 43 CFR 4.21(a)(2), 58 FR 4942-43 (Jan. 19, 1993), a decision will be effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for stay pending appeal is filed together with a timely notice of appeal. Where a notice of appeal is timely filed, but the petition for stay is filed after the expiration of the time period for filing an appeal, the petition is untimely and the decision becomes effective on the day after the expiration of the appeal period. However, nothing in the regulations precludes the filing of a subsequent petition for stay, and the Board of Land Appeals, in its discretion, may entertain such a petition.

Robert E. Oriskovich, 128 IBLA 69 (Dec. 6, 1993)

An appeal taken pursuant to 43 CFR 4.1280 from a decision requiring payment of additional reclamation fees will be dismissed where the decision did not specifically grant a right of appeal to the Board.

Terry Eagle Coal Co., 129 IBLA 367 (June 7, 1994)

BOARD OF LAND APPEALS--Continued

OSM was not estopped to issue a NOV and CO requiring reclamation of highwalls by an OSM inspector's oral statement concerning alternative highwall reclamation made during discussion of permit amendments when no provision for such reclamation was included in the amended permit.

Fremont Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 130 IBLA 41 (July 12, 1994)

Challenges to the approval or amendment of a RMP and its related EIS are accorded administrative review only in conformity with the protest procedures prescribed by 43 CFR Part 1600. Such challenges are properly distinguished from an appeal challenging implementing actions undertaken without preparation of a supplemental EIS which may be appealed to the Board of Land Appeals.

Colorado Environmental Coalition, 130 IBLA 61 (July 22, 1994)

Where a decision by BIA declaring that an Indian oil and gas lease held in its extended term by production terminated for lack of production is not appealed, review of that termination is barred by the doctrine of administrative finality. Further, neither BLM nor the Board of Land Appeals has jurisdiction to review BIA's decision, which is committed entirely to its authority.

Cross Creek Corp., 131 IBLA 32 (Sept. 29, 1994)

In an appeal of a BLM decision adjudicating grazing privileges, neither an ALJ nor the Board of Land Appeals has authority to entertain a claim by one grazing applicant of breach of the terms of a contract between the United States, acting through the Department of the Navy, and one of the other applicants.

Jerry Kelly (Appellee) v. Bureau of Land Management (Appellant), Sheldon W. Lamb (Intervenor/Appellant), 131 IBLA 146 (Oct. 31, 1994)

BOARD OF LAND APPEALS--Continued

In accepting a right-of-way grant for salt water disposal, the grantee agrees to be bound by all applicable State and Federal laws, including those related to water quality. Where the U.S. EPA determines that the grantee is polluting waters of the United States in violation of Federal law and orders the grantee to cease and desist, this Board has no jurisdiction to review such an order.

Under 43 CFR 2803.4(d), before suspending or terminating a right-of-way grant for failure to comply with applicable law or regulations, BLM must give the holder written notice that such action is contemplated and the grounds therefor and must allow the holder a reasonable opportunity to cure such noncompliance. When, by decision, BLM terminates a right-of-way grant without providing the required notice, that decision will be set aside and the case remanded to BLM.

Laguna Gatuna, Inc., 131 IBLA 169 (Nov. 2, 1994)

BLM properly declines to allow a DLE and returns the DLE application where the lands sought, situated within the California Desert Conservation Area, have been classified in a land-use plan, issued pursuant to secs. 202 and 601 of FLPMA, 43 U.S.C. §§ 1712 and 1781 (1988), so as to preclude agricultural uses. The propriety of the land-use classification set forth in the plan is not subject to review by the Board.

David R. Hinkson, 131 IBLA 251 (Nov. 22, 1994)

BOUNDARIES
(See also Accretion, Avulsion, Public Lands, Reliction, Surveys of Public Lands)

An unsurveyed island, whether located in navigable or non-navigable waters, remains public domain, does not pass with the bed under the water to a state upon statehood or convey with a grant of riparian land, and may be surveyed and disposed of by the United States.

A railroad patent to the State of Michigan describing "all of section one" does not convey an unsurveyed island within the meander lines of a lake, whether navigable or non-navigable, located within

BOUNDARIES--Continued

sec. 1, and the United States may properly survey such island.

Northern Michigan Exploration Co., 114 IBLA 177 (Apr. 23, 1990) 97 I.D. 171

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)

When surveying the boundaries of an Indian reservation created in 1891 on an island off the coast of Alaska, it was not proper to include an island in the reservation that clearly was not included as the reservation was defined by the President in 1916.

State of Alaska, Forest Service, U.S. Dept. of Agriculture, 127 IBLA 1 (July 12, 1993)

BUREAU OF INDIAN AFFAIRS
(See also Indian Probate)

GENERALLY

Where an Indian tribe resolves an election dispute in a valid tribal forum, neither the Bureau of Indian Affairs nor the Board of Indian Appeals may disregard the resolution reached by that forum.

Beverly A. Smalley et al. v. Eastern Area Director, Bureau of Indian Affairs, 18 IBIA 459 (Sept. 27, 1990)

BUREAU OF INDIAN AFFAIRS--Continued

GENERALLY--Continued

BIA is bound by the terms of leases it has approved, when the leases are in accord with governing regulations.

Kenneth F. Abbott v. Billings Area Director, Bureau of Indian Affairs, 20 IBIA 268 (Sept. 24, 1991)

BIA is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations.

The Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director, Bureau of Indian Affairs, 21 IBIA 45 (Nov. 12, 1991)

Comanche Housing Authority & Chloveta A. Caudill v. Anadarko Area Director, Bureau of Indian Affairs, 22 IBIA 271 (Sept. 9, 1992)

American Indian Land Development Corp. v. Sacramento Area Director, Bureau of Indian Affairs, 23 IBIA 208 (Feb. 25, 1993)

The BIA does not have the authority or responsibility to enforce a tribal court order. That authority and responsibility resides with the tribal court.

Sherry Camel v. Ass't Portland Area Director, Bureau of Indian Affairs, 21 IBIA 179 (Feb. 10, 1992)

In order to correct prior error, an official of the BIA may change an administrative interpretation of a statute as long as the reason for the change is clearly set forth to show that the departure from the prior administrative position is not arbitrary or capricious.

Hopi Indian Tribe v. Director, Office of Trust & Economic Development, Bureau of Indian Affairs, 22 IBIA 10 (Apr. 7, 1992)

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

BUREAU OF INDIAN AFFAIRS--Continued

GENERALLY--Continued

In accordance with the Federal policy of fostering tribal self-determination, which counsels respect for the right of tribes to interpret their own governing documents, BIA should avoid interpreting a tribal constitution unless there is a clear necessity for it to do so.

Parmenton Decorah et al. v. Minneapolis Area Director, Bureau of Indian Affairs, 22 IBIA 98 (June 10, 1992)

When an official of BIA has reason to question a tribal decision which requires action by the Bureau, such as the leasing of tribal trust land, he or she should make the question known to the proper tribal official or forum and ask for clarification of the tribal position.

Thor K. Lande v. Acting Billings Area Director, Bureau of Indian Affairs, 22 IBIA 188 (July 22, 1992)

Although the BIA normally would be bound by the terms of a Housing Improvement Program grant agreement it had signed, it may be excused from performance in a case where performance is impossible.

Mildred Hartman v. Anadarko Area Director, Bureau of Indian Affairs, 23 IBIA 122 (Dec. 18, 1992)

The BIA is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations. Specifically, the parties can agree to extend the period established in 25 CFR 162.14 during which a breach of a lease can be cured.

Nevaco, Inc. & Pyramid Lake Paiute Tribe of Indians v. Acting Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 157 (Aug. 31, 1993)

BUREAU OF INDIAN AFFAIRS--Continued

GENERALLY--Continued

BIA is bound by the terms of contracts it has approved, when the contracts are not in conflict with governing regulations.

Rose Stuart v. Acting Billings Area Director, Bureau of Indian Affairs, 25 IBIA 282 (Apr. 19, 1994)

Where a decision by BIA declaring that an Indian oil and gas lease held in its extended term by production terminated for lack of production is not appealed, review of that termination is barred by the doctrine of administrative finality. Further, neither BLM nor the Board of Land Appeals has jurisdiction to review BIA's decision, which is committed entirely to its authority.

Where an Indian oil and gas lease held by production has been deemed by BIA to have terminated due to lack of production, BLM properly requires the lessee of record to plug and abandon wells on the leased land.

Cross Creek Corp., 131 IBLA 32 (Sept. 29, 1994)

ADMINISTRATIVE APPEALS

Generally

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract for one of the Five Civilized Tribes is final for the Department and is not subject to appeal within the Department.

Principal Chief, Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 105 (Jan. 17, 1990)

The Bureau of Indian Affairs is required to set forth the grounds upon which its decisions are based. Those grounds, which include, but are not limited to, the identification of relevant factual issues with an explanation of the legal significance of those facts,

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

should normally appear in the decision below and be supported by the administrative record.

Alvin Atencio v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 126 (Jan. 31, 1990)

When the administrative record in an appeal from a Bureau of Indian Affairs decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

GMG Oil & Gas Corp. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 187 (Mar. 7, 1990)

When the administrative record in an appeal from a Bureau of Indian Affairs Area Director's decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

K. D. McPhail, dba Macro Oil Co. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 353 (July 6, 1990)

After issuing a decision subject to appeal under 25 CFR Part 2, a Bureau of Indian Affairs official may revoke that decision within the time for filing an appeal, provided no notice of appeal has been filed. Once a notice of appeal has been filed, the original deciding official loses jurisdiction over the matter, and jurisdiction is vested in the official who will decide the appeal.

Jimmy D. Fox, Sr. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 444 (Sept. 21, 1990)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

The Board of Indian Appeals has jurisdiction to review a decision of a Bureau of Indian Affairs official declining to approve or disapprove an Indian group's attorney contract on the basis that the group is not a Federally recognized Indian tribe.

Edwards, McCoy & Kennedy & Western Shoshone Business Council of the Duck Valley Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 454 (Sept. 24, 1990)

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a Bureau of Indian Affairs official, the Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

If, during the course of an appeal to the Board of Indian Appeals, the Bureau of Indian Affairs determines that the decision on appeal was incorrect, it can: (1) request that the decision be vacated and the matter remanded in order to grant the relief the appellant requests, (2) confess error and ask the Board to reverse the decision, or (3) enter into a settlement with the appellant. Each of these actions are taken through the filing of an appropriate document with the Board.

Bernadette L. Raymond v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 41 (Oct. 25, 1990)

A Bureau of Indian Affairs official is bound by a decision in an administrative appeal which has become final for the Department of the Interior.

Bryan Knows Ground et al. v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 50 (Nov. 6, 1990)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

An unorganized group lacks standing to bring an appeal under 25 CFR Part 2.

Novo River Indian Community v. Acting Sacramento Area Director, Bureau of Indian Affairs, 19 IBIA 63 (Nov. 14, 1990)

Under 25 CFR 2.7(a), it is the responsibility of a Bureau of Indian Affairs' deciding official to give notice of the decision to all interested parties known to the official.

Edward Parisian v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 109 (Dec. 3, 1990)

A Bureau of Indian Affairs Area Director is vested with jurisdiction to decide an appeal arising under 25 CFR Part 2 "if the subject of appeal is a decision by a person under the authority of that Area Director." 25 CFR 2.4(a).

Choctaw Nation of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 243 (Feb. 26, 1991)

The Indian Self-Determination Act does not give a subcontractor an explicit or implicit right to appeal under 25 CFR Part 2 from an action taken by an Indian tribe pursuant to a contact under the Act.

In connection with its authority to rescind an Indian Self-Determination Act contract under 25 U.S.C. § 450m (1988), the BIA has authority to investigate an Indian tribe's performance under the contract.

Larry Martin v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 279 (Apr. 4, 1991) 98 I.D. 200

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

Corrections to inventories in Indian estates may not be pursued through administrative appeals of unrelated BIA decisions.

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Georgianna L. Danks v. Aberdeen Area Director, Bureau of Indian Affairs, 20 IBIA 79 (June 12, 1991)

When a Bureau of Indian Affairs Area Director fails to issue a decision in a matter appealed to him, the Superintendent's decision cannot properly be said to be "final" for the Department of the Interior.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

After issuing a decision concerning general assistance benefits, a Bureau of Indian Affairs official may reverse that decision within the time for filing an appeal, provided no appeal has been filed.

Linda Stark, Edward Stark, & Frederick Stark v. Acting Portland Area Director, Bureau of Indian Affairs, 20 IBIA 121 (July 11, 1991)

A decision issued by a BIA official cannot properly be said to be "final" when a notice of appeal was filed from that decision, but was not acted upon as required by relevant regulations.

Zonnie Bahe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 255 (Sept. 23, 1991)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a BIA official, the Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

If, during the course of an appeal to the Board of Indian Appeals, the BIA determines that the decision on appeal was incorrect, it can: (1) request that the decision be vacated and the matter remanded in order to grant the relief the appellant requests, (2) confess error and ask the Board to reverse the decision, or (3) enter into a settlement with the appellant. Each of these actions is taken through the filing of an appropriate document with the Board.

Five Sandoval Indian Pueblos, Inc. v. Deputy Comm'r of Indian Affairs, 21 IBIA 17 (Oct. 10, 1991)

A BIA Area Director does not have authority to make his decision final for the Department of the Interior.

Citation Oil & Gas, Ltd. v. Acting Billings Area Director, Bureau of Indian Affairs, 21 IBIA 75 (Dec. 17, 1991)

An appeal pending before the BIA may be summarily dismissed only when the reasons for the appeal cannot be determined from the appeal documents taken as a whole and only after the appellant has been given an opportunity to amend his/her appeal documents.

When it is necessary to approximate the date on which an answer is due in an appeal pending before the BIA, the Bureau deciding official should not issue a decision until a reasonable time has passed after the date an answer might be expected.

Peace Pipe, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 22 IBLA 1 (Apr. 2, 1992)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

A decision signed by an Acting Area Director of BIA has the same status as a decision signed by an Area Director.

Pat Hayes v. Acting Anadarko Area Director, BIA, 22 IBIA 65 (June 3, 1992)

A decision signed by an Acting Area Director of BIA has the same status as a decision signed by the Area Director.

Navajo Precision Built Systems, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 22 IBIA 153 (June 26, 1992)

A letter signed by a BIA official in which the official states that he or she cannot make a decision in a pending matter because of insufficient or inadequate information is subject to administrative review under 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Pinoleville Indian Community Governing Council v. Sacramento Area Director, Bureau of Indian Affairs, 22 IBIA 176 (July 16, 1992)

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a BIA official, the Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

Cherokee Nation of Oklahoma, Chickasaw Nation, & Choctaw Nation of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 22 IBIA 240 (Aug. 24, 1992)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

A Federal agency has a responsibility to explain the rationale and factual basis for decisions affecting persons dealing with the agency. Failure to provide such information is a violation of due process.

Quileute Tribe v. Portland Area Director, Bureau of Indian Affairs, 23 IBIA 20 (Oct. 29, 1992)

An organization need not be incorporated in order to have standing to appeal under 25 CFR Part 2.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992)
99 I.D. 219

In appeals arising under 25 CFR Part 2, interested parties are entitled to respond to an appellant's argument by filing an answer under 25 CFR 2.11. Therefore, a BIA Area Director may not issue a decision in an appeal prior to expiration of the time allowed for answers in sec. 2.11.

Cheyenne River Sioux Tribe v. Aberdeen Area Director, Bureau of Indian Affairs, 23 IBIA 103 (Dec. 14, 1992)

When, in the course of reviewing a matter under appeal, a BIA official becomes aware that an error has been made by a subordinate Bureau official, and the error is still capable of correction, the deciding official has the authority and the responsibility to correct the error, even though the particular matter was not raised as an issue by the appellant.

Mildred Hartman v. Anadarko Area Director, Bureau of Indian Affairs, 23 IBIA 122 (Dec. 18, 1992)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

When the administrative record and the decision in an appeal from a BIA Area Director's decision are inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

White Earth Band of Chippewa Indians v. Minneapolis Area Director, Bureau of Indian Affairs, 23 IBIA 216 (Mar. 3, 1993)

When the administrative record in an appeal from a BIA Area Director's decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 228 (Mar. 8, 1993)

The regulations in 25 CFR Part 2 do not require a BIA Area Director, before whom an appeal is pending, to provide advance notice that he expects to address an issue not decided by the Superintendent or raised by the parties. However, when resolution of the new issue depends upon facts which may not be reflected in the record as originally constituted, the Area Director has an obligation to seek out any additional relevant documents and to advise the parties, in accordance with 25 CFR 2.21(b), that he intends to consider them.

Lower Peoples Creek Cooperative v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 297 (Apr. 22, 1993)

Where an appeal procedure for certain decisions under the Indian Self-Determination Act appears only in the BIA Manual, and is not required either by statute or regulation, an appellant may waive the procedure in the

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

Manual and proceed under the Bureau's general appeal regulations in 25 CFR Part 2.

Kaw Nation v. Anadarko Area Director, Bureau of Indian Affairs, 24 IBIA 21 (May 26, 1993)

In cases arising under 25 CFR 2.8, challenging the failure of a BIA official to issue a decision, the burden is on the Bureau either to show that the failure was justified or to present and support a position that the official could have taken.

United Auburn Indian Community v. Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 33 (May 28, 1993)

Inclusion of a copy of 25 CFR Part 2 with a decision issued by a BIA Superintendent, although an excellent practice, does not replace the written statement of appeal rights that is required under 25 CFR 2.7(c).

Nevaco, Inc. & Pyramid Lake Paiute Tribe of Indians v. Acting Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 157 (Aug. 31, 1993)

When an appellant before the BIA makes repetitious appeals, the Bureau deciding official may summarily dispose of any issues which have been fully addressed in earlier appeals.

Under 25 CFR 2.18, BIA deciding officials have authority to consolidate appeals pending before them when the appeals involve common questions of law or fact.

Pat Hayes v. Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 50 (Nov. 30, 1993)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over certain threshold decisions rendered by BIA officials in considering proposals to contract under the Indian Self-Determination Act, P.L. 93-638, despite the special appeal procedure in 25 CFR Part 271.

Colorado River Indian Tribes v. Phoenix Area Director, Bureau of Indian Affairs, 26 IBIA 39 (June 8, 1994)

The decisions of BIA officials in election contests under 25 CFR 81.22 may be appealed under 25 CFR Part 2.

Thurman L. Welbourne v. Anadarko Area Director, Bureau of Indian Affairs, 26 IBIA 69 (June 20, 1994)

Although a BIA Director has authority to place a Superintendent's decision into immediate effect under 25 CFR 2.6(a), an Area Director does not have authority to make his or her own decision final for the Department when Departmental regulations provide a right of appeal to the Board of Indian Appeals.

Even in the case of a decision based on the exercise of discretion, BIA has a responsibility to explain the rationale and factual basis of the decision.

Dean Wallace v. Aberdeen Area Director, Bureau of Indian Affairs, 26 IBIA 150 (Aug. 2, 1994)

The Assistant Secretary--Indian Affairs lacks authority to assume jurisdiction over an appeal filed with the Board of Indian Appeals when the timeframes established in 25 CFR 2.20(c) and 43 CFR 4.332(b) have passed.

When BIA shows that it is working on a response to a request for action under 25 CFR 2.8, the Board of

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

Indian Appeals will dismiss without prejudice an appeal based on the failure to respond to the request.

Shaahook Group of Capitan Grande Band of Diegueno Mission Indians v. Director, Office of Tribal Services, Bureau of Indian Affairs, 27 IBIA 43 (Nov. 29, 1994)

Under the circumstances of this case, the Board of Indian Appeals finds no reason why self-governance decisions signed by the Deputy Commissioner of Indian Affairs should be immune from the general right of review by the Board. If these decisions are actually decisions of the Assistant Secretary--Indian Affairs, they should be signed by the Assistant Secretary, not by the Deputy Commissioner or any other subordinate official.

Mille Lacs Band of Ojibwe v. Acting Deputy Commissioner of Indian Affairs, 27 IBIA 94 (Dec. 21, 1994)

Acts of Agents of the United States

Unauthorized acts by an employee of the Bureau of Indian Affairs cannot serve as the basis for conferring rights not authorized by law.

Death Valley Timbi-Sha Shoshone Tribe v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 196 (Mar. 16, 1990)

Unauthorized acts of a BIA employee cannot serve as the basis for conferring rights not authorized by law.

D. G. & D. Logging Co. v. Billings Area Director, Bureau of Indian Affairs, 20 IBIA 229 (Aug. 29, 1991)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Discretionary Decisions

Under 25 CFR 89.41, a decision whether to authorize the expenditure of appropriated funds to pay tribal attorney's fees is a decision based on the exercise of discretion.

Walker River Paiute Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 109 (Jan. 17, 1990)

Under the circumstances of this case, in which, inter alia, a grant application under the Indian Business Development Program was disapproved on grounds not communicated to the applicant in the disapproval notification, the disapproval will be vacated and the matter referred to the Assistant Secretary--Indian Affairs for the exercise of discretion committed to the Bureau of Indian Affairs and the issuance of a new decision.

Sherry Wilson Price v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 272 (May 1, 1990)

When a challenge is raised to a discretionary decision issued by a Bureau of Indian Affairs official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

Home Respiratory Services, Inc. & The Will Rogers Bank & Trust Co. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 299 (May 24, 1990)

Because it is improper to base a decision on the lack of information that was never requested from the applicant, if the Bureau of Indian Affairs issues a decision denying an application for assistance under the Indian Financing Act of 1974 and the record shows that the decision was based on the lack of information

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Discretionary Decisions--Continued

that was not requested either on the standard application form or as a supplemental submission, the decision is not supported by the record.

When a challenge is raised to a discretionary decision issued by a Bureau of Indian Affairs official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

Robert Gauthier v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 303 (May 24, 1990)

Because it is improper to base a decision on the lack of information that was never requested from the applicant, if the Bureau of Indian Affairs issues a decision denying an application for assistance under the Indian Financing Act of 1974 and the record shows that the decision was based on the lack of information that was not requested either on the standard application form or as a supplemental submission, the decision is not supported by the record.

Aubertin Logging & Lumber Enterprises v. Acting Portland Area Director, Bureau of Indian Affairs, 18 IBIA 307 (May 31, 1990)

Decisions of Bureau of Indian Affairs officials concerning whether to seek legislation affecting Indian allotments on the public domain are decisions based on the exercise of discretionary authority. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau.

Cora Marion v. Billings Area Director, Bureau of Indian Affairs, 18 IBIA 395 (Aug. 15, 1990)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Discretionary Decisions--Continued

When the reason for denial of an application to modify a loan under the Indian Revolving Loan Program is not given in the denial decision, the decision will be vacated and the matter remanded for further proceedings.

Lyle Cochran v. Acting Billings Area Director, Bureau of Indian Affairs, 18 IBIA 406 (Aug. 21, 1990)

The Board of Indian Appeals has held that it lacks authority to substitute its judgment for that of the Bureau of Indian Affairs when the Bureau has been granted discretion over the subject matter of an appeal; i.e., when there is "no law to apply." The Board has jurisdiction to determine whether a BIA decision is properly characterized as discretionary and whether all legal prerequisites to the exercise of discretion have been met.

Lyle D. & Donna J. Griffith v. Acting Portland Area Director, Bureau of Indian Affairs, 19 IBIA 14 (Oct. 19, 1990)

Decisions governing the granting of a farming lease of trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Discretionary Decisions--Continued

Where a Bureau of Indian Affairs Area Director denies an application for a loan under the Indian Revolving Loan Fund on the grounds that the financial condition of the applicant is inadequate to provide a reasonable prospect of repayment, the administrative record should show how the Area Director reached his conclusions concerning the applicant's financial condition.

S&H Concrete Construction, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 19 IBIA 69 (Nov. 15, 1990)

The Board of Indian Appeals will refer to the Assistant Secretary--Indian Affairs an appeal requiring a decision as to whether to waive regulations set forth in 25 CFR 256.5(b), limiting certain categories of assistance under the Housing Improvement Program.

Jimmie L. Sanders v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 213 (Feb. 12, 1991)

When a BIA Area Director denies an application for a loan guaranty on the grounds that he or she lacks confidence in the ability of a new business to repay the loan out of its profits, the administrative record should show how the Area Director reached this conclusion.

Fred A. Reed v. Minneapolis Area Director, Bureau of Indian Affairs, 19 IBIA 249 (Mar. 5, 1991)

Because it is improper to base a decision on the lack of information that was never requested from the applicant, if the Bureau of Indian Affairs issues a decision denying an application for assistance under the Indian Financing Act of 1974 and the record shows that the decision was based on the lack of information

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Discretionary Decisions--Continued

that was not requested either on the standard application form or was a supplemental submission, the decision is not supported by the record.

David Pourier v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 266 (Mar. 21, 1991)

When a challenge is raised to a discretionary decision issued by a BIA official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

Raymond E. Patchen v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 219 (Aug. 27, 1991)

John Ross, Jr. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 21 IBIA 251 (Mar. 18, 1992)

Novak Brothers et al. v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 25 IBIA 104 (Jan. 5, 1994)

When the BIA denies an application for a U.S. Direct Loan, the administrative record and the decision, when read together, must show how the Bureau reached its conclusions.

Charles McCloud v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 21 IBIA 254 (Mar. 18, 1992)

When an official of BIA determines that an application for financial assistance under the Indian Financing Act should be disapproved, the issuance of a preliminary determination to that effect, allowing the applicant an opportunity to respond, could significantly expedite final resolution of the matter by allowing the applicant to address the official's concerns before initiation of the appeal process.

Nockey Construction, Inc. v. Portland Area Director, Bureau of Indian Affairs, 22 IBIA 38 (May 1, 1992)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Discretionary Decisions--Continued

Even if a grant application under the Indian Business Development Program is found to be eligible for funding, it is a proper exercise of the discretion granted to the BIA to find that other applications have higher priority under 25 CFR 286.8. Support for this conclusion must, however, appear in the administrative record.

Stone Trucking v. Portland Area Director, Bureau of Indian Affairs, 22 IBIA 52 (May 5, 1992)

Even in the case of a decision based on the exercise of discretion, BIA has a responsibility to explain the rationale and factual basis of the decision.

ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 228 (Mar. 8, 1993)

Even in the case of a decision based on the exercise of discretionary authority, the BIA has a responsibility to explain the rationale and factual basis of the decision.

Kaw Nation v. Anadarko Area Director, Bureau of Indian Affairs, 24 IBIA 21 (May 26, 1993)

Where a tribal constitution gives a BIA official authority to approve or disapprove amendments, and no limitations are placed on that authority by the constitution or by Federal statute, the Bureau official has the discretion to disapprove an amendment which would remove the requirement for approval of future amendments.

Seminole Nation of Oklahoma v. Acting Director, Office of Tribal Services, Bureau of Indian Affairs, 24 IBIA 209 (Sept. 23, 1993)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Discretionary Decisions--Continued

Decisions concerning whether or not to grant a lease of trust or restricted land are committed to the discretion of BIA. It is not the Board's function, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Vincent Blackhawk v. Billings Area Director, Bureau of Indian Affairs, 24 IBIA 275 (Oct. 21, 1993)

Under 25 CFR 162.2(a)(4), the BIA has discretion in determining whether to approve a proposed lease of trust or restricted property when the owners have not agreed to a lease.

Joe Brooks v. Muskogee Area Director, Bureau of Indian Affairs, 25 IBIA 31 (Nov. 12, 1993)

Decisions concerning whether or not to grant a trader's license or peddler's permit are committed to the discretion of BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Jane Rush v. Acting Navajo Area Director, Bureau of Indian Affairs, 25 IBIA 198 (Mar. 4, 1994)

A BIA decision distributing program funds among several tribes is a decision based on the exercise of discretion. In reviewing such decisions, the Board does not substitute its judgment for that of the Bureau but, rather, seeks to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

When a challenge is raised to a discretionary decision issued by a BIA official, the appellant bears

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Discretionary Decisions--Continued

the burden of showing that the official did not properly exercise discretion.

Sault Ste. Marie Tribe of Chippewa Indians v. Minneapolis Area Director, Bureau of Indian Affairs, 25 IBIA 236 (Mar. 16, 1994)

It is ultimately a decision within the informed discretion of BIA as to whether any conveyance of trust property, including one presented after the death of the grantor, should be approved.

Estate of George Levi, 26 IBIA 50 (June 17, 1994)

Filing

Mandatory Time Limit

A notice of appeal from a decision of a BIA official that is not timely filed will be dismissed.

Matilda Arviso et al. v. Ass't Navajo Area Director, Bureau of Indian Affairs, 18 IBIA 118 (Jan. 18, 1990)

Perry Murdock v. Acting Phoenix Area Director, Bureau of Indian Affairs, 22 IBIA 130 (June 18, 1992)

A notice of appeal from a decision of a Bureau of Indian Affairs official that is not timely filed will be dismissed.

Under the circumstances of this case, the time for filing a notice of appeal was tolled during the time the Bureau of Indian Affairs Superintendent and the party adversely affected by the Superintendent's decision were engaged in discussions pursuant to a request to rescind the decision.

New Mexico Highway & Transportation Dept. v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 165 (Feb. 23, 1990)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Filing--Continued

Mandatory Time Limit--Continued

Regulations promulgated by the Bureau of Indian Affairs at 25 CFR 2.10 (1988) establish a 30-day period for filing a notice of appeal.

Badger Oil Corp. & Ute Indian Tribe of the Uintah & Ouray Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 174 (Mar. 1, 1990)

A notice of appeal from an action or decision of a Bureau of Indian Affairs official that is not timely filed with the Board of Indian Affairs will be dismissed for lack of jurisdiction in accordance with 43 CFR 4.332(a).

Louis Sequoyah Locust v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 286 (May 8, 1990)

An appeal from a Bureau of Indian Affairs decision under 25 CFR Part 2 (1988) is timely if the notice of appeal is filed within 30 days after the appellant's receipt of the decision being appealed.

Erin Forrest v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 372 (July 19, 1990)

Regulations promulgated by the BIA in 25 CFR 2.10 (1988), established a 30-day period for filing notices of appeal.

Rocky Boy Schools v. Acting Billings Area Director, Bureau of Indian Affairs, 21 IBIA 112 (Dec. 19, 1991)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Filing--Continued

Mandatory Time Limit--Continued

A notice of appeal from a decision of a BIA official that is not timely filed will be dismissed.

Where the Board of Indian Appeals has not received a notice of appeal alleged to have been timely filed, the burden is on the appellant to show that the notice was timely mailed or delivered to the Board at its correct address.

American Land Development Corp. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 25 IBIA 120 (Jan. 12, 1994)

Leases

When a lease of trust or restricted land provides that arbitration "may" be used to resolve disputes arising between the parties, arbitration is not the exclusive remedy available to the parties. The BIA and the Board of Indian Appeals have authority to consider disputes arising under such a lease when the parties do not agree to the use of arbitration.

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 33 (Oct. 24, 1991)

BUREAU OF LAND MANAGEMENT
(See also Mineral Leasing Act)

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within 10 business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider

BUREAU OF LAND MANAGEMENT--Continued

its decision, it may request the Board to vacate or set aside the decision and remand the matter.

A Record of Decision and Finding of No Significant Impact based on an environmental record of review or an environmental assessment prepared in response to the filing of an application for a permit to drill under 43 CFR 3162.3-1 is first subject to administrative review by a State Director of BLM in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director may appeal that decision to the Interior Board of Land Appeals.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

"Holding for rejection." A decision properly "holds an application for rejection" only when BLM does not actually reject the application as of the date of the decision, but indicates that it will do so if specified defects are not cured as directed. Under this procedure, the decision is rejected only after the end of the period allowed for compliance, and the appeal period does not commence until after the compliance period has run. Where BLM mischaracterizes its decision as one holding for rejection an application for mineral patent, it is properly modified on appeal.

Where a 10-day deadline for filing a mineral patent application has irrevocably passed so that the applicant can do nothing to prevent rejection of his untimely application, it is not proper for BLM to "hold the application for rejection" by providing a compliance period to allow the applicant to conform his application to specified requirements, since compliance with the time limit is impossible, and since there is no longer any application pending before BLM to be cured. In these circumstances, BLM should reject the application as untimely (subject to an immediate appeal), and advise the applicant what it would require if and when he re-executes his application or files an amended application. BLM can then adjudicate whether any new or re-executed application complies with its filing requirements.

G. Donald Massey, 114 IBLA 209 (Apr. 25, 1990)

BUREAU OF LAND MANAGEMENT--Continued

In keeping with the principle that the filing of a notice of appeal vests exclusive authority over the matter under appeal with the Board of Land Appeals, BLM must forward the case (as represented by BLM's case file) to the Board within no more than 10 working days so that it may exercise its authority to resolve the dispute.

Thana Conk, 114 IBLA 263 (May 9, 1990)

BLM may use the American Gas Ass'n Gas Measurement Committee standards as the source for establishing a requirement as to the proper measurement of production, but a lessee is not in violation of that requirement until BLM has decided to impose it, has notified the lessee, and has given an opportunity to comply.

The regulations at 43 CFR 3162.1(a) and 43 CFR 3161.2 reflect BLM's broad authority to issue orders governing operations at lease sites. Challenges to the scope of BLM's authority and the manner in which it is exercised are properly raised by a party adversely affected by appeal to the Board of Land Appeals, after administrative review by the State Director.

Luff Exploration Co., 115 IBLA 134 (June 28, 1990)

BLM is expected to promptly forward the complete, original case file to the Board within 10 days of receipt of a notice of appeal.

If a party protests and refuses to comply with a requirement that is found to be incorrect on review, he is not subject to sanctions for not complying. Thus, where a special use permittee refuses to pay use fees and demands a deduction, he is not subject to sanctions for failure to pay timely if BLM allows his request for deduction.

Patrick G. Blumm, dba Rio Grande Rapid Transit, 116 IBLA 321 (Oct. 29, 1990)

BUREAU OF LAND MANAGEMENT--Continued

The Board of Indian Appeals lacks jurisdiction over appeals from decisions of officials of the General Land Office or the Bureau of Land Management concerning Indian allotments on the public domain.

James Robert Burchard v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 254 (Mar. 8, 1991)

BLM is required to fully adjudicate a protest against a proposed land sale where it raises reasonable doubt about the correctness of BLM's proposed action. BLM should specifically address the substantive questions in its decision ruling on the protest and, if it decides to reject them, should explain its reasons for doing so.

Joyce & Tony Padilla, 119 IBLA 33 (Mar. 25, 1991)

43 CFR 3165.4(c) prevents the suspension on appeal of a notice of violation or assessment or an instruction, order, or decision or a notice of proposed penalty. In accordance with 43 CFR 4.21(a), a timely appeal to the Interior Board of Land Appeals suspends the effect of a decision approving an Application for Permit to Drill pending the decision on appeal.

Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, 121 IBLA 1 (Oct. 4, 1991) 98 I.D. 267

The regulations governing special recreation permits do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. A decision by a BLM Area Office adversely affecting a party to a case is subject to immediate appeal to the Board of Land Appeals under 43 CFR 4.410(a).

Patrick G. Blumm, dba Rio Grande Rapid Transit, 121 IBLA 169 (Oct. 31, 1991)

BUREAU OF LAND MANAGEMENT--Continued

A ROD and FONSI issued by a BLM Area Manager, which is based on an environmental record of review or an EA prepared in response to the filing of an APD an oil and gas well under 43 CFR 3162.3-1, is first subject to administrative review by a BLM State Director in accordance with 43 CFR 3165.3(b). An appeal to this Board of such a decision that has not been the subject of State Director review will be dismissed and the case remanded for referral to the appropriate State Director.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 283 (Mar. 5, 1992)

A decision approving an application for permit to drill an oil and gas well under 43 CFR 3162.3-1 is first subject to administrative review by the appropriate BLM State Director in accordance with 43 CFR 3165.3(b). Where an appeal to this Board from such a decision has not been the subject of State Director review, it will be dismissed.

Wyoming Wildlife Federation, 123 IBLA 392 (Aug. 7, 1992)

BLM properly overruled an order of the Colorado Oil and Gas Commission refusing to reduce spacing requirements for coalbed methane gas wells in a formation on tribal-owned lands within an Indian reservation where such action was shown to be reasonable and was supported by the record.

San Juan Citizens Alliance et al., 129 IBLA 1 (Mar. 14, 1994)

The regulations governing special land-use permits, 43 CFR Part 2920, do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. A decision by a BLM Area Manager refusing to renew a land-use permit is subject to immediate appeal by the permittee to the Board of Land Appeals under 43 CFR 4.410(a).

Carl S. Hansen, 130 IBLA 369 (Sept. 15, 1994)

BUREAU OF LAND MANAGEMENT--Continued

Where a decision by BIA declaring that an Indian oil and gas lease held in its extended term by production terminated for lack of production is not appealed, review of that termination is barred by the doctrine of administrative finality. Further, neither BLM nor the Board of Land Appeals has jurisdiction to review BIA's decision, which is committed entirely to its authority.

Where an Indian oil and gas lease held by production has been deemed by BIA to have terminated due to lack of production, BLM properly requires the lessee of record to plug and abandon wells on the leased land.

Cross Creek Corp., 131 IBLA 32 (Sept. 29, 1994)

A decision by BLM denying an organization "affected interest status" in grazing matters is properly set aside where BLM did not state therein why it felt the organization did not meet relevant criteria. That failure violated not only the terms of a governing BLM State Office IM, but also the more general requirement, imposed by well-established precedent, that its decision must contain a reasoned and factual explanation providing a basis for understanding and accepting the decision, or alternatively, for appealing and disputing it before this Board.

Southern Utah Wilderness Alliance, 131 IBLA 293 (Nov. 30, 1994)

CLAIMS BY THE UNITED STATES

The Secretary of the Interior is authorized to waive use of funds in Individual Indian Money accounts to satisfy indebtedness of Indians to the United States resulting from errors in recording Indian probate distributions.

Ardis Robinson v. Acting Billings Area Director, Bureau of Indian Affairs, 20 IBIA 168 (Aug. 13, 1991)

CLASSIFICATION AND MULTIPLE USE ACT OF 1964

The Federal District Court injunction issued in National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), cert. granted sub nom., Lujan v. National Wildlife Federation, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990) (No. 89-640), is without effect as to land for which BLM issued a purported Oct. 29, 1981, termination of classification, when the classification had in fact automatically terminated pursuant to sec. 4 of the Classification and Multiple Use Act of 1964 prior to the effective date of the injunction.

Pursuant to the Classification and Multiple Use Act of 1964 the segregative effect of a disposal classification for a tract of land larger than 2,500 acres terminated automatically 2 years after publication of the notice of proposed classification, unless a continuance was obtained. This Board will not apply the "notation" or "tract book" rule in a manner which thwarts this clear congressional intent.

Phelps Dodge Corp., 115 IBLA 214 (July 3, 1990)

It is proper for BLM to declare a lode mining claim null and void ab initio if it was located on land segregated from mineral entry by a valid land classification at the time of location.

Mike & Sandra Sprunger, 123 IBLA 330 (July 10, 1992)

COAL LEASES AND PERMITS
(See also Mineral Leasing Act)

GENERALLY

Where a pre-1976 coal lease is modified in 1981 and included in the modified lease is a term designating the lease as a logical mining unit, a subsequent rulemaking announcing that leases would no longer be automatically designated as logical mining units did not change the logical mining unit status of the modified lease.

The intent of the proviso in a modified Federal coal lease that it is issued pursuant and subject to the terms and provisions of the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), and to all regulations of

COAL LEASES AND PERMITS--Continued

GENERALLY--Continued

the Secretary of the Interior then in force or subsequently promulgated and to make them "a part hereof," is to incorporate future regulations, even though inconsistent with those in effect at the time of a modification of the lease under the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 203 (1982), and even though to do so creates additional obligations or burdens for the lease.

AMCA Coal Leasing, Inc. (On Reconsideration), 114 IBLA 246 (May 8, 1990)

Under 43 CFR 3482.2(c)(2), a proposal to modify a mine plan must be submitted in writing, with a justification, by the operator or lessee. It is not effective until it has been approved in writing by the authorized officer.

BLM does not have authority to require payment of royalties for coal that was not mined in accordance with a resource recovery and protection plan, in violation of 43 CFR 3481.1(b), before it is mined later in accordance with an approved modification of the plan.

Utah Power & Light Co., 118 IBLA 181 (Mar. 6, 1991)
98 I.D. 97

BLM does not have the authority to require payment of royalties for coal which was bypassed and not mined in accordance with a resource recovery and protection plan, regardless of whether the decision to bypass violated the principle of maximum economic recovery or constituted waste of coal reserves.

Cordero Mining Co., 121 IBLA 314 (Dec. 4, 1991)

BLM was authorized to hold a coal lease sale in response to an application for coal deposits where the lands applied for were outside coal production regions following decertification of the Powder River Coal Region. A decision by BLM taking action under that

COAL LEASES AND PERMITS--Continued

GENERALLY--Continued

authority is properly affirmed in the absence of a convincing showing that BLM abused its discretion.

An EIS need not be prepared if, on the basis of an adequate EA, BLM finds that the proposed action will produce "no significant impact." A FONSI will be affirmed on appeal if the record shows that a careful review of environmental problems has been made, relevant environmental concerns have been identified, and the final determination is reasonable. Appellants bear the burden of proving error; expressing disagreement with BLM's actions is not enough to succeed on appeal. Where the party challenging the FONSI fails to show that it was premised on a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial environmental question of material significance to the action; and where BLM's EA is an extensive analysis of environmental concerns, the issuance of the FONSI will be affirmed.

Power River Basin Resource Council, Wyoming Chapter of the Sierra Club, Wyoming Outdoor Council, 124 IBLA 83 (Sept. 15, 1992)

Ordinarily, BLM does not have authority to disapprove an assignment of an overriding royalty interest in Federal coal leases, but instead merely accepts a copy of such full historical information concerning how much overriding royalty has been reserved. BLM does have authority to disapprove such assignment either where the assignee is not qualified to hold an interest in the lease or where the assignment would so burden the leasehold that a lessee or operator would shut down what could be an economically viable operation if not for the excess royalties that must be paid. However, BLM's decision denying a request for approval of an assignment of overriding royalty is properly vacated where the record does not reveal such circumstances. BLM should instead have merely accepted the submitted documents for filing.

Robert H. Gleason, 129 IBLA 378 (June 9, 1994)

COAL LEASES AND PERMITS--Continued

GENERALLY--Continued

Where a provision of a LMU approval document merely informs the lessee and the operator of Federal coal leases that at some time in the future the Department might seek to impose royalty on Federal coal bypassed in violation of an approved resource recovery and protection plan, but there is presently no alleged violation of such a plan or any decision imposing royalty, a dispute does not exist and the case is not ripe for review.

AMAX Coal Co., 131 IBLA 324 (Dec. 14, 1994)

APPLICATIONS

BLM was authorized to hold a coal lease sale in response to an application for coal deposits where the lands applied for were outside coal production regions following decertification of the Powder River Coal Region. A decision by BLM taking action under that authority is properly affirmed in the absence of a convincing showing that BLM abused its discretion.

Power River Basin Resource Council, Wyoming Chapter of the Sierra Club, Wyoming Outdoor Council, 124 IBLA 83 (Sept. 15, 1992)

The revised regulations governing preference right coal lease applications, first promulgated in 1976 with retroactive effect, apply to BLM's adjudication of pending preference right coal lease applications even though the applicant asserts that he completed the exploration required by his coal prospecting permits in 1970, applied for the preference right coal leases in 1972, and complied with the regulatory standards in effect at the time the applications were filed.

Eugene Stevens, 126 IBLA 357 (June 29, 1993)

Under sec. 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1988), which provides that "[w]here, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement * * * has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or

COAL LEASES AND PERMITS--Continued

APPLICATIONS--Continued

easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him," BLM must issue coal preference right leases before granting regional selection applications covering the same lands.

Morgan Coal Co., 129 IBLA 386 (June 20, 1994)

ASSIGNMENTS AND TRANSFERS

Standing to appeal a decision to the Board requires that an appellant be a party to the case adversely affected by the decision appealed. An assignee who has filed an application for approval of an assignment of a coal lease lacks standing to appeal a decision finding the assignment subject to approval on provision of a lease bond where the bond requirement is not contested.

G. H. Allen et al., 119 IBLA 272 (May 30, 1991)

A Federal coal lessee's election not to seek review of lease conditions to determine whether a royalty rate less than 8 percent was warranted for underground operations is not subject to challenge by a sublessee.

Valley Camp of Utah, Inc., Coastal States Energy Co., 120 IBLA 201 (Aug. 5, 1991)

BLM properly denies approval of an assignment of a coal lease where the assignee fails to submit a lease bond in response to a requirement to do so issued pursuant to 43 CFR 3453.2-4(a).

Gifford H. Allen et al., 131 IBLA 195 (Nov. 9, 1994)

COAL LEASES AND PERMITS--Continued

BONDS

The automatic stay of the Bankruptcy Code invoked upon the filing of a petition in bankruptcy applies to the commencement or continuation of administrative or judicial proceedings against the debtor or the debtor's assets. As a general rule, the stay does not bar proceedings against a guarantor or surety on a coal lease bond securing the debtor's obligations under the lease. Hence, a motion on reconsideration to vacate the decision of the Board adjudicating the royalty due on a coal lease on the ground that the lessee came within the jurisdiction of the bankruptcy court prior to issuance of the Board's decision is properly denied where the decision is being relied upon to support a claim against the third party surety and not against the debtor/lessee.

Lone Star Steel Co. (On Reconsideration), 124 IBLA 144 (Sept. 30, 1992)

DILIGENCE

Where a pre-1976 coal lease is modified in 1981 and included in the modified lease is a term designating the lease as a logical mining unit, a subsequent rulemaking announcing that leases would no longer be automatically designated as logical mining units did not change the logical mining unit status of the modified lease.

AMCA Coal Leasing, Inc. (On Reconsideration), 114 IBLA 246 (May 8, 1990)

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1988), requires that any coal lease not producing in commercial quantities at the end of the 10-year diligent development period be terminated. No suspension of this obligation to commence production is authorized by statute or regulation.

Utah Power & Light Co., 117 IBLA 271 (Jan. 15, 1991)

COAL LEASES AND PERMITS--Continued

DILIGENCE--Continued

Under sec. 7(a) of the MLA, as amended, any Federal coal lease which is not producing in "commercial quantities" at the end of 10 years shall be terminated. Production of "commercial quantities" (defined as 1 percent of recoverable coal reserves) must be achieved by the end of the "diligent development period," which is 10 years after lease issuance.

Under sec. 7(b) of the MLA, as amended, a Federal coal lease is subject to two requirements: diligent development and continued operation. The requirement for continued operation may be suspended under that section "where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee," that is, by force majeure conditions. The requirement for diligent development, however, may not be suspended by the existence of force majeure conditions under sec. 7(b).

A suspension granted under sec. 39 of the MLA, as amended, "in the interest of conservation" suspends the requirement of sec. 7(a) and (b) of the MLA, as amended, requiring diligent development within 10 years of the date of issuance of the coal lease.

Alfred G. Hoyl, 123 IBLA 169 (June 3, 1992)
99 I.D. 87

LEASES

Under 43 CFR 3482.2(c)(2), a proposal to modify a mine plan must be submitted in writing, with a justification, by the operator or lessee. It is not effective until it has been approved in writing by the authorized officer.

BLM does not have authority to require payment of royalties for coal that was not mined in accordance with a resource recovery and protection plan, in violation of 43 CFR 3481.1(b), before it is mined later in accordance with an approved modification of the plan.

Utah Power & Light Co., 118 IBLA 181 (Mar. 6, 1991)
98 I.D. 97

COAL LEASES AND PERMITS--Continued

LEASES--Continued

A coal lessee seeking reduction of the royalty rate on production from 12-1/2 percent to 8 percent must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms. Rejection of such an application may be affirmed where the record supports a finding that a royalty reduction is not necessary to encourage the greatest ultimate recovery of the Federally leased coal in that the bypass of any such coal in favor of privately leased coal would be merely temporary.

Western Energy Co., 119 IBLA 359 (June 21, 1991)

BLM does not have the authority to require payment of royalties for coal which was bypassed and not mined in accordance with a resource recovery and protection plan, regardless of whether the decision to bypass violated the principle of maximum economic recovery or constituted waste of coal reserves.

Cordero Mining Co., 121 IBLA 314 (Dec. 4, 1991)

BLM was authorized to hold a coal lease sale in response to an application for coal deposits where the lands applied for were outside coal production regions following decertification of the Powder River Coal Region. A decision by BLM taking action under that authority is properly affirmed in the absence of a convincing showing that BLM abused its discretion.

Power River Basin Resource Council, Wyoming Chapter of the Sierra Club, Wyoming Outdoor Council, 124 IBLA 83 (Sept. 15, 1992)

The 20-year readjustment interval stated in coal leases issued prior to enactment of FCLAA of Aug. 4, 1976, 30 U.S.C. §§ 201, 209 (1988), was converted to a 10-year readjustment interval by that Act. Although a failure to provide timely notice of readjustment at the end of a 20-year period is treated as a Departmental waiver of its right to impose new or additional terms and conditions, this waiver does not extend to the

period between readjustments set by the Act, and a lease may be readjusted at the end of the next 10-year period.

Pursuant to 43 CFR 3473.3-2(a)(3) (1989), royalty for coal removed by underground methods will be 8 percent unless the lessee establishes that conditions warrant a lower amount, but in no case shall the lease term provide for less than 5-percent royalty for coal removed by underground operations. Where there is an indication of ongoing underground mining and the existence of plans for further underground mining, the case will be remanded to determine whether conditions warrant a royalty rate less than 8 percent.

Sunnyside Reclamation & Salvage, Inc., 124 IBLA 238 (Oct. 30, 1992)

The revised regulations governing preference right coal lease applications, first promulgated in 1976 with retroactive effect, apply to BLM's adjudication of pending preference right coal lease applications even though the applicant asserts that he completed the exploration required by his coal prospecting permits in 1970, applied for the preference right coal leases in 1972, and complied with the regulatory standards in effect at the time the applications were filed.

Eugene Stevens, 126 IBLA 357 (June 29, 1993)

Ordinarily, BLM does not have authority to disapprove an assignment of an overriding royalty interest in Federal coal leases, but instead merely accepts a copy of such full historical information concerning how much overriding royalty has been reserved. BLM does have authority to disapprove such assignment either where the assignee is not qualified to hold an interest in the lease or where the assignment would so burden the leasehold that a lessee or operator would shut down what could be an economically viable operation if not for the excess royalties that must be paid. However, BLM's decision denying a request for approval of an assignment of overriding royalty is properly vacated where the record does not reveal such circumstances. BLM

should instead have merely accepted the submitted documents for filing.

Robert H. Gleason, 129 IBLA 378 (June 9, 1994)

Where a provision of a LMU approval document merely informs the lessee and the operator of Federal coal leases that at some time in the future the Department might seek to impose royalty on Federal coal bypassed in violation of an approved resource recovery and protection plan, but there is presently no alleged violation of such a plan or any decision imposing royalty, a dispute does not exist and the case is not ripe for review.

AMAX Coal Co., 131 IBLA 324 (Dec. 14, 1994)

READJUSTMENT

Where, in accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), the Board has remanded a case to BLM for a determination of the proper royalty to be applied to coal recovered by underground mining operations on a Federal coal lease, and BLM's decision and the accompanying case record fail to disclose a rational basis for BLM's conclusion that conditions do not warrant a royalty rate lower than 8 percent, the decision will be set aside and the case remanded for a new determination and inclusion of BLM's analysis in the record.

Kanawha & Hocking Coal & Coke Co., 112 IBLA 365 (Jan. 19, 1990)

Effective Feb. 26, 1990, 43 CFR 3473.3-2 requires payment of a royalty of 8 percent of the value of coal removed from an underground mine for all new leases issued under the Mineral Leasing Act of 1920 and for all previously issued leases at the time of the next scheduled readjustment of the lease.

Utah Power & Light Co., 115 IBLA 366 (Aug. 15, 1990)

COAL LEASES AND PERMITS--Continued

READJUSTMENT--Continued

Where, in accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), the Board has remanded a case to BLM for a determination of the proper royalty to be applied on coal recovered by underground mining operations from a Federal coal lease, and where BLM's subsequent decision and the accompanying case record fail to disclose a rational basis for its conclusion that conditions do not warrant a royalty rate lower than 8 percent, the decision will be set aside.

BLM should provide the lessee the opportunity to submit data concerning whether conditions warrant a royalty rate of less than 8 percent for coal recovered by underground mining operations on a Federal coal lease, prior to making such determination.

Kanawha & Hocking Coal & Coke Co., 118 IBLA 364 (Mar. 14, 1991)

A Federal coal lessee's election not to seek review of lease conditions to determine whether a royalty rate less than 8 percent was warranted for underground operations is not subject to challenge by a sublessee.

Objections to readjusted terms of a Federal coal lease did not delay the effective date of the readjusted lease under provision of Departmental regulation 43 CFR 3451(d) (1981).

Valley Camp of Utah, Inc., Coastal States Energy Co., 120 IBLA 201 (Aug. 5, 1991)

A decision on lease readjustment pursuant to 30 U.S.C. § 207(a) (1988), and the implementing regulation at 43 CFR 3473.3-2(a)(3) (1987), setting the royalty rate for coal mined by underground operations at 8 percent and declining to reduce it to 5 percent on the basis of lack of evidence of adverse geologic or engineering conditions which would justify a lower rate over the entire term of the lease will be affirmed where supported by the record. A distinction between long-term geologic and engineering conditions likely to continue for the term of the lease, on the one hand, and shorter-term economic conditions which may be addressed in the context of a petition for reduction in royalty under 30 U.S.C. § 209 (1988), on the other hand, will be upheld as a reasonable interpretation of the statute and

COAL LEASES AND PERMITS--Continued

READJUSTMENT--Continued

regulations governing readjustment of the royalty rates for coal leases.

Atlantic Richfield Co., et al., 121 IBLA 373 (Dec. 19, 1991) 98 I.D. 429

The 20-year readjustment interval stated in coal leases issued prior to enactment of FCLAA of Aug. 4, 1976, 30 U.S.C. §§ 201, 209 (1988), was converted to a 10-year readjustment interval by that Act. Although a failure to provide timely notice of readjustment at the end of a 20-year period is treated as a Departmental waiver of its right to impose new or additional terms and conditions, this waiver does not extend to the period between readjustments set by the Act, and a lease may be readjusted at the end of the next 10-year period.

Pursuant to 43 CFR 3473.3-2(a)(3) (1989), royalty for coal removed by underground methods will be 8 percent unless the lessee establishes that conditions warrant a lower amount, but in no case shall the lease term provide for less than 5-percent royalty for coal removed by underground operations. Where there is an indication of ongoing underground mining and the existence of plans for further underground mining, the case will be remanded to determine whether conditions warrant a royalty rate less than 8 percent.

Sunnyside Reclamation & Salvage, Inc., 124 IBLA 238 (Oct. 30, 1992)

RELINQUISHMENT

A request for relinquishment of a coal lease is properly denied pursuant to Departmental regulation 43 CFR 3452.1-3 where the record shows that payment of $3,753.60 for outstanding accrued rental and interest had not been paid when the request was filed.

That BLM did not take action on a request for relinquishment of a coal lease until 2 years after it was filed, during which time late payment charges accrued, does not relieve the lessee of the obligation to pay late payment charges.

Ametex Corp., 121 IBLA 291 (Nov. 25, 1991)

COAL LEASES AND PERMITS--Continued

RENTALS

Under 30 U.S.C. § 209 (1988), BLM is authorized to reduce the royalty rate and waiver rentals for a coal lease for the purpose of encouraging the greatest ultimate recovery of Federal coal and in the interest of conservation of natural resources, if it determines either that such relief is necessary to promote development, or the Federal lease cannot be operated successfully under its existing terms. A BLM decision denying a royalty rate reduction and waiver of rentals may be set aside and remanded where that decision is based on BLM guidelines that do not address the unique circumstances of a not-for-profit, captive mine, which sells its entire production at cost to one of its owners, a not-for-profit electric generation and transmission cooperative, and which is an integral part of a rural electric power project financed by loans guaranteed by the Rural Electrification Administration, and on appeal, the Board of Land Appeals determines that such circumstances are appropriate for consideration.

Western Fuels-Utah, Inc., 119 IBLA 231 (May 14, 1991)

A request for relinquishment of a coal lease is properly denied pursuant to Departmental regulation 43 CFR 3452.1-3 where the record shows that payment of $3,753.60 for outstanding accrued rental and interest had not been paid when the request was filed.

That BLM did not take action on a request for relinquishment of a coal lease until 2 years after it was filed, during which time late payment charges accrued, does not relieve the lessee of the obligation to pay late payment charges.

Ametex Corp., 121 IBLA 291 (Nov. 25, 1991)

A Federal coal lessee's obligation to pay rental may be suspended under sec. 39 of the MLA, as amended, as interpreted by Departmental regulation 43 CFR 3485.2(c), if he submits detailed supporting information, including (among other things) facts indicating whether the mine can be successfully operated under the existing lease terms. A request for suspension that

COAL LEASES AND PERMITS--Continued

RENTALS--Continued

does not comply with that regulation is properly rejected.

Alfred G. Hoyl, 123 IBLA 169 (June 3, 1992)
99 I.D. 87

ROYALTIES

Where, in accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), the Board has remanded a case to BLM for a determination of the proper royalty to be applied to coal recovered by underground mining operations on a Federal coal lease, and BLM's decision and the accompanying case record fail to disclose a rational basis for BLM's conclusion that conditions do not warrant a royalty rate lower than 8 percent, the decision will be set aside and the case remanded for a new determination and inclusion of BLM's analysis in the record.

Kanawha & Hocking Coal & Coke Co., 112 IBLA 365 (Jan. 19, 1990)

Effective Feb. 26, 1990, 43 CFR 3473.3-2 requires payment of a royalty of 8 percent of the value of coal removed from an underground mine for all new leases issued under the Mineral Leasing Act of 1920 and for all previously issued leases at the time of the next scheduled readjustment of the lease.

Utah Power & Light Co., 115 IBLA 366 (Aug. 15, 1990)

The Minerals Management Service has been delegated the royalty management functions of the Secretary including the authority to audit a lessee's records to determine royalty liability.

The authority of the Minerals Management Service to conduct an audit of a coal lessee's records to determine royalty liability is properly distinguished from the authority of the Minerals Management Service

under 30 CFR 217.200 to require a lessee to retain an independent certified public accountant to conduct a self-audit.

A royalty valuation decision will be affirmed on appeal where the record establishes a reasonable basis for the valuation using one or more of the factors enumerated in the regulation. The fact that another regulatory factor was not used as a basis for valuation will not justify a remand of the case in the absence of a showing that the failure to use that factor was arbitrary and capricious.

Lone Star Steel Co., 117 IBLA 96 (Dec. 3, 1990)

Where, in accordance with Coastal States Energy Co. v. Model, 816 F.2d 502 (10th Cir. 1987), the Board has remanded a case to BLM for a determination of the proper royalty to be applied on coal recovered by underground mining operations from a Federal coal lease, and where BLM's subsequent decision and the accompanying case record fail to disclose a rational basis for its conclusion that conditions do not warrant a royalty rate lower than 8 percent, the decision will be set aside.

BLM should provide the lessee the opportunity to submit data concerning whether conditions warrant a royalty rate of less than 8 percent for coal recovered by underground mining operations on a Federal coal lease, prior to making such determination.

Kanawha & Hocking Coal & Coke Co., 118 IBLA 364 (Mar. 14, 1991)

Under 30 U.S.C. § 209 (1988), BLM is authorized to reduce the royalty rate and waiver rentals for a coal lease for the purpose of encouraging the greatest ultimate recovery of Federal coal and in the interest of conservation of natural resources, if it determines either that such relief is necessary to promote development, or the Federal lease cannot be operated successfully under its existing terms. A BLM decision denying a royalty rate reduction and waiver of rentals may be set aside and remanded where that decision is based on BLM guidelines that do not address the unique circumstances of a not-for-profit, captive mine, which sells its entire production at cost to one of its owners, a

not-for-profit electric generation and transmission cooperative, and which is an integral part of a rural electric power project financed by loans guaranteed by the Rural Electrification Administration, and on appeal, the Board of Land Appeals determines that such circumstances are appropriate for consideration.

Western Fuels-Utah, Inc., 119 IBLA 231 (May 14, 1991)

A coal lessee seeking reduction of the royalty rate on production from 12-1/2 percent to 8 percent must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms. Rejection of such an application may be affirmed where the record supports a finding that a royalty reduction is not necessary to encourage the greatest ultimate recovery of the Federally leased coal in that the bypass of any such coal in favor of privately leased coal would be merely temporary.

Western Energy Co., 119 IBLA 359 (June 21, 1991)

A Federal coal lessee's election not to seek review of lease conditions to determine whether a royalty rate less than 8 percent was warranted for underground operations is not subject to challenge by a sublessee.

Valley Camp of Utah, Inc., Coastal States Energy Co., 120 IBLA 201 (Aug. 5, 1991)

A decision on lease readjustment pursuant to 30 U.S.C. § 207(a) (1988), and the implementing regulation at 43 CFR 3473.3-2(a)(3) (1987), setting the royalty rate for coal mined by underground operations at 8 percent and declining to reduce it to 5 percent on the basis of lack of evidence of adverse geologic or engineering conditions which would justify a lower rate over the entire term of the lease will be affirmed where supported by the record. A distinction between long-term geologic and engineering conditions likely to continue for the term of the lease, on the one hand, and shorter-term economic conditions which may be addressed in the context of a petition for reduction in royalty

under 30 U.S.C. § 209 (1988), on the other hand, will be upheld as a reasonable interpretation of the statute and regulations governing readjustment of the royalty rates for coal leases.

Atlantic Richfield Co., et al., 121 IBLA 373 (Dec. 19, 1991) 98 I.D. 429

The applicable regulations for purposes of determining royalty on Federal coal production sold pursuant to an arm's-length coal supply contract during the period 1980-86 provide that gross value shall be the sale or contract unit price times the number of units sold. What constitutes the sale or contract unit price depends on the terms of the contract.

Where separate provisions of an arm's-length coal supply contract provide the sale or contract unit price for separate sources of coal, and the sales price billed the purchaser is merely a sum of all the various contract pricing components, the pricing provision governing Federal coal production is properly utilized to determine the gross value of Federal production for purposes of calculating royalty.

San Juan Coal Co., 123 IBLA 245 (June 15, 1992)

Under the pre-1989 regulations governing valuation of coal for royalty purposes, one of the factors to be considered in valuing coal sold under a non-arm's-length contract is the price reported to FERC.

Valuation of coal disposed of under a non-arm's-length contract at the higher of a price determined in a fair market value study or the cost of coal reported to FERC by the consuming utility will be affirmed.

Inclusion in the royalty valuation of coal disposed of under a non-arm's-length contract of that part of the cost of coal reported to FERC which consists of the cost (interest and amortization of principal) to repay a loan secured for development of the mine is proper. The fact that the payments included by the utility in the cost of

coal reported to FERC are repaid by the lessee to the utility which extended the loan for development of the mine does not alter this result.

Under coal royalty valuation regulations effective Mar. 1, 1989, the value of coal disposed of under a non-arm's-length contract shall not be less than the gross proceeds accruing to the lessee less relevant allowances. Prices reported to the Energy Information Administration, Dept. of Energy, by lessee's affiliated coal purchaser, an electric utility, are an appropriate measure of gross proceeds.

Under the pre-1989 regulations, a transportation allowance is authorized when coal is valued for royalty purposes at a market point remote from the lease where the production is obtained. Costs of storing and loading the coal are costs of mining and are not allowed as a deduction. Where coal storage and loadout facilities are located offlease because the terrain precludes location on the leasehold, a decision denying a transportation allowance for an overload conveyor extending 1.2 miles from the lease to the loadout facilities will be affirmed.

Under the coal royalty valuation regulations effective Mar. 1, 1989, a transportation allowance is authorized for the "reasonable, actual costs incurred by the lessee" for moving coal to a point of sale or delivery remote from the mine and the lease. Movement of coal from the mine portal to storage facilities and loadout facilities of the mine situated offlease because of the terrain on the leasehold is considered part of the mining operation for which a transportation allowance is properly denied.

Under the pre-1989 royalty valuation regulations for coal, allowances for washing and transportation of coal are properly limited to certain costs of preparation/transportation of the coal which enhance the value of the coal prior to sale. A decision to deny washing and transportation allowances for payments made to local governmental entities pursuant to a socioeconomic impact mitigation agreement will be affirmed.

Under the coal royalty valuation regulations effective Mar. 1, 1989, transportation allowances are limited to lessee's actual costs for transportation and washing, including operating and maintenance expenses, overhead, and depreciation and a return on undepreciated investment. Socioeconomic impact payments to local government

entities do not qualify as directly allocable and attributable operating expenses and, hence, are not an allowable expense.

Western Fuels-Utah, Inc., 130 IBLA 18 (July 8, 1994)

SUSPENSION OF OPERATIONS AND PRODUCTION

Where a mine fire occurs on fee land adjoining a Federal lease, and where the fee land and Federal lease are not part of a logical mining unit, the fire is not a force majeure providing grounds for relief from the terms of the Federal lease. Further, where the lessee fails to prove that the alleged force majeure event was the proximate cause of his nonperformance; that a good faith effort was made to overcome the problem; and that the problem was beyond his reasonable control, he is not entitled to relief.

A Federal coal lease may not be suspended under sec. 7(b) of the MLA, as amended, recognizing force majeure conditions, due to adverse market conditions.

Under sec. 7(b) of the MLA, as amended, a Federal coal lease is subject to two requirements: diligent development and continued operation. The requirement for continued operation may be suspended under that section "where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee," that is, by force majeure conditions. The requirement for diligent development, however, may not be suspended by the existence of force majeure conditions under sec. 7(b).

The only relief available under sec. 7(b) of the MLA, as amended, where force majeure conditions exist is from the lease requirement that "continued operation" be maintained. In order to achieve "continued operation," a lessee must, inter alia, achieve the production of not less than commercial quantities of recoverable coal reserves in each of the first 2 continued operation years "following the achievement of diligent development." Where lessees have not commenced operations on a Federal leasehold, they have not achieved either "diligent development" or "continued operation," so that

no relief is available to them under the force majeure provision.

A suspension granted under sec. 39 of the MLA, as amended, "in the interest of conservation" suspends the requirement of sec. 7(a) and (b) of the MLA, as amended, requiring diligent development within 10 years of the date of issuance of the coal lease.

Sec. 39 of the MLA, as amended, provides for suspension of a Federal coal lease either (1) as a matter of right where, through some act, omission, or delay by a Federal agency, beneficial enjoyment of a lease has been precluded, such as where delays imposed upon the lessee due to administrative actions addressing environmental concerns have the effect of denying lessee's operator "timely access" to the property; or (2) as a matter of discretion, in the interest of conservation, e.g., to prevent damage to the environment. Where there is no persuasive evidence either of undue delay imposed by administrative actions addressing environmental concerns or of environmental harm, an application for suspension under sec. 39 is properly denied. The fact that a substantial investment of funds was made in three Federal leases does not create any cognizable right to retain the leases indefinitely. To the contrary, in the FCLA Act, Congress required timely development of the leases on pain of termination.

A Federal coal lessee's obligation to pay rental may be suspended under sec. 39 of the MLA, as amended, as interpreted by Departmental regulation 43 CFR 3485.2(c), if he submits detailed supporting information, including (among other things) facts indicating whether the mine can be successfully operated under the existing lease terms. A request for suspension that does not comply with that regulation is properly rejected.

Alfred G. Hoyl, 123 IBLA 169 (June 3, 1992)
99 I.D. 87

COAL LEASES AND PERMITS--Continued

TERMINATION

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1988), requires that any coal lease not producing in commercial quantities at the end of the 10-year diligent development period be terminated. No suspension of this obligation to commence production is authorized by statute or regulation.

Utah Power & Light Co., 117 IBLA 271 (Jan. 15, 1991)

Under sec. 7(a) of the MLA, as amended, any Federal coal lease which is not producing in "commercial quantities" at the end of 10 years shall be terminated. Production of "commercial quantities" (defined as 1 percent of recoverable coal reserves) must be achieved by the end of the "diligent development period," which is 10 years after lease issuance.

Under sec. 7(b) of the MLA, as amended, a Federal coal lease is subject to two requirements: diligent development and continued operation. The requirement for continued operation may be suspended under that section "where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee," that is, by force majeure conditions. The requirement for diligent development, however, may not be suspended by the existence of force majeure conditions under sec. 7(b).

A suspension granted under sec. 39 of the MLA, as amended, "in the interest of conservation" suspends the requirement of sec. 7(a) and (b) of the MLA, as amended, requiring diligent development within 10 years of the date of issuance of the coal lease.

Alfred G. Hoyl, 123 IBLA 169 (June 3, 1992)
99 I.D. 87

Federal coal leases are properly terminated for failure to produce coal in commercial quantities at the end of 10 years. Where the coal lessee has been unsuccessful in his attempts to obtain a suspension of the term of the lease, this deadline cannot be extended.

Alfred G. Hoyl, 127 IBLA 297 (Oct. 7, 1993)

COLOR OR CLAIM OF TITLE

GENERALLY

An applicant under the Color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory requirements for purchase under the Act have been met. The applicant must establish that each of the requirements for a class 1 claim has been met. A failure to carry the burden of proof with respect to one of the elements is fatal to the application.

In order to satisfy the statutory requirement of possession of the land under claim or color of title, an applicant must establish a chain of title based on a document which, on its face, purports to convey title to the claimed land.

An essential element of a color-of-title claim is the good faith requirement. Good faith under the Color of Title Act mandates that an applicant and his predecessors honestly believe that they were vested with title. In order to determine whether a claimant or his predecessor honestly believed that he was seized with title, the Department may consider whether such belief was unreasonable in light of the facts then actually known. Knowledge of Federal ownership of the land negates the requisite good faith. To establish the requisite over 20 years of possession, an applicant may tack onto his possession a period when the land was possessed by his predecessors in title, but if this is done, their good faith must also be established. If, however, a predecessor in title did not hold in good faith, the chain is broken, the holding period of the predecessor in title cannot be tacked on, and the statutory period begins anew after the predecessor divested himself of title.

In order to qualify for a patent under the Color of Title Act, an applicant must have placed valuable improvements on the land or reduced the land to cultivation. In order to qualify as valuable improvements under the Act, they must have existed on the land at the time the application was filed and must enhance the value of the land.

John P. & Helen S. Montoya, 113 IBLA 8 (Jan. 25. 1990)

COLOR OR CLAIM OF TITLE--Continued

GENERALLY--Continued

An applicant for a class I claim under the Color of Title Act has the burden of establishing to the Secretary of the Interior's satisfaction that each of the statutory requirements for purchase under the Act have been met. A failure to carry the burden of proof with respect to one of the elements is fatal to the application.

Occupancy and improvement of public lands without color of title create no vested rights as against the United States, because no adverse possession of Government property can affect the title of the United States, except as provided by the Color of Title Act. In order to satisfy the statutory requirement of possession of the land under claim of color of title, an applicant's claim of apparent ownership must be based on a document which, on its face, purports to convey title to the claimed land.

Delfino J. & Clara M. Borrego, 113 IBLA 209 (Feb. 22, 1990)

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors, or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based on a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. When the applicant fails to produce such a document, the application must be rejected.

James A. Kesel, 113 IBLA 380 (Mar. 28, 1990)

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document purporting on its fact to convey the claimed land to the applicant or the applicant's predecessors. If the land sought is omitted land lying adjacent to a lake, and the document relied upon described the land in accordance with a Government survey

COLOR OR CLAIM OF TITLE--Continued

GENERALLY--Continued

showing the land as lakeshore property, such a document purports on its fact to convey the claimed land.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

Applicants who timely showed that they were owners of land in Wisconsin lying along a meander line, subsequently resurveyed, who held down lands between the original meander and the water shown on the later survey and have, since Jan. 21, 1953, held the land in good faith and peaceful adverse possession, were entitled to purchase it under the Act of Aug. 24, 1954, known as the O'Konski Act, 43 U.S.C. § 1221 (1988).

Victor A. Markunas, Victoria E. Markunas, 119 IBLA 70 (Apr. 1, 1991)

Issuance of patent under the Color of Title Act, as amended, 43 U.S.C. §§ 1068-1068b (1988), is not warranted if the land was restored to tribal ownership prior to when the color-of-title claimant's chain of title was initiated.

Estate of Edna Turney, 123 IBLA 354 (July 20, 1992)

A class 1 color-of-title claim requires proof that the land has been held in good faith and in peaceful adverse possession by a claimant, his ancestors, or grantors for more than 20 years, under claim or color of title based on a document from a party other than the United States which on its face purports to convey the claimed land to the applicant or the applicant's predecessors, and that valuable improvements have been placed on the land or some part of the land has been reduced to cultivation. An applicant under the color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory requirements for purchase under the Act have been met, and a failure to carry the burden of proof with respect to one of the requirements is fatal to the application.

Because there can be no peaceful, adverse possession where the applicant's chain of title commences at a time when the land was withdrawn or

COLOR OR CLAIM OF TITLE--Continued

GENERALLY--Continued

reserved for Federal purposes, a color-of-title application is properly rejected where the applicant fails to produce a document which on its face purports to convey the claimed land prior to the time the land was reserved as a national forest.

Shirley & Pearl Warner, 125 IBLA 143 (Jan. 15, 1993)

An essential element of a color-of-title claim is the good faith requirement. Good faith is not established where a color-of-title applicant bases his ownership in part on a quitclaim deed issued to him some 18 months after the applicant learned that he did not have clear title. An applicant does not have good faith where he knows that the lands applied for were never patented by the Federal Government.

Under 43 U.S.C. § 1068(b) (1988), a class 2 color-of-title claim requires, inter alia, that the tract applied for has been held in peaceful, adverse possession by the claimant, his ancestors, or grantors, under color or claim of title for a period commencing not later than Jan. 1, 1901, to the date of application. Where the chain of title is interrupted by a tax sale of the land in 1958, a new title is initiated for purposes of determining when claim or color-of-title commenced, and the class 2 claim is properly rejected.

Thomas Doyle Jones, Jr., 125 IBLA 230 (Feb. 11, 1993)

A claim under the Color of Title Act, 43 U.S.C. § 1068 (1988), has not been held in peaceful, adverse possession where it was initiated while the land was withdrawn or reserved for Federal purposes.

James E. Gaylord, Jr., 125 IBLA 247 (Feb. 11, 1993)

Where BLM's determination that a class 1 color-of-title applicant has failed to show that valuable improvements have been placed on the land or that some part of the land has been reduced to cultivation is based on its review of the application and a field examination, but the record is unclear whether BLM properly considered whether the applicant's silvicultural activities support a claim that valuable

COLOR OR CLAIM OF TITLE--Continued

GENERALLY--Continued

improvements have been placed on the land, its decision rejecting the color-of-title application will be set aside and the application remanded for further consideration.

Ralph E. Williamson, 125 IBLA 255 (Feb. 16, 1993)

A BLM decision rejecting a class 1 color-of-title application on the ground that no valuable improvements have been placed on the land will be reversed where the applicant's fencing of the parcel and his noxious weed control program have enhanced the value of the land by promoting its use for grazing.

Math Warmsbecker, 127 IBLA 47 (July 15, 1993)

In order for an access road to constitute a valuable improvement under the Color of Title Act, it must enhance the value of the land for the purpose to which it is devoted at the time of filing the application.

A determination that a color-of-title applicant has not satisfied the cultivation requirement will be affirmed on appeal where the land contains no evidence of activities relating to crop production and the claimant fails to demonstrate how the clearing of some trees would satisfy the cultivation requirement.

Louis C. Scalise, 129 IBLA 334 (May 31, 1994)

A class 1 color-of-title applicant must establish a 20-year period of good faith possession under claim or color of title immediately prior to the time he learned of the defect in his purported title to meet the good faith requirement of a class 1 color-of-title claim. An applicant who has held the land less than 20 years prior to filing his application must establish good faith possession under claim or color of title by his ancestors or grantors.

Felix F. Vigil, 129 IBLA 345 (June 2, 1994)

COLOR OR CLAIM OF TITLE--Continued

ADVERSE POSSESSION

Occupancy and improvement of public lands without color of title create no vested rights against the United States, because no adverse possession of Government property can affect the title of the United States, except as provided by the Color of Title Act and similar statutes. An applicant's claim of apparent ownership must be based on a document which, on its face, purports to convey title to the claimed land. The instrument of conveyance upon which an applicant relies is sufficient to provide color of title only if it describes the land conveyed with such certainty that the boundaries and identity of the land may be ascertained.

Felix F. Vigil, 129 IBLA 345 (June 2, 1994)

APPLICATIONS

An applicant under the Color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory requirements for purchase under the Act have been met. The applicant must establish that each of the requirements for a class 1 claim has been met. A failure to carry the burden of proof with respect to one of the elements is fatal to the application.

In order to satisfy the statutory requirement of possession of the land under claim or color of title, an applicant must establish a chain of title based on a document which, on its face, purports to convey title to the claimed land.

An essential element of a color-of-title claim is the good faith requirement. Good faith under the Color of Title Act mandates that an applicant and his predecessors honestly believe that they were vested with title. In order to determine whether a claimant or his predecessor honestly believed that he was seized with title, the Department may consider whether such belief was unreasonable in light of the facts then actually known. Knowledge of Federal ownership of the land negates the requisite good faith. To establish the requisite over 20 years of possession, an applicant may tack onto his possession a period when the land was possessed by his predecessors in title, but if this is done, their good faith must also be established. If, however, a predecessor in title did not hold in good faith, the chain is broken, the holding period of the predecessor in title cannot be tacked on, and the

COLOR OR CLAIM OF TITLE--Continued

APPLICATIONS--Continued

statutory period begins anew after the predecessor divested himself of title.

In order to qualify for a patent under the Color of Title Act, an applicant must have placed valuable improvements on the land or reduced the land to cultivation. In order to qualify as valuable improvements under the Act, they must have existed on the land at the time the application was filed and must enhance the value of the land.

John P. & Helen S. Montoya, 113 IBLA 8 (Jan. 25, 1990)

An applicant for a class I claim under the Color of Title Act has the burden of establishing to the Secretary of the Interior's satisfaction that each of the statutory requirements for purchase under the Act have been met. A failure to carry the burden of proof with respect to one of the elements is fatal to the application.

Occupancy and improvement of public lands without color of title create no vested rights as against the United States, because no adverse possession of Government property can affect the title of the United States, except as provided by the Color of Title Act. In order to satisfy the statutory requirement of possession of the land under claim of color of title, an applicant's claim of apparent ownership must be based on a document which, on its face, purports to convey title to the claimed land.

Delfino J. & Clara M. Borrego, 113 IBLA 209 (Feb. 22, 1990)

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors, or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based on a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. When the applicant fails to produce such a document, the application must be rejected.

James A. Kesel, 113 IBLA 380 (Mar. 28, 1990)

COLOR OR CLAIM OF TITLE--Continued

APPLICATIONS--Continued

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document purporting on its fact to convey the claimed land to the applicant or the applicant's predecessors. If the land sought is omitted land lying adjacent to a lake, and the document relied upon described the land in accordance with a Government survey showing the land as lakeshore property, such a document purports on its fact to convey the claimed land.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

Applicants who timely showed that they were owners of land in Wisconsin lying along a meander line, subsequently resurveyed, who held down lands between the original meander and the water shown on the later survey and have, since Jan. 21, 1953, held the land in good faith and peaceful adverse possession, were entitled to purchase it under the Act of Aug. 24, 1954, known as the O'Konski Act, 43 U.S.C. § 1221 (1988).

Victor A. Markunas, Victoria E. Markunas, 119 IBLA 70 (Apr. 1, 1991)

A class 1 color-of-title claim requires proof that the land has been held in good faith and in peaceful adverse possession by a claimant, his ancestors, or grantors for more than 20 years, under claim or color of title based on a document from a party other than the United States which on its face purports to convey the claimed land to the applicant or the applicant's predecessors, and that valuable improvements have been placed on the land or some part of the land has been reduced to cultivation. An applicant under the color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory requirements for purchase under the Act have been met, and a failure to carry the burden of proof with respect to one of the requirements is fatal to the application.

Because there can be no peaceful, adverse possession where the applicant's chain of title commences at a time when the land was withdrawn or

COLOR OR CLAIM OF TITLE--Continued

APPLICATIONS--Continued

reserved for Federal purposes, a color-of-title application is properly rejected where the applicant fails to produce a document which on its face purports to convey the claimed land prior to the time the land was reserved as a national forest.

A class 1 color-of-title application must be rejected where no valuable improvements have been placed on the land and no part of the land has been reduced to cultivation.

Shirley & Pearl Warner, 125 IBLA 143 (Jan. 15, 1993)

An essential element of a color-of-title claim is the good faith requirement. Good faith is not established where a color-of-title applicant bases his ownership in part on a quitclaim deed issued to him some 18 months after the applicant learned that he did not have clear title. An applicant does not have good faith where he knows that the lands applied for were never patented by the Federal Government.

Under 43 U.S.C. § 1068(b) (1988), a class 2 color-of-title claim requires, inter alia, that the tract applied for has been held in peaceful, adverse possession by the claimant, his ancestors, or grantors, under color or claim of title for a period commencing not later than Jan. 1, 1901, to the date of application. Where the chain of title is interrupted by a tax sale of the land in 1958, a new title is initiated for purposes of determining when claim or color-of-title commenced, and the class 2 claim is properly rejected.

Thomas Doyle Jones, Jr., 125 IBLA 230 (Feb. 11, 1993)

A BLM decision rejecting a class 1 color-of-title application on the ground that no valuable improvements have been placed on the land will be reversed where the applicant's fencing of the parcel and his noxious weed control program have enhanced the value of the land by promoting its use for grazing.

Math Warmsbecker, 127 IBLA 47 (July 15, 1993)

COLOR OR CLAIM OF TITLE--Continued

APPLICATIONS--Continued

To demonstrate possession under claim or color of title an applicant's claim of apparent ownership must be based on a document which, on its face, purports to convey title to the claimed land. Thus, the applicant can claim only the land actually described in the documents on which his color of title claim is based.

Basilio R. & Armida D. Torres, 129 IBLA 330 (May 31, 1994)

Good faith, as that term is used in the Color of Title Act, 43 U.S.C. § 1068 (1988), requires that a claimant and his predecessors-in-interest honestly believe that no defect exists in the title to the land claimed. In making the determination of whether the claimant honestly believed that there was no defect in title, the Department may consider the reasonableness of such a belief in light of the facts actually known to the claimant.

Louis C. Scalise, 129 IBLA 334 (May 31, 1994)

BLM properly rejected a color-of-title application claiming peaceful, adverse possession in good faith for a period of 20 years when the applicant failed to offer an initial deed in her chain of title which, on its face, purported to convey the land claimed.

Mabel M. Sherwood, 130 IBLA 249 (Aug. 9, 1994)

CULTIVATION

A class 1 color-of-title application must be rejected where no valuable improvements have been placed on the land and no part of the land has been reduced to cultivation.

Shirley & Pearl Warner, 125 IBLA 143 (Jan. 15, 1993)

COLOR OR CLAIM OF TITLE--Continued

CULTIVATION--Continued

Where BLM's determination that a class 1 color-of-title applicant has failed to show that valuable improvements have been placed on the land or that some part of the land has been reduced to cultivation is based on its review of the application and a field examination, but the record is unclear whether BLM properly considered whether the applicant's silvicultural activities support a claim that valuable improvements have been placed on the land, its decision rejecting the color-of-title application will be set aside and the application remanded for further consideration.

Ralph E. Williamson, 125 IBLA 255 (Feb. 16, 1993)

A determination that a color-of-title applicant has not satisfied the cultivation requirement will be affirmed on appeal where the land contains no evidence of activities relating to crop production and the claimant fails to demonstrate how the clearing of some trees would satisfy the cultivation requirement.

Louis C. Scalise, 129 IBLA 334 (May 31, 1994)

DESCRIPTION OF LAND

In order to satisfy the statutory requirement of possession of the land under claim or color of title, an applicant must establish a chain of title based on a document which, on its face, purports to convey title to the claimed land.

John P. & Helen S. Montoya, 113 IBLA 8 (Jan. 25, 1990)

Occupancy and improvement of public lands without color of title create no vested rights as against the United States, because no adverse possession of Government property can affect the title of the United States, except as provided by the Color of Title Act. In order to satisfy the statutory requirement of possession of the land under claim of color of title, an applicant's claim of apparent ownership must be based on a document

COLOR OR CLAIM OF TITLE--Continued

DESCRIPTION OF LAND--Continued

which, on its face, purports to convey title to the claimed land.

Delfino J. & Clara M. Borrego, 113 IBLA 209 (Feb. 22, 1990)

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document purporting on its fact to convey the claimed land to the applicant or the applicant's predecessors. If the land sought is omitted land lying adjacent to a lake, and the document relied upon described the land in accordance with a Government survey showing the land as lakeshore property, such a document purports on its fact to convey the claimed land.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

Occupancy and improvement of public lands without color of title create no vested rights against the United States, because no adverse possession of Government property can affect the title of the United States, except as provided by the Color of Title Act and similar statutes. An applicant's claim of apparent ownership must be based on a document which, on its face, purports to convey title to the claimed land. The instrument of conveyance upon which an applicant relies is sufficient to provide color of title only if it describes the land conveyed with such certainty that the boundaries and identity of the land may be ascertained.

Felix F. Vigil, 129 IBLA 345 (June 2, 1994)

BLM properly rejected a color-of-title application claiming peaceful, adverse possession in good faith for a period of 20 years when the applicant failed to offer an initial deed in her chain of title which, on its face, purported to convey the land claimed.

Mabel M. Sherwood, 130 IBLA 249 (Aug. 9, 1994)

COLOR OR CLAIM OF TITLE--Continued

GOOD FAITH

An essential element of a color-of-title claim is the good faith requirement. Good faith under the Color of Title Act mandates that an applicant and his predecessors honestly believe that they were vested with title. In order to determine whether a claimant or his predecessor honestly believed that he was seized with title, the Department may consider whether such belief was unreasonable in light of the facts then actually known. Knowledge of Federal ownership of the land negates the requisite good faith. To establish the requisite over 20 years of possession, an applicant may tack onto his possession a period when the land was possessed by his predecessors in title, but if this is done, their good faith must also be established. If, however, a predecessor in title did not hold in good faith, the chain is broken, the holding period of the predecessor in title cannot be tacked on, and the statutory period begins anew after the predecessor divested himself of title.

John P. & Helen S. Montoya, 113 IBLA 8 (Jan. 25, 1990)

A class 1 applicant under the Color of Title Act, 43 U.S.C. § 1068 (1988), must show that the land has been held in good faith and in peaceful, adverse possession by the applicant or his predecessors in interest for more than 20 years. If the predecessor's possession is not in good faith, the chain has been broken, and the predecessor's holding period may not be tacked on to that of the applicant. Good faith requires an honest belief by the claimant or the predecessors that they were invested with title. When a predecessor files an application for land between a meander line and a lakeshore and the application is rejected for the stated reason that the land being sought is owned by the upland owner and thus is not Federal ownership, the lack of good faith ordinarily attributable to the filing of that application may be vitiated.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

COLOR OR CLAIM OF TITLE--Continued

GOOD FAITH--Continued

An essential element of a color-of-title claim is the good faith requirement. Good faith is not established where a color-of-title applicant bases his ownership in part on a quitclaim deed issued to him some 18 months after the applicant learned that he did not have clear title. An applicant does not have good faith where he knows that the lands applied for were never patented by the Federal Government.

Thomas Doyle Jones, Jr., 125 IBLA 230 (Feb. 11, 1993)

Good faith, as that term is used in the Color of Title Act, 43 U.S.C. § 1068 (1988), requires that a claimant and his predecessors-in-interest honestly believe that no defect exists in the title to the land claimed. In making the determination of whether the claimant honestly believed that there was no defect in title, the Department may consider the reasonableness of such a belief in light of the facts actually known to the claimant.

Louis C. Scalise, 129 IBLA 334 (May 31, 1994)

A class 1 color-of-title applicant must establish a 20-year period of good faith possession under claim or color of title immediately prior to the time he learned of the defect in his purported title to meet the good faith requirement of a class 1 color-of-title claim. An applicant who has held the land less than 20 years prior to filing his application must establish good faith possession under claim or color of title by his ancestors or grantors.

In determining whether a color-of-title applicant honestly believed that there was no defect in his title, the Department may consider whether such belief was unreasonable in the light of the facts then actually known to him. If an applicant or his predecessor-in-interest received a grazing allotment map that delineated the allotment so as to make it clear that the area described by his conveyance was public land, it would have imparted such notice as to make appellant's belief of ownership unreasonable and thus would preclude a finding of good faith.

Felix F. Vigil, 129 IBLA 345 (June 2, 1994)

COLOR OR CLAIM OF TITLE--Continued

IMPROVEMENTS

In order to qualify for a patent under the Color of Title Act, an applicant must have placed valuable improvements on the land or reduced the land to cultivation. In order to qualify as valuable improvements under the Act, they must have existed on the land at the time the application was filed and must enhance the value of the land.

John P. & Helen S. Montoya, 113 IBLA 8 (Jan. 25, 1990)

A class 1 color-of-title application must be rejected where no valuable improvements have been placed on the land and no part of the land has been reduced to cultivation.

Shirley & Pearl Warner, 125 IBLA 143 (Jan. 15, 1993)

Where BLM's determination that a class 1 color-of-title applicant has failed to show that valuable improvements have been placed on the land or that some part of the land has been reduced to cultivation is based on its review of the application and a field examination, but the record is unclear whether BLM properly considered whether the applicant's silvicultural activities support a claim that valuable improvements have been placed on the land, its decision rejecting the color-of-title application will be set aside and the application remanded for further consideration.

Ralph E. Williamson, 125 IBLA 255 (Feb. 16, 1993)

A BLM decision rejecting a class 1 color-of-title application on the ground that no valuable improvements have been placed on the land will be reversed where the applicant's fencing of the parcel and his noxious weed control program have enhanced the value of the land by promoting its use for grazing.

Math Warmsbecker, 127 IBLA 47 (July 15, 1993)

COLOR OR CLAIM OF TITLE--Continued

IMPROVEMENTS--Continued

In order for an access road to constitute a valuable improvement under the Color of Title Act, it must enhance the value of the land for the purpose to which it is devoted at the time of filing the application.

Louis C. Scalise, 129 IBLA 334 (May 31, 1994)

COMMUNICATION SITES

The appraised value of a communication site right-of-way pertains to each individual user and is not to be prorated among site users.

In establishing the fair market rental value for a communication site right-of-way, BLM shall not be limited by the estimated value at the time of issuance of the right-of-way.

An appraisal of fair market rental value for a communication site right-of-way may be set aside and the case remanded where the record on appeal shows insufficient analysis of the leases considered in the appraisal.

Pursuant to 43 CFR 2803.1-2(b)(2)(ii), a reduction or waiver of rental for a communication site right-of-way may be granted when the holder provides without charge, or at a reduced rate, a valuable public service.

BLM may reduce rental payments for communication site rights-of-way if it determines pursuant to 43 CFR 2803.1-2(b)(2)(iv) that the imposition of the fair market value rental would cause undue hardship on the right-of-way holder and it is in the public interest to do so.

Lone Pine Television, Inc., 113 IBLA 264 (Mar. 9, 1990)

COMMUNICATION SITES--Continued

A Bureau of Land Management appraisal of fair market value will not be set aside for failure to include five comparable electronic communication sites alleged to afford similar coverage to the appraised site, where no alternative appraisal or evidence is submitted to demonstrate that the allegedly comparable sites afford similar coverage, access, power, and terms to the subject site, or that inclusion of the five allegedly comparable sites would support a different conclusion than that reached by the Bureau of Land Management.

Randy L. Power dba ProComm, 114 IBLA 205 (Apr. 24, 1990)

BLM properly cancels a communications site right-of-way where the holder fails to pay the annual rental charges for the first and second years of the grant following several 30-day notifications by BLM of the fair market rental amount due for those years, as determined by appraisal.

Roy L. Parrish, 114 IBLA 336 (May 22, 1990)

A BLM increase in the annual rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way by the comparable lease method of appraisal.

Union Pacific Railroad Co., 114 IBLA 399 (May 30, 1990)

The Board will not overturn a BLM appraisal of a communication site right-of-way by the comparable lease method of appraisal where the appellant fails to establish by a preponderance of the evidence either that the appraisal method was erroneous or that the appraised value is excessive. Specifically, the appraisal will be affirmed where appellant does not establish that BLM improperly eliminated certain private and Government leases from comparison with the right-of-way, or that BLM improperly failed to adjust for differences both in the cost of obtaining access to

COMMUNICATION SITES--Continued

the communication sites and between BLM rights-of-way and private leases.

MCI Telecommunications Corp., 115 IBLA 117 (June 27, 1990)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Southern Pacific Transportation Co., 115 IBLA 239 (July 18, 1990)

Generally, the proper appraisal method for determining the fair market value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Southern Pacific Transportation Co., 116 IBLA 164 (Sept. 26, 1990)

A BLM appraisal of fair market rental value of a communication site lease will be upheld unless an appellant can show error in the appraisal methods used and demonstrate by convincing evidence that the rental charge is excessive. In the absence of a preponderance of evidence that the appraisal is erroneous, an appraisal generally may be rebutted only by another appraisal.

Gila Electronics, 117 IBLA 51 (Nov. 27, 1990)

COMMUNICATION SITES--Continued

Where BLM granted appellant a communication site right-of-way under Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1988), subject to a future appraisal, application of 43 CFR 2803.1-2(c)(3)(ii), providing that BLM may establish an estimated rental fee, collect a deposit in advance, and adjust the advance deposit upon receipt of an approved fair market appraisal, was not a prohibited imposition of a retroactive rental.

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Oregon Broadcasting Co., 119 IBLA 241 (May 15, 1991)

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

Where BLM is precluded by statutory proviso from expending funds in fiscal year 1991 to increase the fees charged for communication site rights-of-way, a decision reappraising the fair market rental value of the right-of-way may be vacated in part to reflect the lack of authority to collect the reappraised rental prior to Oct. 1, 1991.

Communications Enterprises, Inc., 120 IBLA 146 (July 16, 1991)

Uno Broadcasting Corp., 120 IBLA 380 (Sept. 23, 1991)

COMMUNICATION SITES--Continued

The Board will affirm a BLM decision issuing a communication site right-of-way where on appeal the grantee complains that the rental for the right-of-way is too high, but the record shows that the rental was based on an appraisal of the fair market rental value utilizing the comparable lease method of appraisal and the appellant fails to show either that the appraisal method was erroneous or that the appraised value is excessive.

Idaho Wireless Corp., 120 IBLA 172 (July 23, 1991)

Where BLM has set the annual rental charge for a communication site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charge and remand for a reappraisal and any necessary recalculation of such charges.

First Broadcasting of Nevada, Inc., 120 IBLA 240 (Aug. 9, 1991)

Under the relevant regulation, the comparable lease method of appraisal is the preferred method for determining the fair market value of a nonlinear right-of-way such as a communication site. Under this method, the rentals charged for similar sites in the area are reviewed and adjustments are made for variations in the features of the sites and the rights obtained under the leases. An appraisal based simply on application of the consumer price index to a prior appraisal without any analysis of comparable leases is properly remanded as inconsistent with the regulatory standard.

KSEI, Inc., 120 IBLA 266 (Aug. 21, 1991)

Any use or occupancy of the public lands such as for radio broadcasting which requires a right-of-way or temporary use permit, which use has not been authorized, is prohibited and shall constitute a trespass for which the trespasser is liable for administrative costs, damages, and penalties under the regulations at 43 CFR 2801.3.

An assessment of damages for a willful trespass is properly affirmed where appellant's conduct constituted

COMMUNICATION SITES--Continued

a voluntary or conscious trespass in that the evidence shows appellant knew of the lack of authority to use the public lands for communication site purposes.

High Desert Communications, Inc., 123 IBLA 20 (Apr. 24, 1992)

A BLM increase in the rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Quality Broadcasting Corp., Unicom Broadcasting, Inc., 126 IBLA 174 (May 11, 1993)

Where BLM granted a communication site right-of-way, subject to a future fair market value appraisal, application of 43 CFR 2803.1-2(c)(3)(ii), providing that BLM may establish an estimated rental fee, collect a deposit in advance, and adjust the advance deposit upon receipt of an approved fair market appraisal, was not a prohibited imposition of a retroactive rental.

Where a right-of-way holder charges that the fair market rental value determined by BLM is in error, but shows no error in BLM's appraisal method and provides no evidence to establish that BLM's appraisal is excessive, the Board will affirm BLM's determination.

Alaskan M.D.S., Inc., 130 IBLA 13 (July 6, 1994)

COMMUNICATION SITES--Continued

The provisions of 43 CFR 4.21(a), 58 FR 4942-43 (Jan. 19, 1993), govern the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." The regulations governing the administration of rights-of-way, including communication sites rights-of-way, 43 CFR Part 2800, contain a "pertinent regulation" that meets the exception of 43 CFR 4.21(a). Under 43 CFR 2804.1(b), "[a]ll decisions of the authorized officer under this part shall remain effective pending appeal unless the Secretary rules otherwise."

Where a right-of-way holder charges that the fair market value determined by BLM is in error, but shows no error in BLM's appraisal method and provides no evidence to establish that BLM's appraisal is excessive, the Board will affirm BLM's determination.

London Bridge Broadcasting, Inc., 130 IBLA 73 (July 26, 1994)

A BLM decision approving a reservation for a communication site right-of-way under FLPMA, 43 U.S.C. § 1767(a) (1988), is an exercise of discretion that will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason to disturb the decision is shown.

Confidential Communications Co., 131 IBLA 188 (Nov. 7, 1994)

CONFIDENTIAL INFORMATION
(See also Administrative Procedure: Public Information, Public Records)

Under 43 CFR 4.31, if a person submitting a document in a proceeding before the Department claims that some or all of the information contained in the document is confidential information the disclosure of which to another party in the proceeding is prohibited by law, notwithstanding that party's agreement to keep the information confidential, the submitter of the document has the burden of demonstrating why disclosure of the information is prohibited by law. That the information falls within an exemption from disclosure under FOIA,

CONFIDENTIAL INFORMATION--Continued

5 U.S.C. § 552(b) (1988), does not suffice to establish that disclosure of the information is prohibited by law.

Yates Petroleum Corp., et al., 131 IBLA 230 (Nov. 18, 1994)

CONSTITUTIONAL LAW

GENERALLY

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional.

Thomas Leslie Redleaf v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 268 (Apr. 30, 1990)

Estate of Guadalupe Almanza Conger, 21 IBIA 244 (Mar. 17, 1992)

Perry Murdock v. Acting Phoenix Area Director, Bureau of Indian Affairs, 22 IBIA 130 (June 18, 1992)

The Interior Board of Land Appeals is not the proper forum to decide constitutional issues.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional or a duly promulgated Departmental regulation invalid.

Estates of Evan Gillette, Sr., & Lizzie Gillette/Yellow Bird/Bellanger/Paint/Bedell, aka Elizabeth Burdell, 22 IBIA 133 (June 18, 1992)

The Board of Indian Appeals has no authority to declare a Federal statute violative of the United States Constitution or in conflict with a state constitution.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992)

CONSTITUTIONAL LAW--Continued

GENERALLY--Continued

"Ex post facto law." The term "ex post facto law" in the Indian Civil Rights Act of 1968, 26 U.S.C. § 1302(9) (1988), should not be given a broader interpretation than the same term in the Constitution of the U.S., Art. I, sec. 9, cl. 3, and sec. 10, cl. 1.

Janie Jovita Flores et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12, 1993)

IBLA has no authority to declare sec. 10(a) of OCSLA, 43 U.S.C. § 1339(a) (1988), or any other act of Congress unconstitutional. If an enactment of Congress is in conflict with the U.S. Constitution, it is for the Judicial Branch to so declare.

Amerada Hess Corp., 128 IBLA 94 (Dec. 13, 1993)

DUE PROCESS

Mining claims located on lands closed to mineral entry are null and void ab initio and no property rights are created. Therefore, no deprivation of property rights occurs when such claims are declared null and void ab initio.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

No prior notice to the lessee is required where an oil and gas lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), expires by operation of law. The lessee's right to due process is protected by the administrative appeals process at 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Mobil Oil Corp. v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 315 (July 2, 1990)

CONSTITUTIONAL LAW--Continued

DUE PROCESS--Continued

A Federal oil and gas lease does not require notice and an opportunity to be heard prior to a decision to assess royalties based on a value of production which is higher than the price received by the lessee. The Department is not bound by the price reported by a lessee and has authority to determine for royalty purposes that the value of gas produced was different than the amount received by the lessee. A lessee is entitled to a reasoned and factual explanation supporting a decision setting a different value and an opportunity to challenge it and obtain review.

Phillips Petroleum Co., 117 IBLA 230 (Dec. 21, 1990)

Due process does not require that an evidentiary hearing under the Administrative Procedure Act be provided prior to cancellation of a lease of Indian land.

Dawn Mining Co. v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 50 (May 29, 1991)

Due process requires that the owner of an IIM account be afforded a prompt hearing when a hold is placed on funds in the account.

Ardis Robinson v. Acting Billings Area Director, Bureau of Indian Affairs, 20 IBIA 168 (Aug. 13, 1991)

Marjorie L. Miller v. Anadarko Area Director, Bureau of Indian Affairs, 26 IBIA 97 (July 6, 1994)

Due process does not require that an evidentiary hearing be provided prior to cancellation of a lease of Indian land.

All Materials of Montana, Inc. v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 202 (Feb. 27, 1992)

CONSTITUTIONAL LAW--Continued

DUE PROCESS--Continued

When determining whether to grant a trader's license or peddler's permit, it is a denial of due process for BIA to rely on adverse allegations relating to the character of the applicant without giving the applicant an opportunity to respond to those allegations.

Jane Rush v. Acting Navajo Area Director, Bureau of Indian Affairs, 25 IBIA 198 (Mar. 4, 1994)

CONTESTS AND PROTESTS
(See also Administrative Procedure, Rules of Practice)

GENERALLY

A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude further consideration of the character of the land based on subsequent exploration and development.

A contest complaint is required to contain a statement in clear and concise language of the facts constituting the grounds of the contest. A party seeking a hearing as to the mineral character of land which has been subject to a prior Departmental hearing must make a distinct showing of development made since the prior hearing, such as, if supported by the evidence at the hearing applied for, would clearly demonstrate that since such prior hearing mineral has been discovered in such quantities, and by such thorough work on the premises, as to overcome the effect of the previous judgment as to the character of the land.

An affidavit by a contest complainant is not a substitute for an affidavit of a witness corroborating the factual allegations of the complaint as required by 43 CFR 4.450-4(c). In the absence of an affidavit of a corroborating witness, a private contest complaint is properly dismissed.

Although 30 U.S.C. §§ 29, 30 (1982), do not authorize the Department to rule on the merits of an adverse claim, it is within the Department's authority to determine whether a document presents an adverse

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

claim within the meaning of the statutes. The issue whether land is mineral or nonmineral in character is within the exclusive jurisdiction of the Department of the Interior and for this reason a conflict between mineral and nonmineral claimants does not raise an "adverse claim" within the meaning of the term in the statutes.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

A timely filed state protest of a Native allotment pursuant to ANILCA, sec. 905, prevents legislative approval of the allotment from taking effect.

Where legislative approval of a Native allotment was prevented by timely and effective state protest, adjudication of the ensuing contest proceeding must conform to regulations governing contests without further application of provisions of ANILCA.

An extension of time to file an answer is permitted under Departmental regulations governing contest procedure. Where application for extension of time to answer contest complaint was timely filed with BLM by a Native allotment applicant, it was error to fail to consider and grant the request which was made in conjunction with a motion to dismiss.

William J. Felix, 114 IBLA 86 (Apr. 11, 1990)

Withdrawal of patent applications prior to adjudication of a protest against issuance of patent requires dismissal without prejudice of the protest proceedings.

Sunshine Mining Co. v. State of Idaho, 114 IBLA 317 (May 14, 1990)

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

Sec. 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications; therefore, a protest filed more than 180 days after the enactment of ANILCA must be dismissed and such a protest does not relate back to objections made prior to ANILCA, which were considered by the Bureau of Land Management.

Thelma M. Eckert, 115 IBLA 43 (June 12, 1990)

Pursuant to 43 CFR Subpart 4160, a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

A protest by the State of Alaska against a Native allotment filed under sec. 905(a)(5)(B) of ANILCA will be considered sufficient to require the adjudication of the application pursuant to the Native Allotment Act where, as supplemented by information provided to BLM and the Board, it provides information showing that the allotment probably conflicts with an existing winter trail. A BLM decision denying the State's protest on the grounds that no trail exists that conflicts with the Native allotment will be set aside where the record reveals that such a trail does exist. On remand, BLM must adjudicate the allotment, under the provisions of the Native Allotment Act of 1906, considering whether the existence of the trail affects BLM's conclusions that her use was at least potentially exclusive.

State of Alaska (Molly Tocktoo), 118 IBLA 1 (Feb. 13, 1991)

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

Until patent has issued, the rights of the mining claimant are limited by the statutes and regulations under which those rights are acquired and maintained. The title to the lands subject to unpatented mining claims remains in the United States. As the title owner, the United States may regulate mining activities in national forests in order to protect the surface resources. Therefore, the motivation of the managing Government agency in initiating a contest against a mining claim is irrelevant.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

A decision by BLM may be summarily affirmed where the statement of reasons filed in support of an appeal fails to point out error in the decision under review but instead merely reiterates arguments addressed to BLM in a protest and where the BLM decision on the protest is comprehensive and fully addresses each of the arguments contained in the protest.

In re Mill Creek Salvage Timber Sale, 121 IBLA 360 (Dec. 18, 1991)

The State of Alaska has an interest in assuring that its citizens will have access to lands and resources owned by it, its political subdivisions, or the United States, and to public bodies of water regularly used for transportation purposes. A protest presenting colorable allegations that the State's interest will be adversely affected by a decision is sufficient to give standing to appeal dismissal of a

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

protest. The State has a right to appeal the dismissal of a protest for procedural reasons.

BLM has authority to review the legal sufficiency of a protest filed by the State of Alaska under sub-sec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1988), and to dismiss a protest which it finds to be insufficient. Disagreement with facts asserted in a protest is not a proper basis for dismissal.

State of Alaska (Harvey Pootoogooluk), 121 IBLA 363 (Dec. 19, 1991)

A protest is subject to dismissal if it is founded on conclusory allegations and no reason is given for halting the proposed action. A protestant cannot later cure the defect by stating reasons for protest for the first time on appeal to this Board.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 17 (Jan. 2, 1992)

A decision by BLM may be affirmed where the SOR filed in support of appeal fails to point out error in the decision under review but instead merely reiterates arguments addressed to BLM in a protest and where our review finds the BLM decision on the protest is comprehensive and correctly addresses each of the arguments contained in the protest.

Oregon Natural Resources Council, 122 IBLA 65 (Jan. 9, 1992)

Where an application for patent is filed by a non-mineral claimant which embraces public lands within the boundaries of mineral claims located under the mining laws, the rights of the mining claimants must be considered prior to any ultimate disposition of the land. In such a context, a hearing is properly ordered upon notice to the competing nonmineral and mining claimants

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

for the purpose of determining the character of the land claimed.

Anne Lynn Purdy, Heirs of Arthur Purdy, Sr., 122 IBLA 209 (Feb. 12, 1992)

Under sec. 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), any individual objecting to the approval of a Native allotment application must file a protest within the period established by ANILCA and must allege that the land described in the application is the situs of improvements claimed by the person filing the protest. Where an individual files a protest after the statutory deadline, the protest is properly dismissed.

Marshall McManus, 126 IBLA 168 (May 11, 1993)

A decision by BLM denying a protest of a timber sale may be affirmed where the SOR filed in support of an appeal merely repeats, with little change, arguments raised in the protest and fails to present any new issues or point out any error in the decision appealed from, and the BLM decision is comprehensive and fully addresses each of the arguments contained in the protest.

In Re Eastside Salvage Timber Sale, 128 IBLA 114 (Dec. 20, 1993)

Challenges to the approval or amendment of a RMP and its related EIS are accorded administrative review only in conformity with the protest procedures prescribed by 43 CFR Part 1600. Such challenges are properly distinguished from an appeal challenging implementing actions undertaken without preparation of a supplemental EIS which may be appealed to the Board of Land Appeals.

Colorado Environmental Coalition, 130 IBLA 61 (July 22, 1994)

CONTESTS AND PROTESTS--Continued

GOVERNMENT CONTESTS

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

Where a Government contest complaint against a mining claim contains charges which, if proved, would render the claim invalid, and the contestee fails to timely file an answer to the complaint in accordance with Departmental regulations, the allegations of the complaint will be taken as admitted by the contestee and the claim is properly declared null and void.

When the Government issues a mining claim contest complaint to more than one contestee and subsequently issues a decision declaring the interests in the claim of those contestees null and void for failure to file a timely answer to the complaint, a contestee appealing that decision has no standing to challenge it on the basis of failure to properly serve another contestee, where the appealing contestee has affirmatively alleged that he does not represent the other contestee.

Robert D. McGoldrick et al., 115 IBLA 242 (July 18, 1990)

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the claimed land for a minimum of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the record does not establish applicant's qualifying use, the Bureau of Land

CONTESTS AND PROTESTS--Continued

GOVERNMENT CONTESTS--Continued

Management shall initiate a Government contest so that the factual issues can be resolved at a hearing.

State of Alaska, 117 IBLA 148 (Dec. 13, 1990)

A contestee overcomes the presumption that his answer to a contest complaint was not filed within 30 days from the date of receipt of the complaint by establishing that 14 days before the end of the 30-day period his answer was received by a DOI employee at the street address at which the answer was to be filed. It is proper to assume that the Department employee signing the return receipt card forwarded the answer to the addressee identified on the face of the answer, and it is reasonable to expect that it would take less than 14 days to deliver a letter to that addressee.

George M. Reedy et al., 120 IBLA 274 (Aug. 28, 1991)

Because exposure of a vein or lode carrying mineral values is a necessary precondition to the validity of a lode claim, a claim where no mineral values were exposed was properly found to be invalid.

Without calculations estimating tonnage of ore on a mining claim there was nothing to demonstrate that the claim might be part of a projected low-grade mining operation, and it was therefore null and void.

Proof that claims were potentially profitable as part of a low-grade mining operation established the existence of a discovery thereon.

Where the low value of silver at hearing indicated that a claim could not be operated at a profit, but there was evidence that at the time the claim was included in a wilderness area 4 years previously a prevailing higher value would have allowed a profitable operation, the issue of the profitability of the claim is properly remanded for consideration of historic silver values as they might affect the question of discovery.

United States v. American Independence Mines & Minerals, 122 IBLA 177 (Feb. 10, 1992)

CONTESTS AND PROTESTS--Continued

GOVERNMENT CONTESTS--Continued

Where the Government contests a Native allotment application, the Native is required to make satisfactory proof, by a preponderance of the evidence, of substantially continuous use and occupancy of the claimed land for a minimum of 5 years. Such use and occupancy contemplates substantial actual possession and use of the land, at least potentially exclusive of others.

Where the evidence presented at a hearing on a Government contest of a Native allotment application in support of the Native's position that he utilized the claimed lands for fishing and hunting in accordance with the customs of the Natives of the area fails to show substantial actual possession and use of the claimed land, the application is properly rejected.

Even if the evidence presented at a hearing on a Government contest of a Native allotment application could be considered as establishing substantial actual possession and use of the available claimed lands, the application will be rejected where the evidence shows that the Native's use of the land was not potentially exclusive of others because he was one of many Natives who utilized the claimed lands for subsistence activities during the period of claimed use and occupancy and there was not evidence that the applicant had recognized authority over the land during that period.

United States v. Zack Rastopsoff (Deceased), Ayakulik, Inc. (Intervenor/Appellant), 124 IBLA 294 (Nov. 4, 1992)

An ALJ's conclusion that a Native allotment applicant commenced qualifying use and occupancy of the claimed land prior to the effective date of a withdrawal of the land will be upheld on appeal where the conclusion is based upon a review of all the evidence presented at a hearing and the Judge's resolution of disputed facts is necessarily influenced by his consideration of the credibility of the witnesses testifying at the hearing.

A Government contest of a Native allotment application based on a charge of failure to use and occupy the land to the potential exclusion of others is properly dismissed where the Native shows by a preponderance of the evidence, presented through his testimony and that of numerous witnesses, that his use and occupancy of various improvements on the site for fall hunting

CONTESTS AND PROTESTS--Continued

GOVERNMENT CONTESTS--Continued

purposes were, in fact, at least potentially exclusive of others.

United States v. Edward N. O'Leary, 125 IBLA 235 (Feb. 11, 1993)

Qualifying use and occupancy must be initiated when the land is open to appropriation under the Native Allotment Act. If it can be shown that qualifying use and occupancy was initiated during that period, the applicant would hold a vested right at the time of a subsequent withdrawal. If no qualifying use and occupancy was initiated prior to withdrawal, the withdrawal will attach, the applicant will gain no vested rights, and subsequent use and occupancy will not satisfy the regulatory requirement.

Evidence of independent use is necessary to satisfy the 43 CFR 2561.0-5(a) requirement that there must be substantial actual possession and use of the land, at least potentially exclusive of others. Adult use of land is assumed to be independent, even though the use is concurrent with other members of the family. No distinction is drawn between use in the company of older family members and use in the company of children. There is no similar assumption that a minor child is exercising independent use of the land when in the company of parents or other adults responsible for the child's welfare. There must be specific proof that the minor child acted independently.

United States v. Sergie Alexanderoff, 129 IBLA 279 (May 20, 1994)

CONTRACT DISPUTES ACT OF 1978

GENERALLY

The Board is entitled to dismiss an appeal if the appellant fails to prosecute it and/or to respond in a timely manner.

Appeals of Marty Indian School, IBCA-2563 et al. (Jan. 17, 1991) 98 I.D. 1

CONTRACT DISPUTES ACT OF 1978--Continued

ATTORNEY FEES

Allowable Expenses

Attorney fees incurred for review of the contracting officer's final decision before filing appellants' notice of appeal were not "routine claims processing," as alleged by the Government, but were reasonable and related to the adversary adjudication.

In an EAJA application, certain attorney billings were found to be excessive, redundant, and otherwise unnecessary, and thus unallowable under 5 U.S.C. § 504. In such circumstances, the Board was justified in employing the jury verdict approach to determine the amount of allowable attorney fees.

Application for Attorney Fees of Gracon Corp., IBCA-2582-F (Feb. 22, 1990)

Under the EAJA, a pro se applicant may recover "expenses," which is defined by the Federal Circuit to include "those reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of the specific case before the court, which expenses are customarily charged to the client where the case is filed." Oliveira v. United States, 827 F.2d 735, 744 (Fed. Cir. 1987).

A contractor was allowed to recover attorney fees and expenses for out-of-state counsel under an EAJA application, despite the Government's position that the fees be disallowed as the contractor could have retained an attorney located closer to its place of business. The Board rejected the Government's argument, concluding that it would impair a party's right to competent counsel of its choice.

When attorney fees were actually billed at the statutory maximum rate of $75 per hour in accordance with the EAJA, the Board made no distinction between the hourly rate charged for partner or associate time. Otherwise, associate attorney time was allowed at the lower rate billed the applicant.

Attorney fees and expenses incurred by an applicant as a result of a change in law firms were found to be reasonable under an EAJA application, when the evidence showed that the legal services provided by the second

CONTRACT DISPUTES ACT OF 1978--Continued

ATTORNEY FEES--Continued

Allowable Expenses--Continued

firm were not duplicative of the first and were in connection with the underlying adjudication.

Application of White Buffalo Construction, Inc., for Fees & Expenses Under EAJA, IBCA-2918-F, -2919-F (Aug. 2, 1991)

Application and Jurisdiction

Absent a motion for reconsideration or an appeal to the Federal Circuit, under the EAJA an applicant has 150 days from receipt of the Board's decision or order dismissing the appeal to file a request for attorney fees and expenses.

An EAJA application for attorney fees and expenses arising out of a CDA adjudication is not governed by the procedural requirements of 43 CFR Part 4.6 of the Departmental regulations, which apply to certain "adversary adjudications conducted by the Secretary under 5 U.S.C. § 554" (Administrative Procedures Act). CDA appeals are not pursuant to the Administration Procedures Act, nor conducted by the Secretary. Thus, a contractor's EAJA application was found to meet all EAJA eligibility requirements, although it did not satisfy the more stringent rules set forth in the Part 4.6 regulations.

Application of White Buffalo Construction, Inc., for Fees & Expenses Under EAJA, IBCA-2918-F, -2919-F (Aug. 2, 1991)

Substantially Justified

A construction contractor's application under the EAJA for an award of attorney fees and expenses was granted, because the Government's position in the underlying adjudication lacked substantial justification. Under the EAJA, "substantial justification" means more than merely the existence of a colorable legal basis for the Government's case. The Government must show its

CONTRACT DISPUTES ACT OF 1978--Continued

ATTORNEY FEES--Continued

Substantially Justified--Continued

position to be "clearly reasonable," which it failed to do.

Application of White Buffalo Construction, Inc., for Fees & Expenses Under EAJA, IBCA-2918-F, -2919-F (Aug. 2, 1991)

CONTRACTS
(See also Appeals, Claims Against the United States, Delegation of Authority, Labor, Rules of Practice)

GENERALLY

Disagreement with the terms of a signed contract does not negate those terms.

Thomas J. Sweeney v. Acting Anadarko Area Director, Bureau of Indian Affairs, 19 IBIA 101 (Nov. 29, 1990)

An ambiguity in a written contract can be overcome by the contemporaneous actions and understandings of the parties to the contract.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

The Uniform Commercial Code and state statutory and decisional law can be examined in determining the principles of general contract law in interpreting a contract for the logging and sale of Indian timber.

Based upon the general law of contracts, Indian contracts contain an implied requirement that they be carried out in good faith and in accordance with standards of commercial reasonableness.

Winlock Veneer Co. v. Acting Juneau Area Director, Bureau of Indian Affairs, 20 IBIA 3 (May 2, 1991)

CONTRACTS--Continued

GENERALLY--Continued

The relationship between Departmental bureaus and nonprofit organizations are neither contractual no agency relationships giving rise to inappropriate obligations prior to the commitment of resources for acquisition.

Authority exists to pay overhead and administration costs of the nonprofit organizations.

No authority exists for bureaus to pay interest for income foregone as a result of the acquisition by nonprofit organizations.

While option costs are utilized by nonprofit organizations, and have resulted in payments in excess of costs from bureaus to the nonprofit organizations, the arrangements are legal. The interaction of nonprofit organizations and Departmental bureaus does not give rise to a Federal advisory committee relationship.

Inspector General's Report on Land Acquisitions, M-36974 (July 30, 1992) 100 I.D. 195

The starting point for understanding a contract is the language of the document.

Nevaco, Inc. & Pyramid Lake Paiute Tribe of Indians v. Acting Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 157 (Aug. 31, 1993)

In an appeal of a BLM decision adjudicating grazing privileges, neither an ALJ nor the Board of Land Appeals has authority to entertain a claim by one grazing applicant of breach of the terms of a contract between the United States, acting through the Department of the Navy, and one of the other applicants.

Jerry Kelly (Appellee) v. Bureau of Land Management (Appellant), Sheldon W. Lamb (Intervenor/Appellant), 131 IBLA 146 (Oct. 31, 1994)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION

Generally

In a contract for the provision of an airplane and pilot throughout a mandatory availability period, the Board held that the Government could not use the general default clause as the sole authority on which to base a termination accomplished 23 minutes after the appointed commencement of performance time when the contract also contained a special default clause which established 3 consecutive days of unavailability as "grounds for termination" under the general clause.

Appeal of Pegasus Helicopters, Inc., IBCA-2671 (Mar. 6, 1991)

Failure by the Government to point out defective work during inspections cannot be construed as Government acceptance or approval of material or workmanship.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

Both the Changes and the Termination for Convenience clauses provide a mechanism for the deletion of contract work. However, when major portions of the contract work are deleted, the Termination for Convenience clause is more appropriate if no additional work is substituted in its place.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

Reading all contract provisions in harmony, the Board found that the contract provided for the construction of temporary access roads.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993) 100 I.D. 329

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Generally--Continued

In a contract to drill and grout-fill underground mine voids, a contractor is entitled to an equitable adjustment to the extent that it can show that it incurred additional costs solely as a result of a variation in actual quantities of grout placed from the quantities estimated. Where the contractor satisfies the Board that it has incurred some additional costs because of the variation in estimated quantities, but cannot prove the amount of the costs, the Board, in its discretion, may make an award on the basis of a jury verdict.

Appeal of Eles Bros. Ready Mix Co., IBCA-2952 (July 6, 1994) 101 I.D. 71

The Government is not permitted to substitute the Termination for Convenience clause for the Changes clause to delete a relatively minor portion of the total contract more than 2 years after it issued a deductive change order, which was relied on by the contractor in submitting a proposed credit to the Government for the deleted work. In determining the amount of the credit, the primary consideration is the cost impact on the contractor. Thus, the contractor was entitled to rely upon the cost estimate of the subcontractor that was to have done the work.

Appeal of J. A. Jones Construction Co., IBCA-3280 (Aug. 16, 1994) 101 I.D. 82

In discerning the intent of the parties to a contract, one must start with the language of the contract.

An ambiguity in a written contract can be overcome by the contemporaneous actions and understandings of the parties to the contract.

Pinoleville Indian Community v. Acting Sacramento Area Director, Bureau of Indian Affairs, 26 IBIA 292 (Oct. 25, 1994)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties

An appellant's cross-motion for summary judgment is denied where the Board finds (i) that the motion is predicated upon a particular application of the law of warranties; (ii) that the principal grounds for the motion appears to be based upon the provisions of the Uniform Commercial Code; (iii) that all of the cases cited which apparently involve the Uniform Commercial Code are state cases; (iv) that in regard to such cases the appellant has failed to show that the principles apparently enunciated therein have been endorsed by the Federal courts so as to become a part of what has been described as the general Federal common law; (v) that the state cases so relied upon have not been shown to be dispositive of the question presented; and (vi) that appellant has failed to show that it is entitled to summary judgment as a matter of law.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990)
97 I.D. 193

A contractor was found not to be entitled to an equitable adjustment for an inspector's refusal to conduct a backfill compaction test as requested by the contractor. The evidence indicated (1) that an earlier test taken by the inspector showed that backfill placed by the contractor did not meet specification requirements, (2) that any additional testing would not provide a true and accurate reading, and (3) that the contract documents provided that in any event, such testing was for the sole benefit of the Government.

Where a contractor was allowed to construct a "blockout" in the wall of a concrete structure pending arrival of pipe at the site, but that the design of such blockout was altered by the contracting officer before approval, the resulting deficiencies in the concrete could not be charged against the Government where the evidence showed that (1) it was the contractor's option whether to place the blockout or await for arrival of pipe at the site, (2) that in accommodating the contractor in its request to construct the blockout the Government saved the contractor time, money, and effort on the project, and (3) that the contractor could have

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

shutdown the project in lieu of constructing the blockout, and that such shutdown would not have been the fault of the Government.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

The contemporaneous conduct of the parties during performance, before the contract becomes the subject of controversy, is accorded great, if not controlling, weight in determining responsibilities under the contract. Here, the contents of the Government's inspection reports were found to contain highly persuasive evidence of the reasonableness of the contractor's position.

Appeal of White Buffalo Construction, IBCA-2166, 2173 (Nov. 26, 1990)

A contractor's onsite examination of a designated source of borrow, combined with a specification provision identifying said borrow as a source of fill material, should have caused a reasonable and prudent contractor to anticipate and take into account in its bid price that the existing site conditions were such that it might be necessary to utilize an unquantified amount of fill material to perform the excavation and embankment work under the contract. The contractor's decision not to include a factor for borrow in its bid, was thus held to be an exercise of business judgment, and the contractor assumed the risk that additional borrow might be required.

A contractor's differing site condition claim was denied for lack of persuasive evidence of reliance where the evidence showed that the interpretation given by the contractor to contract documents pertaining to balanced earth work at a construction project was never actually relied upon by the contractor at the time of bidding.

Where an "as built" Government analysis of a shortfall of dirt on a construction project contained an estimated shrink factor that was excessive, the Board adopted a more reasonable shrink factor in order to

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

calculate the extent of the contractor's quantum adjustment.

A contractor is not entitled to impact and extended performance costs incurred as a result of winter damage to excavated roadbeds where the evidence shows that delays associated with the placing of protective aggregate base course, before the winter shutdown, did not arise from unforeseeable causes beyond the contractor's control and without its fault or negligence.

Appeal of Gerald Miller Construction Co., IBCA-2292
(Mar. 14, 1991)

Appellant's allegations that the Government breached implied duties under the road contract to cooperate with it and assist its performance -- duties which appellant alleges were enhanced because it is an Indian contract -- fail as a matter of law. The Government was not subject to a higher standard of conduct because appellant is an Indian contractor and did not have any responsibility under the road contact to assist appellant in obtaining or retaining a yard and pit site.

Appellant's allegations of delay and interruption to its work under the road attributable to Governmental action under the road contract. The Government had no duty under that contract to obtain a yard or pit site for appellant.

Appeal of Blaze Construction Co., Inc., IBCA-2863
(June 6, 1991) 98 I.D. 213

When, after award of a contract to produce rifrap from a specified quarry and repair a dam, the contractor inquired about using other than the contract-specified quarry, the Government did not breach its implied duty of good faith and cooperation by advising that approval of an alternate quarry would be virtually impossible.

The Board found the Government did not delay in rejecting appellant's nonconforming work and, even if

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

it had, any Governmental delay would have been concurrent with the contractor's delay in meeting in-place testing requirements and not compensable.

Appeal of White & McNeil Excavating, Inc., IBCA-2448
(Nov. 4, 1991) 98 I.D. 359

A contractor's interpretation that it was not required to install an outside enclosure to protect an electrical transfer switch was unreasonable, because this interpretation ignored clear contract drawings that mandated "weatherproof fittings outside" as well as specification provisions that incorporated this requirement based on the National Electric Code.

The Government has a right to expect compliance with contract specifications. Thus, as long as the cost of correcting completed work that does not substantially comply with the specifications is not economically wasteful, the Government is entitled to require repair or replacement. However, where the Government rejects nonconforming work, it has the burden of proving that the contract requirements have not been met.

Failure by the Government to point out defective work during inspections cannot be construed as Government acceptance or approval of material or workmanship.

A contractor is not entitled to an equitable adjustment for the erroneous installation of a junction box by its electrical subcontractor, where the contractor had failed to supply the subcontractor with the contract drawings and specifications it needed to assure that the contractor's unapproved shop drawing was accurate.

A contractor is not entitled to an equitable adjustment for the cost of removing an existing 800-amp breaker where it had failed to make an adequate pre-bid site visit to ascertain the difficulty of the work. The condition necessitating removal of the breaker was readily discernible, and it was not reasonable for the contractor to assume, without inquiry, that the Government or another contractor would remove it.

A contractor is entitled to an equitable adjustment for "loss of efficiency" where the Government failed to

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

timely ascertain the suitability of Government-furnished batteries for use under the contract, and the delay hindered the contractor's performance because the batteries remained in the work area and impeded the contractor's other work.

A contractor is not entitled to the excess costs associated with its extensive modifications of single compression lugs in order to assure a proper electrical conduction where the evidence showed that the contractor did not understand the bolt pattern for the unit and did not consult with the unit's onsite manufacturer's representative. Had it done so, it could have purchased the proper lugs and avoided the modifications claimed.

Where a Government inspector observed a contractor installing conduit to an electrical transformer in a manner contrary to both the manufacturer's specific written instructions and the National Electric Code, but nevertheless allowed the contractor to proceed with the installation, such conduct did not constitute "constructive acceptance" by the Government of the defective work. The inspector had promptly notified the contractor of its improper wiring and had thus preserved the Government's right to require correction at the time of final inspection. The inspector's inaction did not relieve the contractor from the contract requirements, nor was the inspector authorized to change any term or condition of the specification without the contracting officer's authorization.

A contractor's alleged interpretation of conflicting drawings and specifications was unpersuasive because it did not prove its reliance on that interpretation either in preparing its bid or in performing the work under the contract.

A contractor fails to meet its burden of proof that Government delays precluded it from voluntarily accelerating its performance under the contract where the contractor did not communicate such an intent to the Government, and its performance schedule did not indicate a critical path method by which the accelerated work could be tracked.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

When, pursuant to the Inspection and Acceptance clause, BOR evaluated whether nonconforming sealant could remain in place, allowed repairs, did not direct a new sealant, but declined to set acceptable bubbling in advance of inspection, its actions were not arbitrary or economically wasteful.

In determining that rejected sealant had to be repaired or replaced, BOR did not use improper testing.

BOR did not withhold superior knowledge about problems with the contractor's sealant.

Appeal of Ball, Ball, & Brosamer, IBCA-2103-N (July 27, 1992) 99 I.D. 126

When it was within a contractor's control to reject or accept a workload beyond a potential maximum, and the contractor did not reject it in accordance with the contract's provisions; when the contractor failed to prove that any action, or nonpayment, by the Government caused the contractor's default; and when its work was replete with errors, and was of poor quality, the contractor failed to carry its burden to prove that its performance failures were excusable as beyond its control and without its fault or negligence.

The fact that contract compliance was more difficult than the contractor had anticipated did not render the contracting officer's default decision arbitrary or capricious, or an abuse of his discretion.

When the Board found no evidence to support the contractor's allegation that BOR acted in bad faith in its administration of the contract, the contractor failed to meet its exceedingly high burden to overcome the presumption that public officials act in good faith.

Appeal of KARPAK Data & Design, IBCA-2944 et al. (Aug. 14, 1992) 99 I.D. 163

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

When, despite an adequate accounting system, a contractor did not foresee an overrun in indirect costs prior to completion of its work under its cost-plus-fixed-fee contract with EPA for a wastewater facilities survey, and so was unable to provide advance notice of the overrun under the contract's Limitation of Funds or Limitation of Cost clauses, those clauses did not preclude recovery of the overrun. The contractor's awareness that its fringe benefit rate exceeded the contract's provisional rate did not constitute foreknowledge of the overrun. In fact, it had projected during performance that it would remain on budget. It established that the increase in fringe benefits costs amounted only to about 44 percent of the total contract overrun, and about 55 percent of the overrun in indirect costs claimed, which was due in large part to resolution by DCAA, at the end of the contract work, of substantial cost issues in the contractor's favor, and to increased overhead resulting from unexpected conflict in Iran that disrupted its business.

The Board found the EPA was not prejudiced. The contractor reported the overrun within a reasonable time after completion of the work, before the contract's actual completion date. By the apparent time of the overrun, the contract already had been fully funded, so there was not meaningful funding, or work cessation, election for the contacting officer or the contractor, respectively, to make under the contract's fund and cost limitation clauses. Moreover, the Board found no evidence that EPA was displeased with the contractor's work, or would have refrained from funding the overrun, or would have terminated the work, if the contractor had been able to report the overrun earlier. Rather, EPA considered the work, necessary for a biennial report to Congress, to be high priority and subject to a strict completion schedule. There was no question that the overrun, undisputed in amount, consisted of allowable costs under the contract's Allowable Cost, Fixed Fee, and Payment clause, and the contractor was entitled to be paid for it.

Appeal of Dames & Moore, IBCA-2553 (Oct. 7, 1992)
99 I.D. 194

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

Where a contract was silent as to when the Notice to Proceed would be issued, but the solicitation stated that the Notice to Proceed would be issued upon receipt of properly executed performance and payment bonds, the Government had an implied obligation to issue the Notice to Proceed within a reasonable time after receiving the bonds.

In an action for delay under the Suspension of Work clause, the Board concluded that a 15-day delay by the Government in issuing the Notice to Proceed was reasonably prompt, where the contractor was also found to be responsible for an 11-day delay in submitting its performance and payment bonds.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

When a combination of actions and inactions by BOR and by the A/E, which was paid by its client irrigation district, but which also served as BOR's authorized representative in administering the contract, resulted in non-objective treatment and hindered the contractor's work, the Board found that BOR had breached its duty to cooperate, causing a constructive change.

In awarding appellant a 370-day time extension, the Board resolved credibility issues in its favor and found that it had proved, with expert testimony and analysis, that specific delays were due to actions or inactions for which BOR was responsible; that Project completion was delayed as a result; and that BOR had not proved any overall Project delay by appellant.

Because BOR had instructed during the contract that 1986 AGC equipment ownership and operating rates were to be used, and its contracting officers had used those rates for modifications, the Board found that BOR had waived a contract provision invoking ownership rates derived from 1974 AGC tables.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

In connection with BLM's unilateral price reduction on a contract for the construction of a fishway, due to the contractor's use of a temporary access spur, rather than highline access allegedly required by the contract, the Board noted that BLM's focus during the project had not been upon the spur, but upon its concern that in-stream fill would exceed the amount specified in permits issued to BLM. In fact, the contract provided that the amount was an estimate and that BLM would modify the permits to conform to actual quantities; the permit issuers were not concerned; and the permits were amended rapidly.

The Board found that BLM impliedly had approved the contractor's temporary access spur plan, which it had presented to the COR well before construction began, and which was within the COR's contract authority to approve; for which the contractor had obtained necessary permits, which the COR had approved; and which the COR and BLM's inspector had observed in operation and allowed to continue until the spur was 90 percent complete. The Board also found that the contractor would not experience a windfall because its bid had not been based upon the use of highline access at the area in question; and that BLM had failed to prove its deduction justified.

In denying the contractor's claims for acceleration and impact, the Board found that the contractor had been allowed to start work earlier, and finish it later, than the contract-specified dates; deleted work had netted more time for the contractor; a suspend work order had been issued due to the contractor's own actions in violating in-stream fill permits; the suspension had applied to only part of the contract work; delay in the grant of an extension for in-stream work due to differing site conditions had not been BLM's fault; and the contractor already had been compensated by the Board's jury verdict for extra time and costs due to the differing conditions.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993)
100 I.D. 329

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Allowable Costs

The Board refused to adopt a contractor's total cost method for pricing its equitable adjustment where the cost data and other evidence of record demonstrated that the Government was not responsible for many of the excess costs incurred by the contractor and included in its claim for relief.

A contractor's claim for an equitable adjustment for excess costs incurred as the result of the Government's rejection of a load of excessively wet concrete, was denied where the contractor failed to show by a preponderance of evidence that actions taken by the Government in batching the concrete were responsible for the rejected load.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

Where a contract specification required the contractor to provide the services of a factory engineer to "supervise and check" the contractor's installation of an electrical unit, the contractor was entitled to an equitable adjustment only for additional costs charged by the manufacturer for "repair" of the unit, which was extra work under the contract. The contractor was not entitled to labor and materials associated with the installation startup, because it was required to perform such services under terms of the contract.

The Government has the burden of proving the amount of a price reduction for deleted work under a contract. The Government met its burden by establishing the reasonable value of such work, based on the contractor's bid estimates for the work items in question.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Allowable Costs--Continued

When, despite an adequate accounting system, a contractor did not foresee an overrun in indirect costs prior to completion of its work under its cost-plus-fixed-fee contract with EPA for a wastewater facilities survey, and so was unable to provide advance notice of the overrun under the contract's Limitation of Funds or Limitation of Cost clauses, those clauses did not preclude recovery of the overrun. The contractor's awareness that its fringe benefit rate exceeded the contract's provisional rate did not constitute foreknowledge of the overrun. In fact, it had projected during performance that it would remain on budget. It established that the increase in fringe benefits costs amounted only to about 44 percent of the total contract overrun, and about 55 percent of the overrun in indirect costs claimed, which was due in large part to resolution by DCAA, at the end of the contract work, of substantial cost issues in the contractor's favor, and to increased overhead resulting from unexpected conflict in Iran that disrupted its business.

The Board found the EPA was not prejudiced. The contractor reported the overrun within a reasonable time after completion of the work, before the contract's actual completion date. By the apparent time of the overrun, the contract already had been fully funded, so there was not meaningful funding, or work cessation, election for the contacting officer or the contractor, respectively, to make under the contract's fund and cost limitation clauses. Moreover, the Board found no evidence that EPA was displeased with the contractor's work, or would have refrained from funding the overrun, or would have terminated the work, if the contractor had been able to report the overrun earlier. Rather, EPA considered the work, necessary for a biennial report to Congress, to be high priority and subject to a strict completion schedule. There was no question that the overrun, undisputed in amount, consisted of allowable costs under the contract's Allowable Cost, Fixed Fee, and Payment clause, and the contractor was entitled to be paid for it.

Appeal of Dames & Moore, IBCA-2553 (Oct. 7, 1992)
99 I.D. 194

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Allowable Costs--Continued

Once the propriety of a termination for convenience has been established, the terminated portion of the contract is converted into a cost-reimbursement contract, and the contractor is entitled to recover its allowable costs in accordance with the standards of reasonableness, cost allocability, and other cost principles set forth in the FAR, including profit.

Pursuant to applicacble provisions of FAR, a contractor may recover its consulting fees under a contract terminated for convenience, where the evidence showed that such costs were adequately documented and were not related to the preparation of litigation.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

Assignment of Claims

In a case where appellants allude to subrogation claims but fail to identify or quantify them or to show that they were presented to the contracting officer for decision, the Board finds that it is without jurisdiction in the matter. The Board notes, however, that even if subrogation claims (properly certified, if required) cognizable as claims under the CDA had been presented to the contracting officer, appellant Federal, as surety, could only recover on such claims if it is shown that the obligations of its principal had been fully satisfied.

Where appellants assert that the completing surety should be recognized as the "contractor" by reason of a de facto takeover agreement but acknowledge that there was no formal takeover agreement and fail to point to any agreement with the Government following the contractor's default on which they rely as a takeover agreement, the Board finds that the surety is without standing to bring this appeal in its own name under the line of cases where takeover agreements were found to exist.

In addition to moving to dismiss the appeals by reason of improper certification, the Government has also moved to dismiss Federal as a party to the instant

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Assignment of Claims--Continued

appeals on the ground that as a surety it is not a contractor within the meaning of sec. 601(4) of the CDA. Subject to proper certification of the claims upon resubmission thereof, the Board finds that the Government was aware of, assented to, and recognizaed the assignment and that the effect of such recognition was to waive the anti-assignment statutes, to make lawful the substitution of the surety for the contractor, and to give standing to the surety to prosecute the instant appeals in its own name as the "contractor" within the meaning of the CDA.

Appeals of Rodgers Construction, Inc., Federal Insurance Co., IBCA-2777 et al. (Oct. 15, 1991) 98 I.D. 281

A prime contractor is not entitled to an adjustment in the contract price under the Prompt Payment clause for a delayed payment to its subcontractor, because that clause does not impose an obligation on the Government to pay interest penalties on past due accounts to subcontractors.

The Government has no obligation to ensure that a subcontractor is paid in accordance with the terms of its subcontract where there is no privity of contract between the subcontractor and the Government.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

Changed Conditions (Differing Site Conditions)

A contractor is not entitled to an equitable adjustment where the extra costs incurred to perform the work were a direct result of its subcontractor's failure to conduct an adequate pre-bid site investigation and where the subcontractor instead relied exclusively on an unapproved field drawing provided by the contractor that failed to depict site conditions correctly.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changed Conditions (Differing Site Conditions) --Continued

When BLM acknowledged liability for site profile differences, and the contractor proved costs incurred in addition to those awarded by unilateral modification, the Board used a jury verdict approach to determine the appropriate amount of increased costs to be recovered. In so doing, the Board found clear proof of injury; that there was no more reliable method for computing damages; and that the evidence was sufficient to make a fair and reasonable approximation of the damages.

In resolving the parties' quantum dispute over a unilateral modification which increased the contract amount due to additional work, but reduced it due to the deletion of boulder work, for an overall net price reduction, the Board found that BLM had not met its burden to prove the full amount of the reduction justified, and that the contractor had not proved the full amount it sought due to the increased work warranted. The Board used a jury verdict method in arriving at the appropriate contract adjustment.

The Board found the contractor entitled to an equitable adjustment for "Type I" differing site conditions when the contractor established that it had encountered mud seams, rotten seams, or clay, while the contract, upon which the contractor reasonably had relied, and the contractor's site visit, had indicated only competent rock. The Board used a jury verdict method to determine the proper amount of the equitable adjustment.

In denying the contractor's claims for acceleration and impact, the Board found that the contractor had been allowed to start work earlier, and finish it later, than the contract-specified dates; deleted work had netted more time for the contractor; a suspend work order had been issued due to the contractor's own actions in violating in-stream fill permits; the suspension had applied to only part of the contract work; delay in the grant of an extension for in-stream work due to differing site conditions had not been BLM's fault; and the contractor already had been compensated by the Board's jury verdict for extra time and costs due to the differing conditions.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993) 100 I.D. 329

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras

Where a contractor was required to perform more or different work, or to higher standards, than called for in the terms of the contract, it was entitled to an equitable adjustment as a constructive change to the contract.

Appeal of White Buffalo Construction, IBCA-2166, 2173 (Nov. 26, 1990)

A cadastral survey contractor is not entitled to an adjustment on the basis of mutual mistake merely because it is unable to meet its expected production rates. A party's prediction as to events that are to occur in the future, or his professional judgment, even if erroneous, is not a compensable mistake. In this case, there is insufficient evidence that the contemplated production rates could not have been achieved by a prudent contractor, and the fixed-price contract placed the risks of unexpected costs of performance on the contractor.

A contractor is not entitled to relief on a theory of constructive change where it failed to show that the Government directed it to perform work that was not required under the contract, or that the Government in any way changed the requirements of the contract after it was entered into.

Appeal of Ocean Technology, Inc., IBCA-2651 (Feb. 27, 1991)

A contractor's onsite examination of a designated source of borrow, combined with a specification provision identifying said borrow as a source of fill material, should have caused a reasonable and prudent contractor to anticipate and take into account in its bid price that the existing site conditions were such that it might be necessary to utilize an unquantified amount of fill material to perform the excavation and embankment work under the contract. The contractor's decision not to include a factor for borrow in its bid, was thus held to be an exercise of business judgment, and

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

the contractor assumed the risk that additional borrow might be required.

Where an "as built" Government analysis of a shortfall of dirt on a construction project contained an estimated shrink factor that was excessive, the Board adopted a more reasonable shrink factor in order to calculate the extent of the contractor's quantum adjustment.

Appeal of Gerald Miller Construction Co., IBCA-2292 (Mar. 14, 1991)

Appellant's allegation that it is entitled to recover under the Charges clause of the road contract, because Indian litigation caused it to relocate its yard and pit, fails as a matter of law. The leased area was not part of the contract. Even if it had been, there was no relevant act by the contracting officer constituting an actual or constructive change.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

The Board found the Government did not have superior knowledge about the contract quarry's conditions and, in any case, the quarry was not deficient.

Although one portion of the Government's 36-inch riprap specification was unreasonable, and the Government relaxed it in accepting appellant's rework, the Board found appellant failed to prove the Government's rework requirement was due to the unreasonable part of the specification. Appellant acknowledged that the first two in-place test samples, which led to rejection of its work, were outside the entire required gradation envelope and did not comply with even the relaxed specification. The contract entitles the Government to reject, and to require replacement of, nonconforming work. Moreover, the extent of the rework was due principally to appellant's delay in testing. Thus, the Government was not responsible for the costs of rework. The Board remanded the appeal to the contracting officer, however, to make an adjustment for

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

any payment deduction incorrectly taken based upon the unreasonable portion of the specification.

Appeal of White & McNeil Excavating, Inc., IBCA-2448 (Nov. 4, 1991) 98 I.D. 359

A contractor is not entitled to an equitable adjustment for the cost of removing an existing 800-amp breaker where it had failed to make an adequate pre-bid site visit to ascertain the difficulty of the work. The condition necessitating removal of the breaker was readily discernible, and it was not reasonable for the contractor to assume, without inquiry, that the Government or another contractor would remove it.

A contractor is entitled to an equitable adjustment for "loss of efficiency" where the Government failed to timely ascertain the suitability of Government-furnished batteries for use under the contract, and the delay hindered the contractor's performance because the batteries remained in the work area and impeded the contractor's other work.

Where a contract specification required the contractor to provide the services of a factory engineer to "supervise and check" the contractor's installation of an electrical unit, the contractor was entitled to an equitable adjustment only for additional costs charged by the manufacturer for "repair" of the unit, which was extra work under the contract. The contractor was not entitled to labor and materials associated with the installation startup, because it was required to perform such services under terms of the contract.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

When the Government incorrectly based a payment deduction upon a portion of its riprap specification which the Board found unreasonable, the contractor was entitled to be recompensed for the improper deduction.

Appeal of White & McNeil Excavating, Inc., IBCA-2448 (July 24, 1992) 99 I.D. 121

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

When, pursuant to the Inspection and Acceptance clause, BOR evaluated whether nonconforming sealant could remain in place, allowed repairs, did not direct a new sealant, but declined to set acceptable bubbling in advance of inspection, its actions were not arbitrary or economically wasteful.

In determining that rejected sealant had to be repaired or replaced, BOR did not use improper testing.

In failing to prove that its products and their application complied with specifications, appellant did not carry its threshold burden to prove BOR's design specifications defective.

BOR did not withhold superior knowledge about problems with the contractor's sealant.

Appeal of Ball, Ball, & Brosamer, IBCA-2103-N (July 27, 1992) 99 I.D. 126

The Board found that appellant contractor, under a BOR contract for canal construction for an irrigation district, had proved specifications, prepared by an A/E firm hired by the district, to be defective. Earthwork elevations were erroneous due to inadequate survey information; they also had been altered arbitrarily without notice; and the estimated borrow quantity, while appearing to a reasonable bidder to be overstated, was greatly underestimated. Borrow quantities provided by the A/E during the job continued to be materially inaccurate. The defective specifications constituted a constructive change compensable under the contract's Changes clause.

Appellant established many discrepancies and design errors affecting structures work and amounting to a constructive change.

When a combination of actions and inactions by BOR and by the A/E, which was paid by its client irrigation district, but which also served as BOR's authorized representative in administering the contract, resulted

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

in non-objective treatment and hindered the contractor's work, the Board found that BOR had breached its duty to cooperate, causing a constructive change.

In awarding appellant an equitable adjustment under the Changes clause for complying with an order to repair storm damage caused by defective specifications, when BOR disputed quantum only, the Board found appellant's proof persuasive.

When BOR acknowledged liability for a contract change due to defective specifications, albeit contested appellant's quantum claim for lowering and extending a siphon, the Board accepted conservative cost estimates made by appellant's onsite project manager in the absence of any cost-effective way of segregating extra costs.

On appellant's claim for excess costs due to defective soil stabilization specifications, the Board found that contemporaneous documentation supported the testimony of appellant's project manager and BOR's inspector that, although the stabilization solution penetration requirement had been waived, appellant had been directed to use the full contract estimated quantity of solution which it had on hand. In finding appellant entitled to an equitable adjustment under the Changes clause, the Board resolved credibility issues in its favor.

When entitlement to compensation for complying with a direction to perform extra sump and wells work was undisputed, the Board awarded appellant an equitable adjustment.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

The Board found that appellant did not meet its burden to prove that NPS was responsible for appellant's costs of bathroom tile repair and replacement. Appellant did not comply with NPS' specifications; it knowingly proceeded to install bathroom flooring contrary to trade practice; it did not inquire specifically and timely about the bathroom floor installation; and it did

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

not prove that it properly used and installed requisite materials in the bathrooms.

Appeal of Nat'l Park Concessions, Inc., IBCA-2995
(Aug. 18, 1994) 101 I.D. 92

Conflicting Clauses

Where provisions relating to form stripping and backfill times under a contract requiring construction of concrete structures along a conveyance channel were deemed to be ambiguous, but such ambiguity was not considered to be patently obvious, a contractor performing the concrete work under the contract was found to be entitled to an equitable adjustment under the principle of contra proferentem, where the contractor's interpretation of the provisions was within the zone of reason according to industry standard and custom.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

Construction Against Drafter

Where provisions relating to form stripping and backfill times under a contract requiring construction of concrete structures along a conveyance channel were deemed to be ambiguous, but such ambiguity was not considered to be patently obvious, a contractor performing the concrete work under the contract was found to be entitled to an equitable adjustment under the principle of contra proferentem, where the contractor's interpretation of the provisions was within the zone of reason according to industry standard and custom.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Construction Against Drafter--Continued

In a Request for Proposals, the Government is required to give prospective bidders accurate and complete information concerning the work to be performed. If it fails to do so, or makes any changes after the contract has been let, and the contractor thereby incurs additional costs, the Government is liable for such costs.

Appeal of The Wackenhut Corp., IBCA-2311 (Sept. 4, 1990)

Contract Clauses

A contractor was found not to be entitled to an equitable adjustment for an inspector's refusal to conduct a backfill compaction test as requested by the contractor. The evidence indicated (1) that an earlier test taken by the inspector showed that backfill placed by the contractor did not meet specification requirements, (2) that any additional testing would not provide a true and accurate reading, and (3) that the contract documents provided that in any event, such testing was for the sole benefit of the Government.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

A contractor's claim for an equitable adjustment for concrete work performed under a contract for construction of a pedestrian way was denied, where the discrepancy between the estimated quantities set forth in the contract documents and the quantities contained in the contractor's bid were so patent and glaring as to raise the duty to inquire, regardless of the reasonableness of the contractor's interpretation.

Appeal of Prism Construction Co., IBCA-2410 (Nov. 20, 1990)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contract Clauses--Continued

A contractor's interpretation of the earth work portion of a construction contract, based on its exclusive reliance on the estimated bid item quantities set forth in the specifications, was held to be unreasonable and precluded recovery on the contractor's claim, because such interpretation failed to look beyond the minimum requirements of the contract and ignored other significant contract indications, including borrow information, and thus failed to give reasonable meaning to the contract as a whole.

Appeal of Gerald Miller Construction Co., IBCA-2292 (Mar. 14, 1991)

Although a liquidated damages clause contained no specific provision for excusable delay, the Board found that a delay caused by an earthquake was excusable under provisions of the default caluse where the length of the period of liquidated damages depended on provisions in the default clause, including its provisions for excusable delay, so that the two clauses could not be interpreted separately.

Appeal of Jelcon, IBCA-2842, -2843 (Apr. 9, 1992)

When, despite an adequate accounting system, a contractor did not foresee an overrun in indirect costs prior to completion of its work under its cost-plus-fixed-fee contract with EPA for a wastewater facilities survey, and so was unable to provide advance notice of the overrun under the contract's Limitation of Funds or Limitation of Cost clauses, those clauses did not preclude recovery of the overrun. The contractor's awareness that its fringe benefit rate exceeded the contract's provisional rate did not constitute foreknowledge of the overrun. In fact, it had projected during performance that it would remain on budget. It established that the increase in fringe benefits costs amounted only to about 44 percent of the total contract overrun, and about 55 percent of the overrun in indirect costs claimed, which was due in large part to resolution

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contract Clauses--Continued

by DCAA, at the end of the contract work, of substantial cost issues in the contractor's favor, and to increased overhead resulting from unexpected conflict in Iran that disrupted its business.

The Board found the EPA was not prejudiced. The contractor reported the overrun within a reasonable time after completion of the work, before the contract's actual completion date. By the apparent time of the overrun, the contract already had been fully funded, so there was not meaningful funding, or work cessation, election for the contacting officer or the contractor, respectively, to make under the contract's fund and cost limitation clauses. Moreover, the Board found no evidence that EPA was displeased with the contractor's work, or would have refrained from funding the overrun, or would have terminated the work, if the contractor had been able to report the overrun earlier. Rather, EPA considered the work, necessary for a biennial report to Congress, to be high priority and subject to a strict completion schedule. There was no question that the overrun, undisputed in amount, consisted of allowable costs under the contract's Allowable Cost, Fixed Fee, and Payment clause, and the contractor was entitled to be paid for it.

Appeal of Dames & Moore, IBCA-2553 (Oct. 7, 1992)
99 I.D. 194

Both the Changes and the Termination for Convenience clauses provide a mechanism for the deletion of contract work. However, when major portions of the contract work are deleted, the Termination for Convenience clause is more appropriate if no additional work is substituted in its place.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contract Clauses--Continued

Under the relevant part of the Responsibility of the Architect-Engineer Contractor clause in appellant's contract, it was responsible only for errors or deficiences in its services or for damages caused by its negligent performance. The Board found that appellant was entitled to recover its additional cost for re-establishing a vandalized survey line because the vandalism was not an error or deficiency in its work; the Government had not met its burden to prove negligence, of which there was no evidence; and the COTR had requested and approved of the work, which was an administrative matter within his purview.

Appeal of Blackwell Engineering, IBCA-2620 (Jan. 14, 1994)
101 I.D. 1

In a contract to drill and grout-fill underground mine voids, a contractor is entitled to an equitable adjustment to the extent that it can show that it incurred additional costs solely as a result of a variation in actual quantities of grout placed from the quantities estimated. Where the contractor satisfies the Board that it has incurred some additional costs because of the variation in estimated quantities, but cannot prove the amount of the costs, the Board, in its discretion, may make an award on the basis of a jury verdict.

Appeal of Eles Bros. Ready Mix Co., IBCA-2952 (July 6, 1994)
101 I.D. 71

The Government is not permitted to substitute the Termination for Convenience clause for the Changes clause to delete a relatively minor portion of the total contract more than 2 years after it issued a deductive change order, which was relied on by the contractor in submitting a proposed credit to the Government for the deleted work. In determining the amount of the credit, the primary consideration is the cost impact on the contractor. Thus, the contractor was entitled to rely upon

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contract Clauses--Continued

the cost estimate of the subcontractor that was to have done the work.

Appeal of J. A. Jones Construction Co., IBCA-3280 (Aug. 16, 1994) 101 I.D. 82

Contracting Officer

The Board denies a Government motion for summary judgment for the failure of the appellant to state a claim for relief with respect to its unilateral mistake in bid claim, where the Board finds (i) that the Government has failed to furnish any information as to what actions the contracting officer took with respect to his bid verification duties upon the opening of bids; (ii) that in the absence of such information it is not possible to determine the reasonableness of the contracting officer's actions; and (iii) that in ruling upon a motion for summary judgment all inferences are to be drawn in favor of the party against whom the motion for summary judgment is advanced.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990) 97 I.D. 193

For the Government to be liable for extra hours worked by a janitorial contractor's workers, the contractor must prove that the changes were ordered or directed by the Government and that they were beyond the scope of the contract. Mere comments or suggestions to the workers by the contracting officer's representatives, and a referral of the resulting wage complaints to the Labor Department by the contracting officer, are insufficient to establish Government liability, since the contractor, not the Government, is responsible for the conduct of its employees.

Appeals of Marc Industries, IBCA-2905, -2906, (Sept. 4, 1991) 98 I.D. 263

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contractor

A contractor is not entitled to an equitable adjustment for the erroneous installation of a junction box by its electrical subcontractor, where the contractor had failed to supply the subcontractor with the contract drawings and specifications it needed to assure that the contractor's unapproved shop drawing was accurate.

A contractor is not entitled to the excess costs associated with its extensive modifications of single compression lugs in order to assure a proper electrical conduction where the evidence showed that the contractor did not understand the bolt pattern for the unit and did not consult with the unit's onsite manufacturer's representative. Had it done so, it could have purchased the proper lugs and avoided the modifications claimed.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

Differing Site Conditions (Changed Conditions)

A contractor's differing site condition claim was denied for lack of persuasive evidence of reliance where the evidence showed that the interpretation given by the contractor to contract documents pertaining to balanced earth work at a construction project was never actually relied upon by the contractor at the time of bidding.

Appeal of Gerald Miller Construction Co., IBCA-2292 (Mar. 14, 1991)

Appellant's allegation that it is entitled to an equitable adjustment under the road contact's Differing Site Conditions clause because its leased yard and pit location was part of a secret, sacred Indian religious site, fails as a matter of law. The leased area was not a contract site.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Differing Site Conditions (Changed Conditions) --Continued

When a contract provided for "at least 50%" quarry waste, and it was 60 percent, there was no Type I differing site condition. Actual conditions were consistent with thos represented. Appellant's interpretation that the quarry would yield about 50 percent waste was found unreasonable. Even if it had been reasonable, or if minimum waste had been understated, appellant did not establish persuasively that it relied upon the waste factor. Quarry geology was not otherwise mis [Dsrepresented. Because the contract quarry's waste was close to, or substantially less than, other limestone quarries in the area, there was no Type II differing site condition.

Appeal of White & McNeil Excavating, Inc., IBCA-2448 (Nov. 4, 1991) 98 I.D. 359

A contractor, who was compensated for differing site conditions requiring removal of unexpected concrete blocks and relocating a drain, was held not to be entitled to an extension of contract time when the differing site condition work was completed more than a month prior to the time the contractor received approval to start the final phase of construction and the differing site conditions were not shown to have any impact on the completion date.

Appeal of Jelcon, IBCA-2842, -2843 (Apr. 9, 1992)

Drawings and Specifications

Under a contract for the construction of an urban road project, the Board found that the liability of the Government for the majority of the items of claim (failure to secure the timely removal of utility lines from the work areas, erroneous staking, improper testing standards, design problems) was established by a preponderance of the evidence, as was the failure of the Government to properly administer the contract in a number of respects. After noting that the evidence offered by the appellant in support of its total cost claim failed in a number of instances to establish a nexus between the cause of delay assigned and the amount

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings and Specifications--Continued

of damages claimed and failed to separate delays for which the Government was responsible from delays attributable to actions of the contractor, the Board concluded (i) that the use of the total cost method for determining the amount of the equitable adjustment in such circumstances was not warranted; and (ii) that where the liability of the Government had been established but the amount of the equitable adjustment could not be determined with any degree of mathematical precision, it was proper to resort to the so-called jury verdict approach for the purpose of determining the amount of the equitable adjustment to which the appellant was entitled.

Appeals of Harvey C. Jones, Inc., IBCA-2070 et al. (Feb. 28, 1990) 97 I.D. 79

Where a contractor's estimate of screw fasteners required to comply with specified spacing is found to be correct and additional screws are required to make a Government-approved plywood underlayerment for roofing membranes to lay flat, the added fasteners are found to be an additional contract requirement for which the contractor is compensated.

Appeal of Niko Contracting Co., IBCA-2368 (Mar. 30, 1990) 97 I.D. 120

In a Request for Proposals, the Government is required to give prospective bidders accurate and complete information concerning the work to be performed. If it fails to do so, or makes any changes after the contract has been let, and the contractor thereby incurs additional costs, the Government is liable for such costs.

Appeal of The Wackenhut Corp., IBCA-2311 (Sept. 4, 1990)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings and Specifications--Continued

A contractor was not prejudiced by the Government's failure to include cross-section surveys of original ground material in the solicitation package where there was no showing either that the contractor requested and was refused examination thereof prior to bid, or that the contractor could not reasonably have calculated any necessary contract estimates on its own, without such cross-sections.

Where a construction contractor failed to show how contract drawings and related estimates were inaccurate because they were based on a centerline design, the Board found that the contract drawings were not substantially defective inasmuch as they contained sufficient information to enable a bidder possessing the requisite skill and knowledge to plot his own cross-sections to determine the approximate quantities of excavation and embankment.

Drawings and specifications, rather than the general estimates of the bidding schedule, govern the size and characteristics of a road construction project, notwithstanding the existence of variations between the estimates and the quantities actually required, even though such variations stemmed partly from errors in the Government computations on which the estimates were based.

A contractor's differing site condition claim was denied for lack of persuasive evidence of reliance where the evidence showed that the interpretation given by the contractor to contract documents pertaining to balanced earth work at a construction project was never actually relied upon by the contractor at the time of bidding.

Appeal of Gerald Miller Construction Co., IBCA-2292
(Mar. 14, 1991)

The Board found the Government did not have superior knowledge about the contract quarry's conditions and, in any case, the quarry was not deficient.

When a contract provided for "at least 50%" quarry waste, and it was 60 percent, there was no Type I differing site condition. Actual conditions were consistent with thos represented. Appellant's interpretation that the quarry would yield about 50 percent waste was found unreasonable. Even if it had been reasonable, or if minimum waste had been

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings and Specifications--Continued

understated, appellant did not establish persuasively that it relied upon the waste factor. Quarry geology was not otherwise mis [Dsrepresented. Because the contract quarry's waste was close to, or substantially less than, other limestone quarries in the area, there was no Type II differing site condition.

Although one portion of the Government's 36-inch riprap specification was unreasonable, and the Government relaxed it in accepting appellant's rework, the Board found appellant failed to prove the Government's rework requirement was due to the unreasonable part of the specification. Appellant acknowledged that the first two in-place test samples, which led to rejection of its work, were outside the entire required gradation envelope and did not comply with even the relaxed specification. The contract entitles the Government to reject, and to require replacement of, nonconforming work. Moreover, the extent of the rework was due principally to appellant's delay in testing. Thus, the Government was not responsible for the costs of rework. The Board remanded the appeal to the contracting officer, however, to make an adjustment for any payment deduction incorrectly taken based upon the unreasonable portion of the specification.

Appeal of White & McNeil Excavating, Inc., IBCA-2448
(Nov. 4, 1991) 98 I.D. 359

A contractor is not entitled to an equitable adjustment where the extra costs incurred to perform the work were a direct result of its subcontractor's failure to conduct an adequate pre-bid site investigation and where the subcontractor instead relied exclusively on an unapproved field drawing provided by the contractor that failed to depict site conditions correctly.

Where a construction contractor asserts that a contract was ambiguous with respect to the grounding of a transformer, but failed to make inquiry prior to bidding to clarify the issue, it assumes the risk of any resulting incorrect assumptions relating to the work during performance of the contract.

A contractor's alleged interpretation of conflicting drawings and specifications was unpersuasive

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings and Specifications--Continued

because it did not prove its reliance on that interpretation either in preparing its bid or in performing the work under the contract.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

When the Government incorrectly based a payment deduction upon a portion of its riprap specification which the Board found unreasonable, the contractor was entitled to be recompensed for the improper deduction.

Appeal of White & McNeil Excavating, Inc., IBCA-2448 (July 24, 1992) 99 I.D. 121

When canal joint sealant did not cure to a homogeneous compound, it did not meet contract specifications.

In failing to prove that its products and their application complied with specifications, appellant did not carry its threshold burden to prove BOR's design specifications defective.

Appeal of Ball, Ball, & Brosamer, IBCA-2103-N (July 27, 1992) 99 I.D. 126

The Board found that appellant contractor, under a BOR contract for canal construction for an irrigation district, had proved specifications, prepared by an A/E firm hired by the district, to be defective. Earthwork elevations were erroneous due to inadequate survey information; they also had been altered arbitrarily without notice; and the estimated borrow quantity, while appearing to a reasonable bidder to be overstated, was greatly underestimated. Borrow quantities provided by the A/E during the job continued to be materially inaccurate. The defective specifications constituted a constructive change compensable under the contract's Changes clause.

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings and Specifications--Continued

Appellant established many discrepancies and design errors affecting structures work and amounting to a constructive change.

In awarding appellant an equitable adjustment under the Changes clause for complying with an order to repair storm damage caused by defective specifications, when BOR disputed quantum only, the Board found appellant's proof persuasive.

When BOR acknowledged liability for a contract change due to defective specifications, albeit contested appellant's quantum claim for lowering and extending a siphon, the Board accepted conservative cost estimates made by appellant's onsite project manager in the absence of any cost-effective way of segregating extra costs.

On appellant's claim for excess costs due to defective soil stabilization specifications, the Board found that contemporaneous documentation supported the testimony of appellant's project manager and BOR's inspector that, although the stabilization solution penetration requirement had been waived, appellant had been directed to use the full contract estimated quantity of solution which it had on hand. In finding appellant entitled to an equitable adjustment under the Changes clause, the Board resolved credibility issues in its favor.

In denying appellant's claim for the costs of placing sealant in transverse contraction joints, the Board found that the specifications and drawings both plainly required it. Therefore, the contract's order of precedence provision, relied upon by appellant when it elected not to place sealant, did not absolve it from its duty of inquiry.

When it was undisputed that certain progress payments had been late and some Prompt Payment Act interest was due, the Board awarded it based upon dates established in an Independent Government Estimate because it provided the best-supported evidence of when the "proper" invoices required by the contract had been received.

The Board found that the contract clearly required contractors to include the cost of certain borrow area

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings and Specifications--Continued

royalties in their bids, as appellant and its subcontractor had done, and denied appellant's claim to recover them.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993) 100 I.D. 215

When, in a solicitation for bids for a contract for the installation of utilities, the Government included drawings that had been reduced in size by one-half without excising the stated full-sized scale, but noted in a special contract provision that the drawings had been reduced and that any stated scales were not to be used, the Board denied recovery on appellant's claim that it had been unaware of the special provision and that its bid had been based upon the stated scales. The Board noted that appellant's error stemmed from its failure to read the contract carefully.

The Board noted that the doctrine of contra proferentem did not apply because the contract was not ambiguous.

The Board found that, apart from the contract's warning not to use any scales depicted on the drawings, ruler measurements would have revealed that the stated scales were incorrect. The controlling factor is not whether appellant knew about the scale inaccuracies, but whether it should have known. The Board concluded that appellant should have been alerted to a possible scale problem and that its failure to raise any pre-bid inquiry precluded its recovery.

Appeal of T. R. Orr, Inc., IBCA-3143 (Apr. 15, 1994)

The Board found that appellant did not meet its burden to prove that NPS was responsible for appellant's costs of bathroom tile repair and replacement. Appellant did not comply with NPS' specifications; it knowingly proceeded to install bathroom flooring contrary to trade practice; it did not inquire specifically and timely about the bathroom floor installation; and it did

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings and Specifications--Continued

not prove that it properly used and installed requisite materials in the bathrooms.

Appeal of Nat'l Park Concessions, Inc., IBCA-2995 (Aug. 18, 1994) 101 I.D. 92

Duty to Inquire

A contractor's claim for an equitable adjustment for concrete work performed under a contract for construction of a pedestrian way was denied, where the discrepancy between the estimated quantities set forth in the contract documents and the quantities contained in the contractor's bid were so patent and glaring as to raise the duty to inquire, regardless of the reasonableness of the contractor's interpretation.

Appeal of Prism Construction Co., IBCA-2410 (Nov. 20, 1990)

The Board found the Government did not have superior knowledge about the contract quarry's conditions and, in any case, the quarry was not deficient.

Appeal of White & McNeil Excavating, Inc., IBCA-2448 (Nov. 4, 1991) 98 I.D. 359

A contractor is not entitled to an equitable adjustment for the cost of removing an existing 800-amp breaker where it had failed to make an adequate pre-bid site visit to ascertain the difficulty of the work. The condition necessitating removal of the breaker was readily discernible, and it was not reasonable for the contractor to assume, without inquiry, that the Government or another contractor would remove it.

Where a construction contractor asserts that a contract was ambiguous with respect to the grounding of a transformer, but failed to make inquiry prior to bidding to clarify the issue, it assumes the risk of any

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Duty to Inquire--Continued

resulting incorrect assumptions relating to the work during performance of the contract.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

In bidding on contracts, potential contractors must seek clarification of obvious, gross, and glaring errors in the Government's specifications; but they are not expected to exercise clairvoyance in spotting hidden ambiguities. Thus, a contractor is not liable for failing to realize that the Government's estimate of the lead content of paint to be removed from an old gantry crane had omitted a zero, when the number set forth was also reasonable, even though it clearly contained an apparently misplaced comma.

Appeal of Foothill Engineering, IBCA-3119-A (Feb. 12, 1993) 100 I.D. 50

Absent clear proof that BOR was responsible for a concrete slab that had to be removed, the Board deducted the removal costs from costs charged to BOR. The Board also deducted the costs of correcting one-gate turnouts to two gates because, even if the drawings were deemed latently ambiguous, appellant had not met its burden to prove that it had relied upon its interpretation at the time of bid. Also, the contract called for inquiry in the event of drawing discrepancies. Although the turnouts had been installed under inspectors' oversight, there was no evidence that they had been aware of the error and, under the Inspection of Construction clause, they could not waive contract requirements.

In denying appellant's claim for the costs of removing and encasing banded mitered pipe bends, the Board found that the contract required encasement; even if the contract were deemed patently or latently ambiguous, appellant had not met its pre-bid duty of inquiry, or its burden to prove reliance at the time of bid, respectively. Appellant also failed to prove that

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Duty to Inquire--Continued

banded bends had been approved as an alternative design and that BOR was estopped from requiring encasement or that BOR's enforcement of the specifications constituted economic waste.

In denying appellant's claim for the costs of placing sealant in transverse contraction joints, the Board found that the specifications and drawings both plainly required it. Therefore, the contract's order of precedence provision, relied upon by appellant when it elected not to place sealant, did not absolve it from its duty of inquiry.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993) 100 I.D. 215

Estimated Quantities

A contractor was not prejudiced by the Government's failure to include cross-section surveys of original ground material in the solicitation package where there was no showing either that the contractor requested and was refused examination thereof prior to bid, or that the contractor could not reasonably have calculated any necessary contract estimates on its own, without such cross-sections.

Where a construction contractor failed to show how contract drawings and related estimates were inaccurate because they were based on a centerline design, the Board found that the contract drawings were not substantially defective inasmuch as they contained sufficient information to enable a bidder possessing the requisite skill and knowledge to plot his own cross-sections to determine the approximate quantities of excavation and embankment.

A contractor's interpretation of the earth work portion of a construction contract, based on its exclusive reliance on the estimated bid item quantities set forth in the specifications, was held to be unreasonable and precluded recovery on the contractor's claim, because such interpretation failed to look beyond the minimum

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Estimated Quantities--Continued

requirements of the contract and ignored other significant contract indications, including borrow information, and thus failed to give reasonable meaning to the contract as a whole.

Drawings and specifications, rather than the general estimates of the bidding schedule, govern the size and characteristics of a road construction project, notwithstanding the existence of variations between the estimates and the quantities actually required, even though such variations stemmed partly from errors in the Government computations on which the estimates were based.

A contractor's onsite examination of a designated source of borrow, combined with a specification provision identifying said borrow as a source of fill material, should have caused a reasonable and prudent contractor to anticipate and take into account in its bid price that the existing site conditions were such that it might be necessary to utilize an unquantified amount of fill material to perform the excavation and embankment work under the contract. The contractor's decision not to include a factor for borrow in its bid, was thus held to be an exercise of business judgment, and the contractor assumed the risk that additional borrow might be required.

Where an "as built" Government analysis of a shortfall of dirt on a construction project contained an estimated shrink factor that was excessive, the Board adopted a more reasonable shrink factor in order to calculate the extent of the contractor's quantum adjustment.

Appeal of Gerald Miller Construction Co., IBCA-2292 (Mar. 14, 1991)

General Rules of Construction

Where provisions relating to form stripping and backfill times under a contract requiring construction of concrete structures along a conveyance channel were deemed to be ambiguous, but such ambiguity was not considered to be patently obvious, a contractor performing the concrete work under the contract was found to be entitled to an equitable adjustment under the principle

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

General Rules of Construction--Continued

of contra proferentem, where the contractor's interpretation of the provisions was within the zone of reason according to industry standard and custom.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

A settlement agreement is a contract, and the normal rules of contract construction govern its interpretation. Contracts entered into by an Indian tribe and approved by the Secretary of the Interior are subject to the same rules of interpretation applicable to contracts between private parties. Federal law, which controls the construction of Federal contracts including Indian contracts, follows the principles of general contract law.

The primary function of contract interpretation is to ascertain the intention of the parties, and that intention must be gathered from the instrument as a whole, preferably giving a reasonable meaning to all parts of the instrument and ascribing to the contract language its ordinary and commonly accepted meaning. If the principal purpose of the parties in entering into the agreement is ascertainable, that purpose is given great weight in interpreting the contract. When a paragraph in a settlement agreement provides that the provisions for minimum royalties in that agreement are in addition to the minimum royalty provisions in the subject mining leases, the Minerals Management Service properly interprets that paragraph as requiring that the total minimum royalties due under the leases and the agreement be combined before subtracting the production royalties to calculate the amount of minimum royalties due.

ASARCO Inc., 116 IBLA 120 (Sept. 21, 1990)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

General Rules of Construction--Continued

A contractor's interpretation of the earth work portion of a construction contract, based on its exclusive reliance on the estimated bid item quantities set forth in the specifications, was held to be unreasonable and precluded recovery on the contractor's claim, because such interpretation failed to look beyond the minimum requirements of the contract and ignored other significant contract indications, including borrow information, and thus failed to give reasonable meaning to the contract as a whole.

A contractor's differing site condition claim was denied for lack of persuasive evidence of reliance where the evidence showed that the interpretation given by the contractor to contract documents pertaining to balanced earth work at a construction project was never actually relied upon by the contractor at the time of bidding.

Appeal of Gerald Miller Construction Co., IBCA-2292 (Mar. 14, 1991)

A contractor's interpretation that it was not required to install an outside enclosure to protect an electrical transfer switch was unreasonable, because this interpretation ignored clear contract drawings that mandated "weatherproof fittings outside" as well as specification provisions that incorporated this requirement based on the National Electric Code.

A contractor's alleged interpretation of conflicting drawings and specifications was unpersuasive because it did not prove its reliance on that interpretation either in preparing its bid or in performing the work under the contract.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

General Rules of Construction--Continued

The interpretation of a contract requires that the agreement must be read as a whole in order to give proper effect to all provisions. Two potentially conflicting provisions must, if possible, be read so as to give effect to both without reading one or the other out of the agreement. In a contract for construction of a concrete water control structure, a provision requiring repairing and patching on the occurrence of certain conditions must be read as modifying the standard Inspection of Construction clause so that the latter does not mandate removal and replacement of the structure based on the occurrence of the conditions covered by the former.

Appeal of Sevcon, Inc., IBCA-2862 (Mar. 9, 1992)

Although a liquidated damages clause contained no specific provision for excusable delay, the Board found that a delay caused by an earthquake was excusable under provisions of the default caluse where the length of the period of liquidated damages depended on provisions in the default clause, including its provisions for excusable delay, so that the two clauses could not be interpreted separately.

Appeal of Jelcon, IBCA-2842, -2843 (Apr. 9, 1992)

In bidding on contracts, potential contractors must seek clarification of obvious, gross, and glaring errors in the Government's specifications; but they are not expected to exercise clairvoyance in spotting hidden ambiguities. Thus, a contractor is not liable for failing to realize that the Government's estimate of the lead content of paint to be removed from an old gantry crane had omitted a zero, when the number set forth was also reasonable, even though it clearly contained an apparently misplaced comma.

Appeal of Foothill Engineering, IBCA-3119-A (Feb. 12, 1993) 100 I.D. 50

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

General Rules of Construction--Continued

When, in a solicitation for bids for a contract for the installation of utilities, the Government included drawings that had been reduced in size by one-half without excising the stated full-sized scale, but noted in a special contract provision that the drawings had been reduced and that any stated scales were not to be used, the Board denied recovery on appellant's claim that it had been unaware of the special provision and that its bid had been based upon the stated scales. The Board noted that appellant's error stemmed from its failure to read the contract carefully.

The Board noted that the doctrine of contra proferentem did not apply because the contract was not ambiguous.

The Board found that, apart from the contract's warning not to use any scales depicted on the drawings, ruler measurements would have revealed that the stated scales were incorrect. The controlling factor is not whether appellant knew about the scale inaccuracies, but whether it should have known. The Board concluded that appellant should have been alerted to a possible scale problem and that its failure to raise any pre-bid inquiry precluded its recovery.

Appeal of T. R. Orr, Inc., IBCA-3143 (Apr. 15, 1994)

BLM properly required oil production to be reported on a leasehold basis after finding it was not subject to a communitization agreement because wells drilled on a restricted Indian lease included in a 640-acre communitized area produced oil instead of natural gas and associated liquid hydrocarbons identified in the agreement as the substances communitized.

Home-Stake Royalty Corp., 130 IBLA 36 (July 12, 1994)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Intent of Parties

A Government motion for summary judgment filed in connection with a contractor's unilateral mistake in bid claim is denied where the Government fails to show that the release language included in a modification to the contract (relied upon by the Government for its affirmative defenses of abandonment, novation, release and accord, and satisfaction) either expressly or by implication refers to any mistake in bid claim where the Board finds that an affidavit filed by appellant raises a genuine issue of material fact as to the intention of the parties at the time the modification containing the release in question was negotiated and executed. The Government's motion for summary judgment is also denied on the alternative ground that subsequent to the execution of the release the parties showed by their conduct that they never considered the release as constituting an abandonment or the mistake in bid claim.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990) 97 I.D. 193

Appellant's allegation that it is entitled to equitable contract reformation fails as a matter of law. There was no mutual mistake in the formation of the road contract. Moreover, under the contract, appellant assumed all risks associated with its yard and pit.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

A contractor fails to meet its burden of proof that Government delays precluded it from voluntarily accelerating its performance under the contract where the contractor did not communicate such an intent to the Government, and its performance schedule did not indicate a critical path method by which the accelerated work could be tracked.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Intent of Parties--Continued

Despite the parol evidence rule, and prior to contract interpretation, extrinsic evidence was admissible to establish that the settlement agreement was, or was not, completely integrated. The Board found appellant's several affidavits and declaration, which BIA did not controvert successfully, persuasive that the agreement was complete and final.

In finding the parties' settlement agreement clear and unambiguous, the Board derived the parties' intent from its plain language, harmonizing and giving a reasonable meaning to all of its parts, without out-of-context analysis or regard to the contracting officer's alleged intent, which BIA did not establish to be anything other than subjective and unexpressed.

Neither party could cast aside a valid settlement agreement without the most compelling of reasons, including proof of invalidity, either by fraud or mutual mistake. A unilateral mistake was not sufficient. The decision by an authorized contracting officer to settle a claim, with knowledge of the facts, was dispositive. The law assumes that the contracting officer's action in signing the agreement was proper.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

Labor Laws

For the Government to be liable for extra hours worked by a janitorial contractor's workers, the contractor must prove that the changes were ordered or directed by the Government and that they were beyond the scope of the contract. Mere comments or suggestions to the workers by the contracting officer's representatives, and a referral of the resulting wage complaints to the Labor Department by the contracting officer, are insufficient to establish Government liability, since the contractor, not the Government, is responsible for the conduct of its employees.

Appeals of Marc Industries, IBCA-2905, -2906, (Sept. 4, 1991) 98 I.D. 263

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Modification of Contracts

Generally

An appellant's cross-motion for summary judgment is denied where the Board finds (i) that the motion is predicated upon a particular application of the law of warranties; (ii) that the principal grounds for the motion appears to be based upon the provisions of the Uniform Commercial Code; (iii) that all of the cases cited which apparently involve the Uniform Commercial Code are state cases; (iv) that in regard to such cases the appellant has failed to show that the principles apparently enunciated therein have been endorsed by the Federal courts so as to become a part of what has been described as the general Federal common law; (v) that the state cases so relied upon have not been shown to be dispositive of the question presented; and (vi) that appellant has failed to show that it is entitled to summary judgment as a matter of law.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990) 97 I.D. 193

Where a contractor was allowed to construct a "blockout" in the wall of a concrete structure pending arrival of pipe at the site, but that the design of such blockout was altered by the contracting officer before approval, the resulting deficiencies in the concrete could not be charged against the Government where the evidence showed that (1) it was the contractor's option whether to place the blockout or await for arrival of pipe at the site, (2) that in accommodating the contractor in its request to construct the blockout the Government saved the contractor time, money, and effort on the project, and (3) that the contractor could have shutdown the project in lieu of constructing the blockout, and that such shutdown would not have been the fault of the Government.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Modification of Contracts--Continued

Generally--Continued

Where a Government inspector observed a contractor installing conduit to an electrical transformer in a manner contrary to both the manufacturer's specific written instructions and the National Electric Code, but nevertheless allowed the contractor to proceed with the installation, such conduct did not constitute "constructive acceptance" by the Government of the defective work. The inspector had promptly notified the contractor of its improper wiring and had thus preserved the Government's right to require correction at the time of final inspection. The inspector's inaction did not relieve the contractor from the contract requirements, nor was the inspector authorized to change any term or condition of the specification without the contracting officer's authorization.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

The Board found that the Government's purported exercise of an option to extend appellant's janitorial services contract departed from the strict option terms by seeking to extend for only 3 months instead of 12; therefore, appellant was not bound by the award fee amount set forth in the original contract; the parties' bilateral contract modification extending the contract for 3 months incorporated the new award fee amount proposed by appellant at the Government's request; and the contracting officer persisted with the modification as written despite actual knowledge of appellant's reasonable interpretation of the agreement as providing for a new fee award.

Appeal of Safeguard Maintenance Corp., IBCA-3379-E (Dec. 22, 1994)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Notices

Where a Government inspector observed a contractor installing conduit to an electrical transformer in a manner contrary to both the manufacturer's specific written instructions and the National Electric Code, but nevertheless allowed the contractor to proceed with the installation, such conduct did not constitute "constructive acceptance" by the Government of the defective work. The inspector had promptly notified the contractor of its improper wiring and had thus preserved the Government's right to require correction at the time of final inspection. The inspector's inaction did not relieve the contractor from the contract requirements, nor was the inspector authorized to change any term or condition of the specification without the contracting officer's authorization.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

When, despite an adequate accounting system, a contractor did not foresee an overrun in indirect costs prior to completion of its work under its cost-plus-fixed-fee contract with EPA for a wastewater facilities survey, and so was unable to provide advance notice of the overrun under the contract's Limitation of Funds or Limitation of Cost clauses, those clauses did not preclude recovery of the overrun. The contractor's awareness that its fringe benefit rate exceeded the contract's provisional rate did not constitute foreknowledge of the overrun. In fact, it had projected during performance that it would remain on budget. It established that the increase in fringe benefits costs amounted only to about 44 percent of the total contract overrun, and about 55 percent of the overrun in indirect costs claimed, which was due in large part to resolution by DCAA, at the end of the contract work, of substantial cost issues in the contractor's favor, and to increased overhead resulting from unexpected conflict in Iran that disrupted its business.

The Board found the EPA was not prejudiced. The contractor reported the overrun within a reasonable time after completion of the work, before the contract's actual completion date. By the apparent time of the overrun, the contract already had been fully funded, so there was not meaningful funding, or work cessation, election for the contacting officer or the contractor,

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Notices--Continued

respectively, to make under the contract's fund and cost limitation clauses. Moreover, the Board found no evidence that EPA was displeased with the contractor's work, or would have refrained from funding the overrun, or would have terminated the work, if the contractor had been able to report the overrun earlier. Rather, EPA considered the work, necessary for a biennial report to Congress, to be high priority and subject to a strict completion schedule. There was no question that the overrun, undisputed in amount, consisted of allowable costs under the contract's Allowable Cost, Fixed Fee, and Payment clause, and the contractor was entitled to be paid for it.

Appeal of Dames & Moore, IBCA-2553 (Oct. 7, 1992)
99 I.D. 194

Payments

A prime contractor is not entitled to an adjustment in the contract price under the Prompt Payment clause for a delayed payment to its subcontractor, because that clause does not impose an obligation on the Government to pay interest penalties on past due accounts to subcontractors.

The Government has no obligation to ensure that a subcontractor is paid in accordance with the terms of its subcontract where there is no privity of contract between the subcontractor and the Government.

The Government has the burden of proving the amount of a price reduction for deleted work under a contract. The Government met its burden by establishing the reasonable value of such work, based on the contractor's bid estimates for the work items in question.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Privity of Contract

The Government has no obligation to ensure that a subcontractor is paid in accordance with the terms of its subcontract where there is no privity of contract between the subcontractor and the Government.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

Subcontractors and Suppliers

A contractor is not entitled to an equitable adjustment where the extra costs incurred to perform the work were a direct result of its subcontractor's failure to conduct an adequate pre-bid site investigation and where the subcontractor instead relied exclusively on an unapproved field drawing provided by the contractor that failed to depict site conditions correctly.

The Government has no obligation to ensure that a subcontractor is paid in accordance with the terms of its subcontract where there is no privity of contract between the subcontractor and the Government.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

Third Persons

The creation of a third-party beneficiary under a lease does not constitute an assignment or sublease and does not otherwise render the lease invalid.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

Warranties

An appellant's cross-motion for summary judgment is denied where the Board finds (i) that the motion is predicated upon a particular application of the law of warranties; (ii) that the principal grounds for the motion appears to be based upon the provisions of the Uniform Commercial Code; (iii) that all of the cases

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Warranties--Continued

cited which apparently involve the Uniform Commercial Code are state cases; (iv) that in regard to such cases the appellant has failed to show that the principles apparently enunciated therein have been endorsed by the Federal courts so as to become a part of what has been described as the general Federal common law; (v) that the state cases so relied upon have not been shown to be dispositive of the question presented; and (vi) that appellant has failed to show that it is entitled to summary judgment as a matter of law.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990) 97 I.D. 193

CONTRACT DISPUTES ACT OF 1978

Generally

Boards of Contract Appeals have jurisdiction to make awards pursuant to the Contract Disputes Act upon determining that private settlements entered into by the parties appear reasonable and that their ratification by the Board having jurisdiction over the appeal is in the best interests of the Government.

Appeals of Monterey Contruction Co., IBCA-2627-2634 (July 17, 1990) 97 I.D. 225

The Board has jurisdiction pursuant to the Contract Disputes Act to examine a settlement agreement between the parties and, if there is sufficient evidence of record to sustain a finding that the settlement agreement is reasonable, to enter a judgment approving the compromise settlement agreed to by the parties.

Appeal of Harrison Western Corp., IBCA-2262 (Nov. 26, 1990)

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Attorney Fees

The position of the Government in denying a claim for excess costs incurred during construction of an aqueduct is not substantially justified where the Government has wrongfully rejected the contractor's hoist gate gear motors based on faulty tests and erroneous application of an industry practice which should have shown that the contractor's gear motors met the technical requirements of the contract.

Application for Attorney Fees of Gracon Corp., IBCA-2582-F (Feb. 22, 1990)

Jurisdiction

Boards of Contract Appeals have jurisdiction to make awards pursuant to the Contract Disputes Act upon determining that private settlements entered into by the parties appear reasonable and that their ratification by the Board having jurisdiction over the appeal is in the best interests of the Government.

Appeals of Monterey Contruction Co., IBCA-2627-2634 (July 17, 1990) 97 I.D. 225

The Board has jurisdiction pursuant to the Contract Disputes Act to examine a settlement agreement between the parties and, if there is sufficient evidence of record to sustain a finding that the settlement agreement is reasonable, to enter a judgment approving the compromise settlement agreed to by the parties.

Appeal of Harrison Western Corp., IBCA-2262 (Nov. 26, 1990)

The Board is not deprived of jurisdiction over a contractor's appeals when the United States brings a civil action against appellant pursuant to the fraudulent claims provision of the Contract Disputes Act of 1978,

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

41 U.S.C. § 604, and the False Claims Act, 31 U.S.C. §§ 3729-3733 (1988).

Although the Board has jurisdiction over the contractor's appeals, the Government carried the burden of proof necessary to sustain its motion to suspend Board proceedings pending the resolution of a civil fraud action against appellant. The alleged fraud is intertwined with the contractor's submission of its claims, their nature, amount, and the facts it asserts in support. The Board is unable to segregate portions of the claims potentially involving a determination of liability for fraud, in which the Board will not engage, 41 U.S.C. § 605(a), from other portions of the claims. Also, it would be contrary to the efficient and economic resolution of the related controversies between the parties to proceed in two fora simultaneously.

Appeals of Hardrives, Inc., IBCA-2319 et al. (Feb. 6, 1991) 98 I.D. 23

The Government's motion to dismiss appellant's appeals for lack of jurisdiction, because they were filed more than 3 years after appellant's original appeal, based upon the same allegations, was dismissed without prejudice, is denied. The Board's Rule 4.127(a), requiring reinstatement within 3 years of an appeal dismissed without prejudice because it was in a suspense status, is procedural, and not part of the jurisdictional constraints of the Contract Disputes Act of 1978. Moreover, the Rule is inapplicable. Appellant's former appeal was not dismissed because it was in a suspense status. It was dismissed for failure to certify the underlying claim, rendering that claim a legal nullity. Thus, the present appeals are not "reinstated." They are new appeals based upon legally new claims.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (May 31, 1991) 98 I.D. 210

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

The Government's motion to dismiss appellant's claims that the Government failed to protect appellant's rights under its lease from Hopi Indians of a construction yard and sand pit site is sustained. The Government was not a party to the lease. Thus, the lease claims are not based upon a contract with the Government, a prerequisite to a cause of action, and to the Board's jurisdiction, under the Contract Disputes Act of 1978.

Appellant's allegations that the Government breached an implied duty to cooperate under its road contract with appellant, of differing site conditions, and of entitlement to equitable contract reformation, arise from the same set of operative facts presented to the contracting officer in appellant's claim and the Board has jurisdiction to consider them.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

The 90-day appeal period established by the Contract Disputes Act of 1978 is a statutory limitation upon jurisdiction and cannot be waived by the Board. In the area of timeliness of a contractor's appeal, that is the only jurisdictional limitation upon the Board's ability to accept appeals.

Unlike the 90-day filing limitation, the portion of the Board's rule 4.102(a) seeking an original and two copies of an appeal is not jurisdictional. It is procedural. It is always within the Board's discretion to relax or modify that part of the rule in the interests of justice.

The Government's motion to dismiss the contractor's appeals as untimely is denied when the appeals were telefaxed to the Board, received in full, and filed by the Recorder of the Board, within the statutory time period prescribed by the Contract Disputes Act of 1978. Although the Board does not encourage appeals by telefax, and a contractor telefaxes at its own risk, the Board will accept a telefaxed appeal if it is received in full, by an individual authorized to receive it on behalf of the Board, before the filing period expires,

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

provided the Board receives the identical original hard copy within a reasonable time thereafter.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (Aug. 19, 1991) 98 I.D. 253

Certification of multiple claims by a division manager under a contract for the construction, inter alia, of a pumping plant is found to be inadequate for the purpose of vesting jurisdiction in the Board over the claims in issue where appellants assert that the division manager qualifies as a senior company official in charge at the contractor's plant or location involved but the evidence offered fails to establish that the division manager had primary responsibility for the execution of the contract and that he had a physical presence at the location of the primary contract activity.

Certification of multiple claims by an assistant vice president of a surety company that completed the contract work is found to be inadequate for the purpose of vesting the Board with jurisdiction over the claims in issue where appellants assert that the assistant vice president had authority to bind the surety company and to certify the claims but make no attempt to show that the assistant vice president who certified the claimson behalf of the surety had overall responsibility for the conduct of the contractor's affairs in general.

In a case where appellants allude to subrogation claims but fail to identify or quantify them or to show that they were presented to the contracting officer for decision, the Board finds that it is without jurisdiction in the matter. The Board notes, however, that even if subrogation claims (properly certified, if required) cognizable as claims under the CDA had been presented to the contracting officer, appellant Federal, as surety, could only recover on such claims if it is shown that the obligations of its principal had been fully satisfied.

Where appellants assert that the completing surety should be recognized as the "contractor" by reason of a de facto takeover agreement but acknowledge that there was no formal takeover agreement and fail to point to

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

any agreement with the Government following the contractor's default on which they rely as a takeover agreement, the Board finds that the surety is without standing to bring this appeal in its own name under the line of cases where takeover agreements were found to exist.

In addition to moving to dismiss the appeals by reason of improper certification, the Government has also moved to dismiss Federal as a party to the instant appeals on the ground that as a surety it is not a contractor within the meaning of sec. 601(4) of the CDA. Subject to proper certification of the claims upon resubmission thereof, the Board finds that the Government was aware of, assented to, and recognizaed the assignment and that the effect of such recognition was to waive the anti-assignment statutes, to make lawful the substitution of the surety for the contractor, and to give standing to the surety to prosecute the instant appeals in its own name as the "contractor" within the meaning of the CDA.

Besides moving to dismiss the instant appeals for lack of proper certification, the Government has also moved to dismiss two of the claims involved (captioned "Maladministration" and "Incidental Impact Expenses") on the ground that such claims were never presented to the contracting officer for decision. The Board finds, however, that the two claims in question were presented to and decided by the contracting officer and that subject to proper certification at the time of resubmission they may again be presented to the contracting officer in their present form for his consideration and decision.

Appeals of Rodgers Construction, Inc., Federal Insurance Co., IBCA-2777 et al. (Oct. 15, 1991) 98 I.D. 281

When, in submitting a claim to the contracting officer in excess of $50,000, the contractor failed to certify that "the supporting data are accurate and complete to the best of his knowledge and belief," the certification did not meet the requirements of the Contract Disputes Act of 1978. The facts that the Board suspected the omission was due to typographical error, and that the contractor otherwise certified to more than was necessary, were irrelevant. The Board could not supply the missing certification requirement by inference. Due to the defective certification, the Board did

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

not possess jurisdiction to entertain the contractor's appeal from the contracting officer's failure to render a decision on the claim.

Appeal of Rock Point Community School Board, IBCA-2953
(Oct. 29, 1991) 98 I.D. 355

In deciding a motion to dismiss, the Board will consider the uncontroverted facts alleged by the appellant to be correct and will construe its allegations favorably to it, but the appellant is required to establish jurisdiction. If the appellant has made a prima facie showing that jurisdiction exists, however, the Government must present some evidence to refute that showing. An unsubstantiated allegation will not suffice.

When the certification requirements of the Contract Disputes Act are met, the Board has jurisdiction to entertain an appeal from a contracting officer's decision denying a claim brought and certified on behalf of a dissolved joint venture, and the appeal may be pursued in the name of the joint venture.

The Board found that a corporation properly could be substituted as the appellant because it was the real party in interest in the appeal. The substitution did not violate the anti-assignment statutes, because they did not apply. The Board based its conclusion upon the facts that the appeal originally was filed correctly on behalf of the joint venture contracting entity; 3 months before the completion of the 2-1/2-year contract term the venture dissolved, but the corporate member of the venture, which was a contract signatory and the venture's managing party for the contract, remained intact, continued to perform, and attended to the completion of the contract work; before the appeal was filed, all of the venture's interests and obligations were merged into the corporation; and there was no prejudice to the Government.

The Board found that the corporate member of a joint venture contracting entity had the authority to certify a claim on behalf of the joint venture and, in any event, was the equivalent of the "general partner" of the venture with overall responsibility for the conduct of its affairs. The latter factor alone qualified

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

the corporation under the contract's Disputes clause to certify the claim. The corporate president, in turn, clearly was authorized to sign for the corporation. Accordingly, his signature bound the joint venture. He also had implied authority to bind the joint venture because he signed the contract on behalf of both of its members. The certification otherwise met all of the requirements of the Disputes clause and the Board had jurisdiction to entertain the appeal.

Appeal of Ball, Ball, & Brosamer, Inc., IBCA-2103-N
(Feb. 5, 1992) 99 I.D. 1

Under the Contract Disputes Act, 41 U.S.C. §§ 605(a) and (b), the Board reviews the contracting officer's decision de novo and his quantum findings are not binding.

Appeal of White & McNeil Excavating, Inc., IBCA-2448
(July 24, 1992) 99 I.D. 121

A contractor's claim certification that the amounts requested accurately reflected the contract price adjustment to which it was entitled, and which otherwise followed the language of the CDA, 41 U.S.C. § 605(c)(1), substantially complied with the statutory requirements.

A claim certification in which the certifier represented that "I" certify that the claim is made in good faith and that the supporting data are accurate and complete to the best of "my" knowledge and belief, and which otherwise followed the language of the CDA, amounted to the corporate contractor's certification, and substantially complied with the statutory requirements.

A corporate Vice President and member of the Board of Directors, who executed and had full responsibility for the bid which became the contract; had full responsibility for the management of the contract project; had full authority to submit claims, without prior approval; was present about 10 percent of his time at the relatively remote desert project site; attended meetings with the contracting officer and all other significant meetings; and was in at least daily communication with

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

his onsite project manager, who reported directly to him, qualified under FAR 33.207(c)(2)(i) to certify the contractor's claims as "[a senior company official in charge at the contractor's plant or location involved."

Appeals of Hardrives, Inc., IBCA-2319 et al. (Dec. 1, 1992) 99 I.D. 242

The Board held that it possessed jurisdiction to decide a dispute involving the funding of an administrative grant issued under the Indian Education Amendments of 1988.

Rock Point Community School Board, IBCA-3008 et al., (Dec. 30, 1992) 99 I.D. 248

In deciding motions to dismiss for lack of jurisdiction, in connection with appellant's claims under its contract with the BOR for canal construction, the Board construed the complaint's allegations favorably to appellant; accepted unchallenged allegations as true; and considered relevant evidence of record.

The Board found that a subcontractor had not withdrawn its claims against appellant arising out of the BOR contract, and the fact that appellant was required to pay the subcontractor in accordance with the subcontract, if the Bureau paid appellant was sufficient to bar the application of the "Severin doctrine," which provides that a prime contractor cannot recover sums from the Government if they pertain only to a subcontractor's claim which the prime is not liable to pay. The Board also found that appellant properly was pursuing claims in its own right, as the entity in privity of contract with the Government.

In finding that appellant's administrative delay claim in connection with the resolution of a design defect involving five concrete structures was based upon the same operative facts included in its original certified claim to the contracting officer under the CDA, and

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

did not constitute a new claim, the Board considered the totality of the relevant correspondence and communications. It also found that the claim satisfied the dispute and "sum certain" requirements of FAR 33.201.

The Board concluded that appellant's increase in its amended complaint of the number of delay days sought, its presentation of its quantum proof on a modified total cost basis, and its inclusion of costs associated with the effect of erroneous contract earthwork elevations upon pipe trenching, previously presented as a separate claim, then withdrawn, did not constitute new claims that had not been submitted to the contracting officer.

While finding that the Government had ample opportunity to audit and review appellant's claims, the Board stressed that an audit was not a jurisdictional prerequisite under the CDA to the Board's consideration of a properly submitted claim.

Appeals of Hardrives, Inc., IBCA-2319 et al. (Dec. 30, 1992) 99 I.D. 249

A corporate vice president and member of the contractor's Board of Directors, who was demonstrated to have responsibility for corporate activities substantially equivalent to that of the contractor's president, qualified under FAR 33.207(c)(2)(ii) to certify the contractor's Contract Disputes Act claims as "(a)n officer * * * of the contractor having overall responsibility for the conduct of the contractor's affairs."

Appeals of Tecom, IBCA-2970 (Jan. 15, 1993) 100 I.D. 1

In an appeal alleging an agreement with the contracting officer settling a dispute under contracts issued pursuant to the Indian Self-Determination and Education Assistance Act, which provides that the CDA shall apply, the contracting officer's proclaimed final decision denying Busby's properly certified claim imbued

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

the Board with jurisdiction under the CDA to determine whether the claim had been settled.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

The Board has no jurisdiction to entertain a claim for expenses incurred in Federal District Court in opposing an action by the SBA to use Federal Offset Procedures against a judgment in appellant's favor by the Board. Thus, the claim was dismissed.

Appeals of R&R Enterprises, IBCA-2833 et al. (Oct. 1, 1993)

In denying the Government's motion to dismiss, the Board held that, when the Government disputed any liability for wage increases during a contract's base year, appellant's quantified claims for such increases satisfied Contract Disputes Act requirements.

The Board found that appellant's claim for increased wages paid after the contract's base year properly was subsumed into appellant's certified, quantified, disputed claim that the Government's option exercise was defective and that, therefore, appellant was entitled to all of its costs on a "cost-plus" basis.

Appeals of Tecom, IBCA-2970 a-1 (Mar. 11. 1994) 101 I.D. 22

The Board held that it possessed jurisdiction under the CDA, 41 U.S.C. § 601, to entertain appellant concessionaire's claim for costs incurred due to allegedly defective specifications provided by the NPS pursuant to an agreement which had settled appellant's prior claims against NPS under its 1961 concession contract. Noting that the Interior Board has held previously that concession contracts are procurement contracts subject to

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

the CDA, the Board found that the settlement agreement modified appellant's successor 1982 concession contract to make NPS responsible for providing the specifications.

Although it did not dispute the amount of appellant's alleged damages, NPS contended that they were consequential and, therefore, the Board lacks jurisdiction over the appeal. The Board noted that whether damages were consequential did not affect jurisdiction and, due to its determination denying liability, it did not address the question.

Appeal of Nat'l Park Concessions, Inc., IBCA-2995 (Aug. 18, 1994) 101 I.D. 92

DISPUTES AND REMEDIES

Generally

A contractor's claim for excess landscaping labor and erosion control costs must be denied when the Government's contemporaneous inspection reports to the contrary are more credible than the unsupported allegations of the contractor.

A contractor is not entitled to an equitable adjustment for excess travel and management expenses where its estimates of typical costs for air fare, lodging, and subsistence are not adequately supported by documentary evidence.

A contractor is not entitled to the excess costs associated with its extensive modifications of single compression lugs in order to assure a proper electrical conduction where the evidence showed that the contractor did not understand the bolt pattern for the unit and did not consult with the unit's onsite manufacturer's representative. Had it done so, it could have purchased the proper lugs and avoided the modifications claimed.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Generally--Continued

Where a contract was silent as to when the Notice to Proceed would be issued, but the solicitation stated that the Notice to Proceed would be issued upon receipt of properly executed performance and payment bonds, the Government had an implied obligation to issue the Notice to Proceed within a reasonable time after receiving the bonds.

In an action for delay under the Suspension of Work clause, the Board concluded that a 15-day delay by the Government in issuing the Notice to Proceed was reasonably prompt, where the contractor was also found to be responsible for an 11-day delay in submitting its performance and payment bonds.

Where the evidence shows that any Government-caused delay was concurrent and intertwined with delay attributable to a contractor, the latter was held to be precluded from recovering damages for delay and impact costs under the Suspension of Work clause.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

The Government has the burden of proving that a contractor's work fails to meet specifications. Where, after due repairs to cable terminators that were found to be leaking, it rejected a fully installed, buried, high voltage a.c. electrical cable system simply because it feared that the cable might have been damaged by the leakage into it of an unknown quantity of inert insulating oil from the faulty terminators, and the purpose of the Government's rejection was simply to coerce the contractor into making additional tests that were neither specified by the contract nor recognized by the cable industry, the Government must pay the cost of the tests.

Even if the Government had a sufficient basis for its concern that a buried high voltage cable system was damaged by the leakage into it of insulating oil from defective cable terminators, it could not require the contractor to perform additional tests that were not consistent with industry standards and that both the

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Generally--Continued

contractor and the Government subsequently agreed were not reliable, unless it paid for the tests.

Appeal of Centric/Jones Constructors, IBCA-3139 (Oct. 1, 1993)

Appeals

Except in the case where the petitioning party contends that it has discovered new evidence that could not have been discovered earlier, the Board will generally deny a petition for reconsideration if it is not based on an asserted error of law.

Appeals of Harvey C. Jones, Inc. (On Reconsideration), IBCA-2070 et al. (Sept. 10, 1990)

Burden of Proof

A contractor's claim for an equitable adjustment for excess costs incurred as the result of the Government's rejection of a load of excessively wet concrete, was denied where the contractor failed to show by a preponderance of evidence that actions taken by the Government in batching the concrete were responsible for the rejected load.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

A contractor was not entitled to a quantum adjustment for extra costs incurred for unanticipated borrow operations where the record established a strong inference that the contractor was itself responsible for most, if not all, factors that resulted in a shortfall of dirt on the project.

Where a contractor failed to establish a causal connection between alleged design deficiencies and the

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

actual occurrence of additional costs, it was not entitled to an equitable adjustment.

Appeal of Gerald Miller Construction Co., IBCA-2292 (Mar. 14, 1991)

The Government has established that there are no material facts in dispute and that it is entitled to summary judgment on appellant's road contract claims.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

In an appeal prosecuted by a pro se appellant, a prima facie case of entitlement can be established through admissions of the Government, which establishment then shifts the burden of proof to the latter to disprove the appellant's case or to establish an affirmative defense. Unless the Government then carries the burden as to one or the other of those alternative bars to recovery, the appellant is entitled to recover. In a similar appeal where there are no Government admissions sufficient to establish appellant's prima facie case, the appellant's submission of mere allegations without proof thereof is not an adequate presentation on which to allow recovery, especially where the allegations, even if accepted as proved, do not state a cognizable claim for recovery.

Appeals of Toland & Sons, IBCA-2716, -2717 (Aug. 7, 1991)

For the Government to be liable for extra hours worked by a janitorial contractor's workers, the contractor must prove that the changes were ordered or directed by the Government and that they were beyond the scope of the contract. Mere comments or suggestions to the workers by the contracting officer's representatives, and a referral of the resulting wage complaints to the Labor Department by the contracting officer, are insufficient to establish Government liability, since

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

the contractor, not the Government, is responsible for the conduct of its employees.

Appeals of Marc Industries, IBCA-2905, -2906, (Sept. 4, 1991) 98 I.D. 263

A contractor's claim for excess landscaping labor and erosion control costs must be denied when the Government's contemporaneous inspection reports to the contrary are more credible than the unsupported allegations of the contractor.

A contractor is not entitled to an equitable adjustment for excess travel and management expenses where its estimates of typical costs for air fare, lodging, and subsistence are not adequately supported by documentary evidence.

The contractor bears the burden of showing a causal relation between alleged Government changes and project delay. A contractor's claim for an equitable adjustment must be denied where contemporaneous evidence does not confirm that the contractor was precluded from completing its work as originally planned.

A contractor fails to meet its burden of proof that Government delays precluded it from voluntarily accelerating its performance under the contract where the contractor did not communicate such an intent to the Government, and its performance schedule did not indicate a critical path method by which the accelerated work could be tracked.

The Government has the burden of proving the amount of a price reduction for deleted work under a contract. The Government met its burden by establishing the reasonable value of such work, based on the contractor's bid estimates for the work items in question.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

When the Government incorrectly based a payment deduction upon a portion of its riprap specification which the Board found unreasonable, the contractor was entitled to be recompensed for the improper deduction.

Appeal of White & McNeil Excavating, Inc., IBCA-2448 (July 24, 1992) 99 I.D. 121

When a contract to provide electrical drawings for BOR's Grand Coulee Dam Project was terminated for default, the Government met its burden to prove the default justified when the contractor stipulated that 62 of the drawings it submitted failed to meet contractual standards and BOR properly rejected them; and the contractor did not deliver any set of drawings, with the minimum 99-percent accuracy required by the contract, within required, or extended, performance periods.

When it was within a contractor's control to reject or accept a workload beyond a potential maximum, and the contractor did not reject it in accordance with the contract's provisions; when the contractor failed to prove that any action, or nonpayment, by the Government caused the contractor's default; and when its work was replete with errors, and was of poor quality, the contractor failed to carry its burden to prove that its performance failures were excusable as beyond its control and without its fault or negligence.

The fact that contract compliance was more difficult than the contractor had anticipated did not render the contracting officer's default decision arbitrary or capricious, or an abuse of his discretion.

When the Board found no evidence to support the contractor's allegation that BOR acted in bad faith in its administration of the contract, the contractor failed to meet its exceedingly high burden to overcome the presumption that public officials act in good faith.

Appeal of KARPAK Data & Design, IBCA-2944 et al. (Aug. 14, 1992) 99 I.D. 163

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

In cases seeking an equitable adjustment in the contract price, a contractor must prove the amount to which is is entitled by a preponderance of the evidence.

Although the Board recognized that a contractor's fixed expenses may not have been lessened as a result of a termination for convenience, it was incumbent upon the contractors to keep adequate records on all aspects of its costs. Since it failed to do so, there was an insufficient basis for a jury verdict award, and the Board was not otherwise disposed to presumptions favorable to the contractor.

Where a contractor seeks recovery for delay costs under the Suspension of Work clause, it has the burden of proving that any Government-caused delay was unreasonable, and that it adversely affected the contractor's performance schedule.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

In awarding appellant a 370-day time extension, the Board resolved credibility issues in its favor and found that it had proved, with expert testimony and analysis, that specific delays were due to actions or inactions for which BOR was responsible; that Project completion was delayed as a result; and that BOR had not proved any overall Project delay by appellant.

When the evidence established BOR's liability and: (1) the impracticability of proving actual losses directly; (2) the reasonableness of the contractor's bid; (3) the reasonableness of its actual costs; and (4) its lack of responsibility for added costs, the Board found the appellant justified in using the modified total cost method for its quantum proof.

When the contractor met its burden to prove that compensable delay occurred, and that it could not take on other jobs during the contract period and, at hearing, BOR did not contest use of the Eichleay formula to compute unabsorbed overhead, the Board found that the daily figure used by both parties was appropriate.

Absent clear proof that BOR was responsible for a concrete slab that had to be removed, the Board deducted the removal costs from costs charged to BOR. The Board

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

also deducted the costs of correcting one-gate turnouts to two gates because, even if the drawings were deemed latently ambiguous, appellant had not met its burden to prove that it had relied upon its interpretation at the time of bid. Also, the contract called for inquiry in the event of drawing discrepancies. Although the turnouts had been installed under inspectors' oversight, there was no evidence that they had been aware of the error and, under the Inspection of Construction clause, they could not waive contract requirements.

In awarding appellant an equitable adjustment under the Changes clause for complying with an order to repair storm damage caused by defective specifications, when BOR disputed quantum only, the Board found appellant's proof persuasive.

When BOR acknowledged liability for a contract change due to defective specifications, albeit contested appellant's quantum claim for lowering and extending a siphon, the Board accepted conservative cost estimates made by appellant's onsite project manager in the absence of any cost-effective way of segregating extra costs.

On appellant's claim for excess costs due to defective soil stabilization specifications, the Board found that contemporaneous documentation supported the testimony of appellant's project manager and BOR's inspector that, although the stabilization solution penetration requirement had been waived, appellant had been directed to use the full contract estimated quantity of solution which it had on hand. In finding appellant entitled to an equitable adjustment under the Changes clause, the Board resolved credibility issues in its favor.

In denying appellant's claim for the costs of removing and encasing banded mitered pipe bends, the Board found that the contract required encasement; even if the contract were deemed patently or latently ambiguous, appellant had not met its pre-bid duty of inquiry, or its burden to prove reliance at the time of bid, respectively. Appellant also failed to prove that banded bends had been approved as an alternative design

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

and that BOR was estopped from requiring encasement or that BOR's enforcement of the specifications constituted economic waste.

When it was undisputed that certain progress payments had been late and some Prompt Payment Act interest was due, the Board awarded it based upon dates established in an Independent Government Estimate because it provided the best-supported evidence of when the "proper" invoices required by the contract had been received.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

The Government has the burden of proving that a contractor's work fails to meet specifications. Where, after due repairs to cable terminators that were found to be leaking, it rejected a fully installed, buried, high voltage a.c. electrical cable system simply because it feared that the cable might have been damaged by the leakage into it of an unknown quantity of inert insulating oil from the faulty terminators, and the purpose of the Government's rejection was simply to coerce the contractor into making additional tests that were neither specified by the contract nor recognized by the cable industry, the Government must pay the cost of the tests.

Even if the Government had a sufficient basis for its concern that a buried high voltage cable system was damaged by the leakage into it of insulating oil from defective cable terminators, it could not require the contractor to perform additional tests that were not consistent with industry standards and that both the contractor and the Government subsequently agreed were not reliable, unless it paid for the tests.

Appeal of Centric/Jones Constructors, IBCA-3139 (Oct. 1, 1993)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

Where the evidence shows that actions of the NPS did not cause the harm appellant complained about, but rather that appellant's own business decisions were the primary cause of its problems, appellant has failed to sustain its burden of proof and has not established entitlement to damages.

Appeals of R&R Enterprises, IBCA-2833 et al. (Oct. 1, 1993)

The Board found that BLM impliedly had approved the contractor's temporary access spur plan, which it had presented to the COR well before construction began, and which was within the COR's contract authority to approve; for which the contractor had obtained necessary permits, which the COR had approved; and which the COR and BLM's inspector had observed in operation and allowed to continue until the spur was 90 percent complete. The Board also found that the contractor would not experience a windfall because its bid had not been based upon the use of highline access at the area in question; and that BLM had failed to prove its deduction justified.

When BLM acknowledged liability for site profile differences, and the contractor proved costs incurred in addition to those awarded by unilateral modification, the Board used a jury verdict approach to determine the appropriate amount of increased costs to be recovered. In so doing, the Board found clear proof of injury; that there was no more reliable method for computing damages; and that the evidence was sufficient to make a fair and reasonable approximation of the damages.

In resolving the parties' quantum dispute over a unilateral modification which increased the contract amount due to additional work, but reduced it due to the deletion of boulder work, for an overall net price reduction, the Board found that BLM had not met its burden to prove the full amount of the reduction justified, and that the contractor had not proved the full amount it sought due to the increased work warranted. The Board used a jury verdict method in arriving at the appropriate contract adjustment.

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

The Board found the contractor entitled to an equitable adjustment for "Type I" differing site conditions when the contractor established that it had encountered mud seams, rotten seams, or clay, while the contract, upon which the contractor reasonably had relied, and the contractor's site visit, had indicated only competent rock. The Board used a jury verdict method to determine the proper amount of the equitable adjustment.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993) 100 I.D. 329

The Government is not permitted to substitute the Termination for Convenience clause for the Changes clause to delete a relatively minor portion of the total contract more than 2 years after it issued a deductive change order, which was relied on by the contractor in submitting a proposed credit to the Government for the deleted work. In determining the amount of the credit, the primary consideration is the cost impact on the contractor. Thus, the contractor was entitled to rely upon the cost estimate of the subcontractor that was to have done the work.

Appeal of J. A. Jones Construction Co., IBCA-3280 (Aug. 16, 1994) 101 I.D. 82

Damages

Generally

A Government acknowledgment that the cost to terminate a contract, correct the specifications, and rebid the project would outweigh the cost of completing the work under the original contract, does not establish that the Government assumed the risk of substantial increased costs in order to complete the work. Where the work was not urgently needed, and there was no evidence that a substitute contractor could complete the work more expeditiously, the Board held that it would have been an abuse of discretion by the Government to default rather than

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Generally--Continued

consider the assessment of delay damages against the contractor.

Appeal of Gerald Miller Construction Co., IBCA-2292 (Mar. 14, 1991)

The contractor bears the burden of showing a causal relation between alleged Government changes and project delay. A contractor's claim for an equitable adjustment must be denied where contemporaneous evidence does not confirm that the contractor was precluded from completing its work as originally planned.

A contractor is entitled to an equitable adjustment for "loss of efficiency" where the Government failed to timely ascertain the suitability of Government-furnished batteries for use under the contract, and the delay hindered the contractor's performance because the batteries remained in the work area and impeded the contractor's other work.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

When the Government incorrectly based a payment deduction upon a portion of its riprap specification which the Board found unreasonable, the contractor was entitled to be recompensed for the improper deduction.

Appeal of White & McNeil Excavating, Inc., IBCA-2448 (July 24, 1992) 99 I.D. 121

Where the evidence shows that any Government-caused delay was concurrent and intertwined with delay attributable to a contractor, the latter was held to be precluded from recovering damages for delay and impact costs under the Suspension of Work clause.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Generally--Continued

Although it did not dispute the amount of appellant's alleged damages, NPS contended that they were consequential and, therefore, the Board lacks jurisdiction over the appeal. The Board noted that whether damages were consequential did not affect jurisdiction and, due to its determination denying liability, it did not address the question.

Appeal of Nat'l Park Concessions, Inc., IBCA-2995 (Aug. 18, 1994) 101 I.D. 92

Liquidated Damages

Liquidated damages imposed by the Government upon a contractor under threat of a default termination, as a work incentive or penalty during the course of the contract, in a situation where the Government's solicitation did not adequately or precisely describe the work to be required, not only was a unilateral action by the Government which the contractor accepted only under duress, but was otherwise unwarranted, since the Government was primarily at fault in causing the delays that the contractor experienced.

Appeal of The Wackenhut Corp., IBCA-2311 (Sept. 4, 1990)

Measurement

The Board refused to adopt a contractor's total cost method for pricing its equitable adjustment where the cost data and other evidence of record demonstrated that the Government was not responsible for many of the excess costs incurred by the contractor and included in its claim for relief.

Where the Board determines that a contractor incurred additional costs as a result of the Government's constructive change, but such costs cannot be established with mathematical precision, it is proper for the Board to resort to a "jury verdict" in order to

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Measurement--Continued

determine the amount of the contractor's equitable adjustment.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

When the Board is not persuaded that all of the unanticipated costs incurred by a services contractor are the result of extra work attributable to the Government's inadequate or defective specifications, it may determine by jury verdict the amount of additional compensation to which the contractor is entitled.

Appeal of The Wackenhut Corp., IBCA-2311 (Sept. 4, 1990)

During a weather-related suspension of a road construction contract, the Government was found to have suspended activities for an unreasonable period of time before authorizing recommencement of the work thereby entitling the contractor to an equitable adjustment.

Appeal of White Buffalo Construction, IBCA-2166, 2173 (Nov. 26, 1990)

In general, the measure of damages for the breach of a contract relating to Indian trust or restricted lands is that amount of money which will place the owner in as good a position as he would have been in had the contract been fully performed.

Under the doctrine of avoidable consequences, damages for breach of contract are normally not awarded to the nonbreaching party for those expenses which could have been avoided through the exercise of reasonable

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Measurement--Continued

care. The doctrine does not, however, create enforceable rights in the breaching party.

Bernell Kombol, dba Grass Mountain Logging Co. v. Ass't Portland Area Director, Bureau of Indian Affairs, 21 IBIA 116 (Dec. 19, 1991)

When the evidence established BOR's liability and: (1) the impracticability of proving actual losses directly; (2) the reasonableness of the contractor's bid; (3) the reasonableness of its actual costs; and (4) its lack of responsibility for added costs, the Board found the appellant justified in using the modified total cost method for its quantum proof.

Because BOR had instructed during the contract that 1986 AGC equipment ownership and operating rates were to be used, and its contracting officers had used those rates for modifications, the Board found that BOR had waived a contract provision invoking ownership rates derived from 1974 AGC tables.

When the contractor met its burden to prove that compensable delay occurred, and that it could not take on other jobs during the contract period and, at hearing, BOR did not contest use of the Eichleay formula to compute unabsorbed overhead, the Board found that the daily figure used by both parties was appropriate.

The Board held that a 10-percent profit rate was reasonable and that the Contractor Proposals clause, concerning proposals for modifications for work performed by subcontractors, and weighted profit averages derived by BOR to limit profit to 8.85 percent, did not apply.

Absent clear proof that BOR was responsible for a concrete slab that had to be removed, the Board deducted the removal costs from costs charged to BOR. The Board also deducted the costs of correcting one-gate turnouts to two gates because, even if the drawings were deemed latently ambiguous, appellant had not met its burden to prove that it had relied upon its interpretation at the time of bid. Also, the contract called for inquiry in the event of drawing discrepancies. Although the

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Measurement--Continued

turnouts had been installed under inspectors' oversight, there was no evidence that they had been aware of the error and, under the Inspection of Construction clause, they could not waive contract requirements.

In awarding appellant an equitable adjustment under the Changes clause for complying with an order to repair storm damage caused by defective specifications, when BOR disputed quantum only, the Board found appellant's proof persuasive.

When BOR acknowledged liability for a contract change due to defective specifications, albeit contested appellant's quantum claim for lowering and extending a siphon, the Board accepted conservative cost estimates made by appellant's onsite project manager in the absence of any cost-effective way of segregating extra costs.

When it was undisputed that certain progress payments had been late and some Prompt Payment Act interest was due, the Board awarded it based upon dates established in an Independent Government Estimate because it provided the best-supported evidence of when the "proper" invoices required by the contract had been received.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993) 100 I.D. 215

Equitable Adjustments

Under a contract for the construction of an urban road project, the Board found that the liability of the Government for the majority of the items of claim (failure to secure the timely removal of utility lines from the work areas, erroneous staking, improper testing standards, design problems) was established by a preponderance of the evidence, as was the failure of the Government to properly administer the contract in a number of respects. After noting that the evidence offered by the appellant in support of its total cost claim failed in a number of instances to establish a nexus between the cause of delay assigned and the amount of damages claimed and failed to separate delays for

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

which the Government was responsible from delays attributable to actions of the contractor, the Board concluded (i) that the use of the total cost method for determining the amount of the equitable adjustment in such circumstances was not warranted; and (ii) that where the liability of the Government had been established but the amount of the equitable adjustment could not be determined with any degree of mathematical precision, it was proper to resort to the so-called jury verdict approach for the purpose of determining the amount of the equitable adjustment to which the appellant was entitled.

Appeals of Harvey C. Jones, Inc., IBCA-2070 et al. (Feb. 28, 1990) 97 I.D. 79

Where a contractor's estimate of screw fasteners required to comply with specified spacing is found to be correct and additional screws are required to make a Government-approved plywood underlayerment for roofing membranes to lay flat, the added fasteners are found to be an additional contract requirement for which the contractor is compensated.

Appeal of Niko Contracting Co., IBCA-2368 (Mar. 30, 1990) 97 I.D. 120

The Board refused to adopt a contractor's total cost method for pricing its equitable adjustment where the cost data and other evidence of record demonstrated that the Government was not responsible for many of the excess costs incurred by the contractor and included in its claim for relief.

Where the Board determines that a contractor incurred additional costs as a result of the Government's constructive change, but such costs cannot be established with mathematical precision, it is proper for the Board to resort to a "jury verdict" in order to determine the amount of the contractor's equitable adjustment.

A contractor was found not to be entitled to an equitable adjustment for an inspector's refusal to conduct a backfill compaction test as requested by the

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

contractor. The evidence indicated (1) that an earlier test taken by the inspector showed that backfill placed by the contractor did not meet specification requirements, (2) that any additional testing would not provide a true and accurate reading, and (3) that the contract documents provided that in any event, such testing was for the sole benefit of the Government.

Where a contractor was allowed to construct a "blockout" in the wall of a concrete structure pending arrival of pipe at the site, but that the design of such blockout was altered by the contracting officer before approval, the resulting deficiencies in the concrete could not be charged against the Government where the evidence showed that (1) it was the contractor's option whether to place the blockout or await for arrival of pipe at the site, (2) that in accommodating the contractor in its request to construct the blockout the Government saved the contractor time, money, and effort on the project, and (3) that the contractor could have shutdown the project in lieu of constructing the blockout, and that such shutdown would not have been the fault of the Government.

A contractor's claim for an equitable adjustment for excess costs incurred as the result of the Government's rejection of a load of excessively wet concrete, was denied where the contractor failed to show by a preponderance of evidence that actions taken by the Government in batching the concrete were responsible for the rejected load.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

The contemporaneous conduct of the parties during performance, before the contract becomes the subject of controversy, is accorded great, if not controlling, weight in determining responsibilities under the contract. Here, the contents of the Government's inspection reports were found to contain highly persuasive evidence of the reasonableness of the contractor's position.

Where a contractor was required to perform more different work, or to higher standards, than called for in the terms of the contract, it was entitled to an

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

equitable adjustment as a constructive change to the contract.

During a weather-related suspension of a road construction contract, the Government was found to have suspended activities for an unreasonable period of time before authorizing recommencement of the work thereby entitling the contractor to an equitable adjustment.

Appeal of White Buffalo Construction, IBCA-2166, 2173 (Nov. 26, 1990)

Where an "as built" Government analysis of a shortfall of dirt on a construction project contained an estimated shrink factor that was excessive, the Board adopted a more reasonable shrink factor in order to calculate the extent of the contractor's quantum adjustment.

A contractor was not entitled to a quantum adjustment for extra costs incurred for unanticipated borrow operations where the record established a strong inference that the contractor was itself responsible for most, if not all, factors that resulted in a shortfall of dirt on the project.

A contractor is not entitled to impact and extended performance costs incurred as a result of winter damage to excavated roadbeds where the evidence shows that delays associated with the placing of protective aggregate base course, before the winter shutdown, did not arise from unforeseeable causes beyond the contractor's control and without its fault or negligence.

Where a contractor failed to establish a causal connection between alleged design deficiencies and the actual occurrence of additional costs, it was not entitled to an equitable adjustment.

Appeal of Gerald Miller Construction Co., IBCA-2292 (Mar. 14, 1991)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

The Government has a right to expect compliance with contract specifications. Thus, as long as the cost of correcting completed work that does not substantially comply with the specifications is not economically wasteful, the Government is entitled to require repair or replacement. However, where the Government rejects nonconforming work, it has the burden of proving that the contract requirements have not been met.

Where a contract specification required the contractor to provide the services of a factory engineer to "supervise and check" the contractor's installation of an electrical unit, the contractor was entitled to an equitable adjustment only for additional costs charged by the manufacturer for "repair" of the unit, which was extra work under the contract. The contractor was not entitled to labor and materials associated with the installation startup, because it was required to perform such services under terms of the contract.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

In cases seeking an equitable adjustment in the contract price, a contractor must prove the amount to which is is entitled by a preponderance of the evidence.

Although the Board recognized that a contractor's fixed expenses may not have been lessened as a result of a termination for convenience, it was incumbent upon the contractors to keep adequate records on all aspects of its costs. Since it failed to do so, there was an insufficient basis for a jury verdict award, and the Board was not otherwise disposed to presumptions favorable to the contractor.

Where a contractor seeks recovery for delay costs under the Suspension of Work clause, it has the burden of proving that any Government-caused delay was unreasonable, and that it adversely affected the contractor's performance schedule.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

The Board found that appellant contractor, under a BOR contract for canal construction for an irrigation district, had proved specifications, prepared by an A/E firm hired by the district, to be defective. Earthwork elevations were erroneous due to inadequate survey information; they also had been altered arbitrarily without notice; and the estimated borrow quantity, while appearing to a reasonable bidder to be overstated, was greatly underestimated. Borrow quantities provided by the A/E during the job continued to be materially inaccurate. The defective specifications constituted a constructive change compensable under the contract's Changes clause.

Appellant established many discrepancies and design errors affecting structures work and amounting to a constructive change.

When a combination of actions and inactions by BOR and by the A/E, which was paid by its client irrigation district, but which also served as BOR's authorized representative in administering the contract, resulted in non-objective treatment and hindered the contractor's work, the Board found that BOR had breached its duty to cooperate, causing a constructive change.

When the evidence established BOR's liability and: (1) the impracticability of proving actual losses directly; (2) the reasonableness of the contractor's bid; (3) the reasonableness of its actual costs; and (4) its lack of responsibility for added costs, the Board found the appellant justified in using the modified total cost method for its quantum proof.

Because BOR had instructed during the contract that 1986 AGC equipment ownership and operating rates were to be used, and its contracting officers had used those rates for modifications, the Board found that BOR had waived a contract provision invoking ownership rates derived from 1974 AGC tables.

When the contractor met its burden to prove that compensable delay occurred, and that it could not take on other jobs during the contract period and, at hearing, BOR did not contest use of the Eichleay formula

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

to compute unabsorbed overhead, the Board found that the daily figure used by both parties was appropriate.

The Board held that a 10-percent profit rate was reasonable and that the Contractor Proposals clause, concerning proposals for modifications for work performed by subcontractors, and weighted profit averages derived by BOR to limit profit to 8.85 percent, did not apply.

Absent clear proof that BOR was responsible for a concrete slab that had to be removed, the Board deducted the removal costs from costs charged to BOR. The Board also deducted the costs of correcting one-gate turnouts to two gates because, even if the drawings were deemed latently ambiguous, appellant had not met its burden to prove that it had relied upon its interpretation at the time of bid. Also, the contract called for inquiry in the event of drawing discrepancies. Although the turnouts had been installed under inspectors' oversight, there was no evidence that they had been aware of the error and, under the Inspection of Construction clause, they could not waive contract requirements.

In awarding appellant an equitable adjustment under the Changes clause for complying with an order to repair storm damage caused by defective specifications, when BOR disputed quantum only, the Board found appellant's proof persuasive.

When BOR acknowledged liability for a contract change due to defective specifications, albeit contested appellant's quantum claim for lowering and extending a siphon, the Board accepted conservative cost estimates made by appellant's onsite project manager in the absence of any cost-effective way of segregating extra costs.

On appellant's claim for excess costs due to defective soil stabilization specifications, the Board found that contemporaneous documentation supported the testimony of appellant's project manager and BOR's inspector that, although the stabilization solution penetration requirement had been waived, appellant had been directed to use the full contract estimated

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

quantity of solution which it had on hand. In finding appellant entitled to an equitable adjustment under the Changes clause, the Board resolved credibility issues in its favor.

When entitlement to compensation for complying with a direction to perform extra sump and wells work was undisputed, the Board awarded appellant an equitable adjustment.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

The Government has the burden of proving that a contractor's work fails to meet specifications. Where, after due repairs to cable terminators that were found to be leaking, it rejected a fully installed, buried, high voltage a.c. electrical cable system simply because it feared that the cable might have been damaged by the leakage into it of an unknown quantity of inert insulating oil from the faulty terminators, and the purpose of the Government's rejection was simply to coerce the contractor into making additional tests that were neither specified by the contract nor recognized by the cable industry, the Government must pay the cost of the tests.

Even if the Government had a sufficient basis for its concern that a buried high voltage cable system was damaged by the leakage into it of insulating oil from defective cable terminators, it could not require the contractor to perform additional tests that were not consistent with industry standards and that both the contractor and the Government subsequently agreed were not reliable, unless it paid for the tests.

Appeal of Centric/Jones Constructors, IBCA-3139 (Oct. 1, 1993)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

When BLM acknowledged liability for site profile differences, and the contractor proved costs incurred in addition to those awarded by unilateral modification, the Board used a jury verdict approach to determine the appropriate amount of increased costs to be recovered. In so doing, the Board found clear proof of injury; that there was no more reliable method for computing damages; and that the evidence was sufficient to make a fair and reasonable approximation of the damages.

In resolving the parties' quantum dispute over a unilateral modification which increased the contract amount due to additional work, but reduced it due to the deletion of boulder work, for an overall net price reduction, the Board found that BLM had not met its burden to prove the full amount of the reduction justified, and that the contractor had not proved the full amount it sought due to the increased work warranted. The Board used a jury verdict method in arriving at the appropriate contract adjustment.

The Board found the contractor entitled to an equitable adjustment for "Type I" differing site conditions when the contractor established that it had encountered mud seams, rotten seams, or clay, while the contract, upon which the contractor reasonably had relied, and the contractor's site visit, had indicated only competent rock. The Board used a jury verdict method to determine the proper amount of the equitable adjustment.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993) 100 I.D. 329

Under the relevant part of the Responsibility of the Architect-Engineer Contractor clause in appellant's contract, it was responsible only for errors or deficiences in its services or for damages caused by its negligent performance. The Board found that appellant was entitled to recover its additional cost for re-establishing a vandalized survey line because the vandalism was not an error or deficiency in its work; the Government had not met its burden to prove negligence, of which there was no evidence; and the COTR had

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

requested and approved of the work, which was an administrative matter within his purview.

Appeal of Blackwell Engineering, IBCA-2620 (Jan. 14, 1994) 101 I.D. 1

In a contract to drill and grout-fill underground mine voids, a contractor is entitled to an equitable adjustment to the extent that it can show that it incurred additional costs solely as a result of a variation in actual quantities of grout placed from the quantities estimated. Where the contractor satisfies the Board that it has incurred some additional costs because of the variation in estimated quantities, but cannot prove the amount of the costs, the Board, in its discretion, may make an award on the basis of a jury verdict.

Appeal of Eles Bros. Ready Mix Co., IBCA-2952 (July 6, 1994) 101 I.D. 71

The Board found that appellant did not meet its burden to prove that NPS was responsible for appellant's costs of bathroom tile repair and replacement. Appellant did not comply with NPS' specifications; it knowingly proceeded to install bathroom flooring contrary to trade practice; it did not inquire specifically and timely about the bathroom floor installation; and it did not prove that it properly used and installed requisite materials in the bathrooms.

Appeal of Nat'l Park Concessions, Inc., IBCA-2995 (Aug. 18, 1994) 101 I.D. 92

Extraordinary Remedies

Appellant's allegation that it is entitled to equitable contract reformation fails as a matter of law. There was mutual mistake in the formation of the road

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Extraordinary Remedies--Continued

contract. Moreover, under the contract, appellant assumed all risks associated with its yard and pit.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

Jurisdiction

The Board is not deprived of jurisdiction over a contractor's appeals when the United States brings a civil action against appellant pursuant to the fraudulent claims provision of the Contract Disputes Act of 1978, 41 U.S.C. § 604, and the False Claims Act, 31 U.S.C. §§ 3729-3733 (1988).

Although the Board has jurisdiction over the contractor's appeals, the Government carried the burden of proof necessary to sustain its motion to suspend Board proceedings pending the resolution of a civil fraud action against appellant. The alleged fraud is intertwined with the contractor's submission of its claims, their nature, amount, and the facts it asserts in support. The Board is unable to segregate portions of the claims potentially involving a determination of liability for fraud, in which the Board will not engage, 41 U.S.C. § 605(a), from other portions of the claims. Also, it would be contrary to the efficient and economic resolution of the related controversies between the parties to proceed in two fora simultaneously.

Appeals of Hardrives, Inc., IBCA-2319 et al. (Feb. 6, 1991) 98 I.D. 23

The Board of Indian Appeals does not have jurisdiction over contract disputes arising under an Indian Self-Determination Act contract.

Larry Martin v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 279 (Apr. 4, 1991) 98 I.D. 200

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction--Continued

The Government's motion to dismiss appellant's appeals for lack of jurisdiction, because they were filed more than 3 years after appellant's original appeal, based upon the same allegations, was dismissed without prejudice, is denied. The Board's Rule 4.127(a), requiring reinstatement within 3 years of an appeal dismissed without prejudice because it was in a suspense status, is procedural, and not part of the jurisdictional constraints of the Contract Disputes Act of 1978. Moreover, the Rule is inapplicable. Appellant's former appeal was not dismissed because it was in a suspense status. It was dismissed for failure to certify the underlying claim, rendering that claim a legal nullity. Thus, the present appeals are not "reinstated." They are new appeals based upon legally new claims.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (May 31, 1991) 98 I.D. 210

The Government's motion to dismiss appellant's claims that the Government failed to protect appellant's rights under its lease from Hopi Indians of a construction yard and sand pit site is sustained. The Government was not a party to the lease. Thus, the lease claims are not based upon a contract with the Government, a prerequisite to a cause of action, and to the Board's jurisdiction, under the Contract Disputes Act of 1978.

Appellant's allegations that the Government breached an implied duty to cooperate under its road contract with appellant, of differing site conditions, and of entitlement to equitable contract reformation, arise from the same set of operative facts presented to the contracting officer in appellant's claim and the Board has jurisdiction to consider them.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction--Continued

The 90-day appeal period established by the Contract Disputes Act of 1978 is a statutory limitation upon jurisdiction and cannot be waived by the Board. In the area of timeliness of a contractor's appeal, that is the only jurisdictional limitation upon the Board's ability to accept appeals.

Unlike the 90-day filing limitation, the portion of the Board's rule 4.102(a) seeking an original and two copies of an appeal is not jurisdictional. It is procedural. It is always within the Board's discretion to relax or modify that part of the rule in the interests of justice.

The Government's motion to dismiss the contractor's appeals as untimely is denied when the appeals were telefaxed to the Board, received in full, and filed by the Recorder of the Board, within the statutory time period prescribed by the Contract Disputes Act of 1978. Although the Board does not encourage appeals by telefax, and a contractor telefaxes at its own risk, the Board will accept a telefaxed appeal if it is received in full, by an individual authorized to receive it on behalf of the Board, before the filing period expires, provided the Board receives the identical original hard copy within a reasonable time thereafter.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (Aug. 19, 1991) 98 I.D. 253

When, in submitting a claim to the contracting officer in excess of $50,000, the contractor failed to certify that "the supporting data are accurate and complete to the best of his knowledge and belief," the certification did not meet the requirements of the Contract Disputes Act of 1978. The facts that the Board suspected the omission was due to typographical error, and that the contractor otherwise certified to more than was necessary, were irrelevant. The Board could not supply the missing certification requirement by inference. Due to the defective certification, the Board did not possess jurisdiction to entertain the contractor's

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction--Continued

appeal from the contracting officer's failure to render a decision on the claim.

Appeal of Rock Point Community School Board, IBCA-2953 (Oct. 29, 1991) 98 I.D. 355

In deciding a motion to dismiss, the Board will consider the uncontroverted facts alleged by the appellant to be correct and will construe its allegations favorably to it, but the appellant is required to establish jurisdiction. If the appellant has made a prima facie showing that jurisdiction exists, however, the Government must present some evidence to refute that showing. An unsubstantiated allegation will not suffice.

When the certification requirements of the Contract Disputes Act are met, the Board has jurisdiction to entertain an appeal from a contracting officer's decision denying a claim brought and certified on behalf of a dissolved joint venture, and the appeal may be pursued in the name of the joint venture.

The Board found that a corporation properly could be substituted as the appellant because it was the real party in interest in the appeal. The substitution did not violate the anti-assignment statutes, because they did not apply. The Board based its conclusion upon the facts that the appeal originally was filed correctly on behalf of the joint venture contracting entity; 3 months before the completion of the 2-1/2-year contract term the venture dissolved, but the corporate member of the venture, which was a contract signatory and the venture's managing party for the contract, remained intact, continued to perform, and attended to the completion of the contract work; before the appeal was filed, all of the venture's interests and obligations were merged into the corporation; and there was no prejudice to the Government.

The Board found that the corporate member of a joint venture contracting entity had the authority to certify a claim on behalf of the joint venture and, in any event, was the equivalent of the "general partner" of the venture with overall responsibility for the conduct of its affairs. The latter factor alone qualified the corporation under the contract's Disputes clause to

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction--Continued

certify the claim. The corporate president, in turn, clearly was authorized to sign for the corporation. Accordingly, his signature bound the joint venture. He also had implied authority to bind the joint venture because he signed the contract on behalf of both of its members. The certification otherwise met all of the requirements of the Disputes clause and the Board had jurisdiction to entertain the appeal.

Appeal of Ball, Ball, & Brosamer, Inc., IBCA-2103-N (Feb. 5, 1992) 99 I.D. 1

The Board held that it possessed jurisdiction to decide a dispute involving the funding of an administrative grant issued under the Indian Education Amendments of 1988.

Rock Point Community School Board, IBCA-3008 et al., (Dec. 30, 1992) 99 I.D. 248

In deciding motions to dismiss for lack of jurisdiction, in connection with appellant's claims under its contract with the BOR for canal construction, the Board construed the complaint's allegations favorably to appellant; accepted unchallenged allegations as true; and considered relevant evidence of record.

The Board found that a subcontractor had not withdrawn its claims against appellant arising out of the BOR contract, and the fact that appellant was required to pay the subcontractor in accordance with the subcontract, if the Bureau paid appellant was sufficient to bar the application of the "Severin doctrine," which provides that a prime contractor cannot recover sums from the Government if they pertain only to a subcontractor's claim which the prime is not liable to pay. The Board also found that appellant properly was pursuing claims in its own right, as the entity in privity of contract with the Government.

In finding that appellant's administrative delay claim in connection with the resolution of a design defect involving five concrete structures was based upon the same operative facts included in its original certified claim to the contracting officer under the CDA, and

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction--Continued

did not constitute a new claim, the Board considered the totality of the relevant correspondence and communications. It also found that the claim satisfied the dispute and "sum certain" requirements of FAR 33.201.

The Board concluded that appellant's increase in its amended complaint of the number of delay days sought, its presentation of its quantum proof on a modified total cost basis, and its inclusion of costs associated with the effect of erroneous contract earthwork elevations upon pipe trenching, previously presented as a separate claim, then withdrawn, did not constitute new claims that had not been submitted to the contracting officer.

While finding that the Government had ample opportunity to audit and review appellant's claims, the Board stressed that an audit was not a jurisdictional prerequisite under the CDA to the Board's consideration of a properly submitted claim.

Appeals of Hardrives, Inc., IBCA-2319 et al. (Dec. 30, 1992) 99 I.D. 249

A corporate vice president and member of the contractor's Board of Directors, who was demonstrated to have responsibility for corporate activities substantially equivalent to that of the contractor's president, qualified under FAR 33.207(c)(2)(ii) to certify the contractor's Contract Disputes Act claims as "(a)n officer * * * of the contractor having overall responsibility for the conduct of the contractor's affairs."

Appeals of Tecom, IBCA-2970 (Jan. 15, 1993) 100 I.D. 1

In an appeal alleging an agreement with the contracting officer settling a dispute under contracts issued pursuant to the Indian Self-Determination and Education Assistance Act, which provides that the CDA shall apply, the contracting officer's proclaimed final decision denying Busby's properly certified claim imbued

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction--Continued

the Board with jurisdiction under the CDA to determine whether the claim had been settled.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

In denying the Government's motion to dismiss, the Board held that, when the Government disputed any liability for wage increases during a contract's base year, appellant's quantified claims for such increases satisfied Contract Disputes Act requirements.

The Board found that appellant's claim for increased wages paid after the contract's base year properly was subsumed into appellant's certified, quantified, disputed claim that the Government's option exercise was defective and that, therefore, appellant was entitled to all of its costs on a "cost-plus" basis.

Appeals of Tecom, IBCA-2970 a-l (Mar. 11. 1994) 101 I.D. 22

The Board held that it possessed jurisdiction under the CDA, 41 U.S.C. § 601, to entertain appellant concessionaire's claim for costs incurred due to allegedly defective specifications provided by the NPS pursuant to an agreement which had settled appellant's prior claims against NPS under its 1961 concession contract. Noting that the Interior Board has held previously that concession contracts are procurement contracts subject to the CDA, the Board found that the settlement agreement modified appellant's successor 1982 concession contract to make NPS responsible for providing the specifications.

Although it did not dispute the amount of appellant's alleged damages, NPS contended that they were consequential and, therefore, the Board lacks jurisdiction over the appeal. The Board noted that whether damages were consequential did not affect jurisdiction

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction--Continued

and, due to its determination denying liability, it did not address the question.

Appeal of Nat'l Park Concessions, Inc., IBCA-2995 (Aug. 18, 1994) 101 I.D. 92

Substantial Evidence

Where an "as built" Government analysis of a shortfall of dirt on a construction project contained an estimated shrink factor that was excessive, the Board adopted a more reasonable shrink factor in order to calculate the extent of the contractor's quantum adjustment.

Appeal of Gerald Miller Construction Co., IBCA-2292 (Mar. 14, 1991)

A contractor is not entitled to an equitable adjustment for excess travel and management expenses where its estimates of typical costs for air fare, lodging, and subsistence are not adequately supported by documentary evidence.

Appeals of Cooper Mechanical Contractors & Continental Engineering, IBCA-2744 et al. (Feb. 18, 1992)

Termination for Convenience

Both the Changes and the Termination for Convenience clauses provide a mechanism for the deletion of contract work. However, when major portions of the contract work are deleted, the Termination for Convenience clause is more appropriate if no additional work is substituted in its place.

Once the propriety of a termination for convenience has been established, the terminated portion of the contract is converted into a cost-reimbursement

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Termination for Convenience--Continued

contract, and the contractor is entitled to recover its allowable costs in accordance with the standards of reasonableness, cost allocability, and other cost principles set forth in the FAR, including profit.

Pursuant to applicacble provisions of FAR, a contractor may recover its consulting fees under a contract terminated for convenience, where the evidence showed that such costs were adequately documented and were not related to the preparation of litigation.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

The Government is not permitted to substitute the Termination for Convenience clause for the Changes clause to delete a relatively minor portion of the total contract more than 2 years after it issued a deductive change order, which was relied on by the contractor in submitting a proposed credit to the Government for the deleted work. In determining the amount of the credit, the primary consideration is the cost impact on the contractor. Thus, the contractor was entitled to rely upon the cost estimate of the subcontractor that was to have done the work.

Appeal of J. A. Jones Construction Co., IBCA-3280 (Aug. 16, 1994) 101 I.D. 82

Termination for Default

Generally

A Government acknowledgment that the cost to terminate a contract, correct the specifications, and rebid the project would outweigh the cost of completing the work under the original contract, does not establish that the Government assumed the risk of substantial increased costs in order to complete the work. Where the work was not urgently needed, and there was no evidence that a substitute contractor could complete the work more expeditiously, the Board held that it would have been an abuse of discretion by the Government to default rather than

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Termination for Default--Continued

Generally--Continued

consider the assessment of delay damages against the contractor.

Appeal of Gerald Miller Construction Co., IBCA-2292 (Mar. 14, 1991)

When a contract to provide electrical drawings for BOR's Grand Coulee Dam Project was terminated for default, the Government met its burden to prove the default justified when the contractor stipulated that 62 of the drawings it submitted failed to meet contractual standards and BOR properly rejected them; and the contractor did not deliver any set of drawings, with the minimum 99-percent accuracy required by the contract, within required, or extended, performance periods.

When it was within a contractor's control to reject or accept a workload beyond a potential maximum, and the contractor did not reject it in accordance with the contract's provisions; when the contractor failed to prove that any action, or nonpayment, by the Government caused the contractor's default; and when its work was replete with errors, and was of poor quality, the contractor failed to carry its burden to prove that its performance failures were excusable as beyond its control and without its fault or negligence.

The fact that contract compliance was more difficult than the contractor had anticipated did not render the contracting officer's default decision arbitrary or capricious, or an abuse of his discretion.

When the Board found no evidence to support the contractor's allegation that BOR acted in bad faith in its administration of the contract, the contractor failed to meet its exceedingly high burden to overcome the presumption that public officials act in good faith.

Appeal of KARPAK Data & Design, IBCA-2944 et al. (Aug. 14, 1992) 99 I.D. 163

CONTRACTS--Continued

FEDERAL PROCUREMENT REGULATIONS

Regulations pertaining to the assignment of claims and contracts which are published in the Federal Register (e.g., one mandating the inclusion of an Assignment of Claims provision in any contract to be awarded) have the force and effect of law.

Appeals of Rodgers Construction, Inc., Federal Insurance Co., IBCA-2777 et al. (Oct. 15, 1991) 98 I.D. 281

FORMATION AND VALIDITY

Generally

To prove an express contract with BIA, appellant had to establish mutual intent to be bound; the authority of BIA's representative; and consideration. Because compromise of a disputed claim was involved, accord and satisfaction principles were relevant: proper subject matter, competent parties, meeting of the minds, and consideration reflected by a bona fide dispute.

Despite the parol evidence rule, and prior to contract interpretation, extrinsic evidence was admissible to establish that the settlement agreement was, or was not, completely integrated. The Board found appellant's several affidavits and declaration, which BIA did not controvert successfully, persuasive that the agreement was complete and final.

In finding the parties' settlement agreement clear and unambiguous, the Board derived the parties' intent from its plain language, harmonizing and giving a reasonable meaning to all of its parts, without out-of-context analysis or regard to the contracting officer's alleged intent, which BIA did not establish to be anything other than subjective and unexpressed.

Neither party could cast aside a valid settlement agreement without the most compelling of reasons, including proof of invalidity, either by fraud or mutual mistake. A unilateral mistake was not sufficient. The decision by an authorized contracting officer to settle a claim, with knowledge of the facts, was dispositive. The law assumes that the contracting officer's action in signing the agreement was proper.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Authority to Make

There was no genuine dispute that the settlement's subject matter was proper and that the officials executing the agreement were authorized.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

Consideration

When appellant established that it believed that it had a legitimate claim for an amount in excess of the settlement amount, the settlement was supported by consideration.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

Formalities

Regulations pertaining to the assignment of claims and contracts which are published in the Federal Register (e.g., one mandating the inclusion of an Assignment of Claims provision in any contract to be awarded) have the force and effect of law.

Appeals of Rodgers Construction, Inc., Federal Insurance Co., IBCA-2777 et al. (Oct. 15, 1991) 98 I.D. 281

BIA conceded that no format was required for the settlement agreement. Provisions of the FAR calling for the execution of a particular form for an agreement modifying a contract were irrelevant because the FAR does not apply to Self-Determination Act contracts such as those in question and contract modifications were not at issue in any case.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Implied and Constructive Contracts

The Board found that appellant, which had a contract with GS to supply hydrostatic pressure sensor units, was entitled to be compensated for the Government's use of certain optional software capability in excess of the maximum number of optional systems it was required to purchase under the contract. Appellant's entitlement arose under a contract implied-in-fact derived principally from the language of its express contract. The appropriate compensation was the unit price for the option to which the parties had agreed in the express contract.

Appeal of Paroscientific, Inc., IBCA-3230 (Nov. 23, 1994)

Mistakes

A Government motion for summary judgment filed in connection with a contractor's unilateral mistake in bid claim is denied where the Government fails to show that the release language included in a modification to the contract (relied upon by the Government for its affirmative defenses of abandonment, novation, release and accord, and satisfaction) either expressly or by implication refers to any mistake in bid claim where the Board finds that an affidavit filed by appellant raises a genuine issue of material fact as to the intention of the parties at the time the modification containing the release in question was negotiated and executed. The Government's motion for summary judgment is also denied on the alternative ground that subsequent to the execution of the release the parties showed by their conduct that they never considered the release as constituting an abandonment or the mistake in bid claim.

The Board denies a Government motion for summary judgment for the failure of the appellant to state a claim for relief with respect to its unilateral mistake in bid claim, where the Board finds (i) that the Government has failed to furnish any information as to what actions the contracting officer took with respect to his bid verification duties upon the opening of bids; (ii) that in the absence of such information it is not possible to determine the reasonableness of the contracting officer's actions; and (iii) that in ruling upon a motion for summary judgment all inferences are

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Mistakes--Continued

to be drawn in favor of the party against whom the motion for summary judgment is advanced.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990)
97 I.D. 193

A cadastral survey contractor is not entitled to an adjustment on the basis of mutual mistake merely because it is unable to meet its expected production rates. A party's prediction as to events that are to occur in the future, or his professional judgment, even if erroneous, is not a compensable mistake. In this case, there is insufficient evidence that the contemplated production rates could not have been achieved by a prudent contractor, and the fixed-price contract placed the risks of unexpected costs of performance on the contractor.

A contractor is not entitled to relief on a theory of constructive change where it failed to show that the Government directed it to perform work that was not required under the contract, or that the Government in any way changed the requirements of the contract after it was entered into.

Appeal of Ocean Technology, Inc., IBCA-2651 (Feb. 27, 1991)

Appellant's allegation that it is entitled to equitable contract reformation fails as a matter of law. There was mutual mistake in the formation of the road contract. Moreover, under the contract, appellant assumed all risks associated with its yard and pit.

Appeal of Blaze Construction Co., Inc., IBCA-2863
(June 6, 1991) 98 I.D. 213

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Mistakes--Continued

In bidding on contracts, potential contractors must seek clarification of obvious, gross, and glaring errors in the Government's specifications; but they are not expected to exercise clairvoyance in spotting hidden ambiguities. Thus, a contractor is not liable for failing to realize that the Government's estimate of the lead content of paint to be removed from an old gantry crane had omitted a zero, when the number set forth was also reasonable, even though it clearly contained an apparently misplaced comma.

Appeal of Foothill Engineering, IBCA-3119-A (Feb. 12, 1993) 100 I.D. 50

The Board found that, although there was a considerable disparity between appellant's bid and the only other bid received, appellant's bid was very close to the Government's estimate, which had been based upon full-sized drawings. Thus, the contracting officer had not acted improperly in failing to seek verification of appellant's bid.

Appeal of T. R. Orr, Inc., IBCA-3143 (Apr. 15, 1994)

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Generally

A formula for the distribution of Indian Self-Determination Act contract funds among several Indian tribes must be made available for comment and discussion by the tribes prior to negotiation of the contracts for the fiscal year to which the formula applies.

Shoshone-Paiute Tribes of the Duck Valley Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 423 (Sept. 13, 1990)

CONTRACTS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Generally--Continued

The Indian Self-Determination Act does not give a subcontractor an explicit or implicit right to appeal under 25 CFR Part 2 from an action taken by an Indian tribe pursuant to a contact under the Act.

The Board of Indian Appeals does not have jurisdiction over contract disputes arising under an Indian Self-Determination Act contract.

In connection with its authority to rescind an Indian Self-Determination Act contract under 25 U.S.C. § 450m (1988), the BIA has authority to investigate an Indian tribe's performance under the contract.

The BIA must implement the Federal commitment to tribal self-determination, which includes a policy of respect for tribal courts, in fulfilling its oversight responsibilities under the Indian Self-Determination Act.

Larry Martin v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 279 (Apr. 4, 1991) 98 I.D. 200

A decision distributing funds among several tribes, for purposes of contracting under the Indian Self-Determination Act, is a decision based on the exercise of discretion. In reviewing such decisions, the Board of Indian Appeals does not substitute its judgment for that of the Bureau but, rather, seeks to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Ponca Tribe of Oklahoma, Pawnee Tribe of Oklahoma, & Otoe-Missouria Tribe v. Acting Anadarko Area Director, Bureau of Indian Affairs, 22 IBIA 199 (Aug. 7, 1992)

Under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. § 450f(b)(3) (1988), whenever the Secretary declines to enter into a self-determination contract, he must provide the tribal organization with a hearing on the record. A BLM decision declining a self-determination contract application will be set aside if BLM has not afforded the tribe an

CONTRACTS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Generally--Continued

opportunity for a hearing, and the case will be assigned to an ALJ to conduct the statutorily mandated hearing. The record of the hearing shall then be forwarded to the Director, BLM, for review and issuance of a decision with appeal rights to the Ass't Secretary, Land and Minerals Management.

Absentee Shawnee Tribe of Oklahoma, 124 IBLA 259 (Nov. 3, 1992)

Where an appeal procedure for certain decisions under the Indian Self-Determination Act appears only in the BIA Manual, and is not required either by statute or regulation, an appellant may waive the procedure in the Manual and proceed under the Bureau's general appeal regulations in 25 CFR Part 2.

Under 25 U.S.C. § 450j-1(b)(3) (1988), the BIA is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under the Indian Self-Determination Act.

Even in the case of a decision based on the exercise of discretionary authority, the BIA has a responsibility to explain the rationale and factual basis of the decision.

Kaw Nation v. Anadarko Area Director, Bureau of Indian Affairs, 24 IBIA 21 (May 26, 1993)

Under 25 U.S.C. § 450b(h) (1988), a "mature contract" is a self-determination contract that has been continuously operated by a tribal organization for 3 or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization.

Tohatchi Special Education & Training Center, Inc. v. Navajo Area Director, Bureau of Indian Affairs, 25 IBIA 259 (Apr. 7, 1994)

CONTRACTS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Generally--Continued

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over certain threshold decisions rendered by BIA officials in considering proposals to contract under the Indian Self-Determination Act, P.L. 93-638, despite the special appeal procedure in 25 CFR Part 271.

Colorado River Indian Tribes v. Phoenix Area Director, Bureau of Indian Affairs, 26 IBIA 39 (June 8, 1994)

Under 25 U.S.C. § 450m-1(c) (1988), the EAJA applies to administrative appeals filed by tribal organizations regarding contracts under the Indian Self-Determination Act.

Tohatchi Special Education & Training Center, Inc. v. Navajo Area Director, Bureau of Indian Affairs, 26 IBIA 138 (July 25, 1994)

The Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1988 and Supps.), preserves the trust responsibility of the United States toward the Indian people, prohibits the Secretary of the Interior from entering into any contract which would impair his ability to discharge his trust responsibility, and authorizes the Secretary to decline a contract where adequate protection of trust resources is not assured.

Where an Alaska Native village has contracted under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1988 and Supps.), to perform realty services, the BIA may reject a request that the contract service area be based on village membership if the Bureau reasonably finds that adequate protection of trust resources will not be assured under a membership-based contract.

Kwethluk Ira Council v. Juneau Area Director, Bureau of Indian Affairs, 26 IBIA 262 (Oct. 18, 1994)

CONTRACTS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Governing Law

In an appeal alleging an agreement with the contracting officer settling a dispute under contracts issued pursuant to the Indian Self-Determination and Education Assistance Act, which provides that the CDA shall apply, the contracting officer's proclaimed final decision denying Busby's properly certified claim imbued the Board with jurisdiction under the CDA to determine whether the claim had been settled.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

Regulations

In accordance with 25 CFR 271.4(h), a tribal contractor under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1982 and Supps.), must apply the eligibility criteria for the contracted program which are established in the Bureau of Indian Affairs' regulations governing the program.

Under the Bureau of Indian Affairs' social services program regulations, the eligibility criteria for miscellaneous assistance in 25 CFR 20.23 do not incorporate the eligibility criteria for general assistance in 25 CFR 20.21.

Muscogee (Creek) Nation v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 135 (Feb. 1, 1990)

PERFORMANCE OR DEFAULT

Generally

In a contract for the provision of an airplane and pilot throughout a mandatory availability period, the Board held that the Government could not use the general default clause as the sole authority on which to base a termination accomplished 23 minutes after the appointed commencement of performance time when the contract also contained a special default clause which established 3

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Generally--Continued

consecutive days of unavailability as "grounds for termination" under the general clause.

Appeal of Pegasus Helicopters, Inc., IBCA-2671 (Mar. 6, 1991)

Acceptance of Performance

The Government has the burden of proving that a contractor's work fails to meet specifications. Where, after due repairs to cable terminators that were found to be leaking, it rejected a fully installed, buried, high voltage a.c. electrical cable system simply because it feared that the cable might have been damaged by the leakage into it of an unknown quantity of inert insulating oil from the faulty terminators, and the purpose of the Government's rejection was simply to coerce the contractor into making additional tests that were neither specified by the contract nor recognized by the cable industry, the Government must pay the cost of the tests.

Even if the Government had a sufficient basis for its concern that a buried high voltage cable system was damaged by the leakage into it of insulating oil from defective cable terminators, it could not require the contractor to perform additional tests that were not consistent with industry standards and that both the contractor and the Government subsequently agreed were not reliable, unless it paid for the tests.

Appeal of Centric/Jones Constructors, IBCA-3139 (Oct. 1, 1993)

Compensable Delays

The Board found the Government did not delay in rejecting appellant's nonconforming work and, even if it had, any Governmental delay would have been concurrent with the contractor's delay in meeting in-place testing requirements and not compensable.

Appeal of White & McNeil Excavating, Inc., IBCA-2448 (Nov. 4, 1991) 98 I.D. 359

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Compensable Delays--Continued

In awarding appellant a 370-day time extension, the Board resolved credibility issues in its favor and found that it had proved, with expert testimony and analysis, that specific delays were due to actions or inactions for which BOR was responsible; that Project completion was delayed as a result; and that BOR had not proved any overall Project delay by appellant.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

Excusable Delays

In denying the contractor's claims for acceleration and impact, the Board found that the contractor had been allowed to start work earlier, and finish it later, than the contract-specified dates; deleted work had netted more time for the contractor; a suspend work order had been issued due to the contractor's own actions in violating in-stream fill permits; the suspension had applied to only part of the contract work; delay in the grant of an extension for in-stream work due to differing site conditions had not been BLM's fault; and the contractor already had been compensated by the Board's jury verdict for extra time and costs due to the differing conditions.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993)
100 I.D. 329

Impossibility of Performance

Although the BIA normally would be bound by the terms of a Housing Improvement Program grant agreement it had signed, it may be excused from performance in a case where performance is impossible.

Mildred Hartman v. Anadarko Area Director, Bureau of Indian Affairs, 23 IBIA 122 (Dec. 18, 1992)

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Inspection

The Board found that BLM impliedly had approved the contractor's temporary access spur plan, which it had presented to the COR well before construction began, and which was within the COR's contract authority to approve; for which the contractor had obtained necessary permits, which the COR had approved; and which the COR and BLM's inspector had observed in operation and allowed to continue until the spur was 90 percent complete. The Board also found that the contractor would not experience a windfall because its bid had not been based upon the use of highline access at the area in question; and that BLM had failed to prove its deduction justified.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993)
100 I.D. 329

Release and Settlement

When, under a contract to provide inspection, site survey, and other services to the Government in connection with the Government's contract with another contractor, appellant, by separate cover letter, excepted its claim for extra survey work from a final modification containing a release of claims, and the Government did not dispute the exception, appellant did not waive its claim by signing the modification.

Appeal of Blackwell Engineering, IBCA-2620 (Jan. 14, 1994)
101 I.D. 1

Substantial Performance

The Government has the burden of proving that a contractor's work fails to meet specifications. Where, after due repairs to cable terminators that were found to be leaking, it rejected a fully installed, buried, high voltage a.c. electrical cable system simply because it feared that the cable might have been damaged by the leakage into it of an unknown quantity of inert insulating oil from the faulty terminators, and the purpose of the Government's rejection was simply to coerce the contractor into making additional tests that were neither specified by the contract nor recognized by the

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Substantial Performance--Continued

cable industry, the Government must pay the cost of the tests.

Even if the Government had a sufficient basis for its concern that a buried high voltage cable system was damaged by the leakage into it of insulating oil from defective cable terminators, it could not require the contractor to perform additional tests that were not consistent with industry standards and that both the contractor and the Government subsequently agreed were not reliable, unless it paid for the tests.

Appeal of Centric/Jones Constructors, IBCA-3139 (Oct. 1, 1993)

Waiver and Estoppel

Because BOR had instructed during the contract that 1986 AGC equipment ownership and operating rates were to be used, and its contracting officers had used those rates for modifications, the Board found that BOR had waived a contract provision invoking ownership rates derived from 1974 AGC tables.

Absent clear proof that BOR was responsible for a concrete slab that had to be removed, the Board deducted the removal costs from costs charged to BOR. The Board also deducted the costs of correcting one-gate turnouts to two gates because, even if the drawings were deemed latently ambiguous, appellant had not met its burden to prove that it had relied upon its interpretation at the time of bid. Also, the contract called for inquiry in the event of drawing discrepancies. Although the turnouts had been installed under inspectors' oversight, there was no evidence that they had been aware of the error and, under the Inspection of Construction clause, they could not waive contract requirements.

In denying appellant's claim for the costs of removing and encasing banded mitered pipe bends, the Board found that the contract required encasement; even if the contract were deemed patently or latently ambiguous, appellant had not met its pre-bid duty of inquiry, or its burden to prove reliance at the time of bid, respectively. Appellant also failed to prove that banded bends had been approved as an alternative design and that BOR was estopped from requiring encasement or

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Waiver and Estoppel--Continued

that BOR's enforcement of the specifications constituted economic waste.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

The Board found that BLM impliedly had approved the contractor's temporary access spur plan, which it had presented to the COR well before construction began, and which was within the COR's contract authority to approve; for which the contractor had obtained necessary permits, which the COR had approved; and which the COR and BLM's inspector had observed in operation and allowed to continue until the spur was 90 percent complete. The Board also found that the contractor would not experience a windfall because its bid had not been based upon the use of highline access at the area in question; and that BLM had failed to prove its deduction justified.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993)
100 I.D. 329

RULES OF PRACTICE

Generally

In applying its discovery rules, the Interior Board has adopted a flexible application of the term "good cause" and strongly encourages parties to engage in informal, cooperative, relevant, discovery to the extent practicable, without abusing the process.

The Board held that, consistent with the amended Federal Rules of Civil Procedure, no later than 30 days before hearing, both parties were to identify their proposed lay hearing witnesses and exhibits, and to exchange those exhibits not already in the other's possession.

CONTRACTS--Continued

RULES OF PRACTICE--Continued

Generally--Continued

Each party was to notify the other of any experts to be called at hearing as soon as those experts were identified and was to supply the other with a copy of any expert report or exhibit as soon as prepared. Without the need to request subpoenas from the Board, each party could depose the other's expert report or exhibit. In any case, expert identification and production of any expert report or exhibit was to occur no later than 60 days before hearing.

Without the need to request subpoenas from the Board, each party could notice and take the depositions of the other's knowledgeable personnel, based upon its own analysis, and/or upon the other's response to a Fed. R. Civ. P. 30(b)(6) notice. If a party deemed the number of depositions or particular individuals to be deposed to be unreasonable, it could seek a protective order.

The Board issued rulings on interrogatories and requests for production of documents to which the Government had objected on the grounds that the requested information had been supplied through document production, or that the requests were overly broad or irrelevant. The Board agreed that some of appellant's interrogatories and document production requests were overly broad, but found others to be relevant, and directed various responses by the Government.

The Board found that disputed requests for admission were relevant and clear and directed responses.

Appeals of Federal Insurance Co., IBCA-3236 (Dec. 22, 1993) 100 I.D. 448

Upon appellant's demonstration of good cause, the Board granted reconsideration of orders dismissing appeals with prejudice for failure to prosecute. The appeals previously had been dismissed without prejudice. No show cause orders had issued prior to the dismissals with prejudice; there was no reinstatement deadline for one of the appeals; the parties had agreed to delay the prosecution of the other appeal pending resolution of the first one and the Board had acquiesced; appellant had been actively pursuing its claims, albeit in other

CONTRACTS--Continued

RULES OF PRACTICE--Continued

Generally--Continued

flora; and the Government had not established any specific prejudice.

The Board's Rule 4.127(a), calling for the dismissal with prejudice of certain appeals, if not reinstated within 3 years after their dismissal without prejudice, did not apply. That rule pertained to appeals, unlike those at issue, with which the Board was unable to proceed and which it was required to dismiss without prejudice for reasons beyond its control.

The Board noted that involuntary dismissals with prejudice prior to any resolution on the merits constituted a severe sanction, which was unwarranted when appellant had not acted willfully or in bad faith and had not refused to comply with any Board order.

Appeals of Marshall Associated Contractors, Inc., & Columbia Excavating, Inc. (J.V.), IBCA-1901 (Feb. 15, 1994) 101 I.D. 15

Motions

The Government has established that there are no material facts in dispute and that it is entitled to summary judgment on appellant's road contract claims.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

Upon appellant's demonstration of good cause, the Board granted reconsideration of orders dismissing appeals with prejudice for failure to prosecute. The appeals previously had been dismissed without prejudice. No show cause orders had issued prior to the dismissals with prejudice; there was no reinstatement deadline for one of the appeals; the parties had agreed to delay the prosecution of the other appeal pending resolution of the first one and the Board had acquiesced; appellant had been actively pursuing its claims, albeit in other flora; and the Government had not established any specific prejudice.

CONTRACTS--Continued

RULES OF PRACTICE--Continued

Motions--Continued

The Board noted that involuntary dismissals with prejudice prior to any resolution on the merits constituted a severe sanction, which was unwarranted when appellant had not acted willfully or in bad faith and had not refused to comply with any Board order.

Appeals of Marshall Associated Contractors, Inc., & Columbia Excavating, Inc. (J.V.), IBCA-1901 (Feb. 15, 1994) 101 I.D. 15

TRIBALLY CONTROLLED SCHOOLS ACT

Generally

The Board has jurisdiction to decide disputes arising from grants made under the Tribally Controlled Schools Act of 1988, 25 U.S.C. §§ 2501-2511.

Appeal of Rough Rock Community School Board, IBCA-3037 (Feb. 12, 1993) 100 I.D. 45

Grants

Grant recipients under the Tribally Controlled Schools Act are not entitled to interest pursuant to the Prompt Payment Act on late payments, because the Prompt Payment Act by its terms applies only to contracts as such; and any payment of interest on the Tribally Controlled Schools Act grants would require express statutory authority, which clearly does not exist.

Appeal of Rough Rock Community School Board, IBCA-3037 (Feb. 12, 1993) 100 I.D. 45

CONVEYANCES

EXCEPTIONS

A railroad patent to the State of Michigan describing "all of section one" does not convey an unsurveyed island within the meander lines of a lake, whether navigable or non-navigable, located within sec. 1, and the United States may properly survey such island.

Northern Michigan Exploration Co., 114 IBLA 177 (Apr. 23, 1990) 97 I.D. 171

INTEREST CONVEYED

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and the actual water line is deemed to be the omitted land and the property of the United States.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

CONVEYANCES--Continued

INTEREST CONVEYED--Continued

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)
98 I.D. 398

When unpatented mining claims have been donated to the NPS by quitclaim deed and the record before BLM discloses a dispute regarding the chain of title to the claims or the existence of encumbrances upon title to the claims, neither the regulations applicable to mining claims recordation nor the regulations governing acceptance of donated interests in real property authorizes BLM to adjudicate title to the claims and a decision purporting to do so is properly vacated.

David J. Bartoli, 123 IBLA 27 (Apr. 29, 1992)
99 I.D. 55

RESERVATIONS

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

CONVEYANCES--Continued

RESERVATIONS--Continued

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)
98 I.D. 398

Michigan law determined when title to the oil and gas estate passed to the U.S. under a grant retaining mineral title "until May 16, 1985." The conclusion that an oil and gas lease offer for acquired lands was prematurely filed on May 16, 1985, must therefore be reversed where Michigan case law indicates that ambiguity is properly construed against a grantor if it appears as a limitation on the grant.

Wilfred Plomis, 126 IBLA 68 (Apr. 14, 1993)

RESERVATIONS AND EXCEPTIONS

Where patents issued pursuant to the Act of July 17, 1914, as amended, reserve "all oil and gas and all shale or other rock valuable as a source of petroleum," that reservation is properly held to include sodium which occurs as an integral component of the reserved oil shale rock.

Shell Western E&P, Inc., 119 IBLA 125 (Apr. 22, 1991)

COURTS

The Federal District Court injunction issued in National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), cert. granted sub nom., Lujan v. National Wildlife Federation, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990) (No. 89-640), is without effect as to land for which BLM issued a purported Oct. 29, 1981, termination of classification, when the classification had in fact automatically terminated pursuant to sec. 4 of the Classification and Multiple Use Act of 1964 prior to the effective date of the injunction.

Phelps Dodge Corp., 115 IBLA 214 (July 3, 1990)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a withdrawal or segregation of lands pursuant to a first-form reclamation withdrawal, thereby reinstating the terms of the withdrawal, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

DELEGATION OF AUTHORITY
(See also Administrative Authority, Contracts)

Once jurisdiction over an appeal has been lodged in the Board of Land Appeals by the timely filing of a notice of appeal, the supervisory authority provided by 43 CFR 4.5 may be exercised only by the Secretary, Deputy Secretary, or Director, Office of Hearings and Appeals.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

Where the Colorado State Director, BLM, issued a decision approving a record of decision for an EIS regarding a vegetative treatment program for 13 western states, insofar as it related to public lands administered by BLM in Colorado, and the Ass't Secretary, Land and Minerals Management, subsequently concurred in selection of the vegetative treatment program, that concurrence amounted to Secretarial approval of the vegetative treatment program for BLM lands in 13 western

DELEGATION OF AUTHORITY--Continued

states, including Colorado. Accordingly, the Board of Land Appeals lacks jurisdiction to consider an appeal of the Colorado State Director's decision file subsequent to the Ass't Secretary's action.

The Wilderness Society, 122 IBLA 162 (Feb. 6, 1992)

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

DESERT LAND ENTRY

GENERALLY

An irrigation plan that would transfer an existing water license from private farmland which has been subdivided for residential use in order to irrigate a desert land entry does not comply with provision of the Desert Land Entry Act requiring that an entryman provide a permanent and sufficient source of water to the desert entry.

When the Department reviews an irrigation plan pursuant to 43 U.S.C. § 327 (1982), it may consider whether a plan of irrigation is speculative and may

DESERT LAND ENTRY--Continued

GENERALLY--Continued

reject a plan which is contrary to existing agricultural practices.

M. Kent Hafen, 114 IBLA 239 (May 7, 1990)

APPLICATIONS

A decision rejecting a desert land entry application on the ground that the land is within an unpatented mining claim will be reversed and remanded where no final certificate of mineral entry was in effect at the time the desert land entry application was filed and where BLM records strongly suggest that the unpatented mining claims are invalid and, therefore, have no segregative effect.

Nancy M. Swallow, A. Dean Martineau, 112 IBLA 321 (Jan. 12, 1990)

A decision to reject a desert land entry application because the lands identified in the entry cannot be farmed as an economically feasible operating unit will be set aside and the case remanded where there is no support in the record for the soil classification information utilized by BLM in its computer analysis which formed the basis for its decision, and where utilization of the soil classification information for which there is record support dramatically favors the applicant's position.

Norma C. Jolley, 113 IBLA 292 (Mar. 12, 1990)

BLM properly rejects a desert land entry application where, at the time the application was filed, the land sought had already been effectually reclaimed by conducting water to the land in sufficient quantity so as to render it available for irrigation of the land; where, at some time in the past, one-eighth of the land had been cultivated using that irrigation system; and where the entryman fails to establish that the land has reverted to an unreclaimed state by deterioration of that system.

Nathan F. Gardiner, 114 IBLA 380 (May 24, 1990)

DESERT LAND ENTRY--Continued

APPLICATIONS--Continued

A decision rejecting a desert land entry application on the ground that the land is appropriated by unpatented mining claims will be reversed where a final certificate of mineral entry has not been issued for the land at the time the desert land entry application was filed.

Bobby L. Franklin, 116 IBLA 29 (Aug. 27, 1990)

Where a desert land entry applicant receives notice from BLM that based on a computer projection the proposed operation has been determined to be economically unfeasible and the applicant fails to respond to an invitation to provide further support for the operation, BLM may properly reject the application. However, where the applicant alleges facts for the first time on appeal which should be considered by BLM in its analysis of the plan, the Board may set aside BLM's decision and remand the case for consideration thereof.

Norma J. Brown, 116 IBLA 158 (Sept. 25, 1990)

BLM properly rejects a desert land entry application where the applicant has failed to submit proof that he has acquired, is seeking to acquire, or is qualified under state law to acquire a right to permanent use of sufficient water to irrigate and reclaim all irrigable portions of the land sought. It is not sufficient that an applicant establish that he is relying on a state water permit application of his deceased father that he has not actively sought to have transferred to him and which has been denied.

Glen H. Wharton, 125 IBLA 165 (Jan. 28, 1993)

BLM properly rejected a desert land entry application for lands that were classified unsuitable for agricultural development by a final order of the Secretary of the Interior.

Keith P. Gunderson, 127 IBLA 16 (July 12, 1993)

DESERT LAND ENTRY--Continued

APPLICATIONS--Continued

The mere filing of a desert land entry application does not create any present right or interest in the land in the applicant, but only the right to have the application considered.

A desert land entry application must be accompanied by a petition for classification, unless the lands have already been classified and opened for disposition under the desert land entry laws. Such a classification is a prerequisite to allowance of an entry.

The law governing desert land entries provides only for the assignment of entries, not applications.

When, at the time of filing a desert land entry application, 1/8 of the desired land is being farmed through the use of irrigation, the land is considered effectively reclaimed and not subject to desert land entry.

Carl S. Hansen, 130 IBLA 369 (Sept. 15, 1994)

BLM properly declines to allow a DLE and returns the DLE application where the lands sought, situated within the California Desert Conservation Area, have been classified in a land-use plan, issued pursuant to secs. 202 and 601 of FLPMA, 43 U.S.C. §§ 1712 and 1781 (1988), so as to preclude agricultural uses. The propriety of the land-use classification set forth in the plan is not subject to review by the Board.

David R. Hinkson, 131 IBLA 251 (Nov. 22, 1994)

BLM properly refuses to allow a DLE and returns the DLE application where the land sought to be entered, located within the California Desert Conservation Area, has been classified as unavailable for agricultural use in the land-use plan promulgated for the area in accordance with 43 U.S.C. §§ 1712 and 1781 (1988). The Board has no authority to review such a land-use plan or the classifications contained therein.

BLM's refusal to approve an application to make a DLE does not constitute a compensable taking of private property since the filing of a DLE application for public land does not create any present right or title

DESERT LAND ENTRY--Continued

APPLICATIONS--Continued

in the land in the applicant, but only a right to have the application considered.

To the extent that a DLE application proposes to preserve acreage as desert, the application cannot be allowed since it conflicts with the Desert Land Act's primary goal of changing desert to agricultural land through actual and permanent cultivation of land which in its natural state is unproductive.

Max Wilson, 131 IBLA 306 (Dec. 5, 1994)

CANCELLATION

BLM properly cancels a desert land entry where the entryman has voluntarily granted an option to acquire the water rights submitted as the source of water for his entry and has presented no evidence of some other permanent source of water for the entry. Cancellation of the entry is appropriate even though the option has not been exercised and the events which render the option operative have not occurred.

Harry Gray Browne, Franklyn D. Jeans, Carl W. Rimbey, 121 IBLA 218 (Nov. 13, 1991)

It is proper for BLM to cancel a desert land entry when the entrant had clearly failed to demonstrate that, during the statutory life of the entry, she acquired or was taking the necessary steps to acquire the legal and physical right to sufficient water to reclaim the entered land, thus fulfilling the purpose of the Act of Mar. 3, 1877.

Anna R. Williams, Frances L. Roylance, 126 IBLA 20 (Apr. 8, 1993)

CLASSIFICATION

DESERT LAND ENTRY--Continued

CLASSIFICATION--Continued

BLM properly rejected a desert land entry application for lands that were classified unsuitable for agricultural development by a final order of the Secretary of the Interior.

Keith P. Gunderson, 127 IBLA 16 (July 12, 1993)

BLM properly declines to allow a DLE and returns the DLE application where the lands sought, situated within the California Desert Conservation Area, have been classified in a land-use plan, issued pursuant to secs. 202 and 601 of FLPMA, 43 U.S.C. §§ 1712 and 1781 (1988), so as to preclude agricultural uses. The propriety of the land-use classification set forth in the plan is not subject to review by the Board.

David R. Hinkson, 131 IBLA 251 (Nov. 22, 1994)

BLM properly refuses to allow a DLE and returns the DLE application where the land sought to be entered, located within the California Desert Conservation Area, has been classified as unavailable for agricultural use in the land-use plan promulgated for the area in accordance with 43 U.S.C. §§ 1712 and 1781 (1988). The Board has no authority to review such a land-use plan or the classifications contained therein.

Max Wilson, 131 IBLA 306 (Dec. 5, 1994)

CULTIVATION AND RECLAMATION

BLM properly rejects a desert land entry application where, at the time the application was filed, the land sought had already been effectually reclaimed by conducting water to the land in sufficient quantity so as to render it available for irrigation of the land; where, at some time in the past, one-eighth of the land had been cultivated using that irrigation system; and where the entryman fails to establish that the land has reverted to an unreclaimed state by deterioration of that system.

Nathan F. Gardiner, 114 IBLA 380 (May 24, 1990)

DESERT LAND ENTRY--Continued

CULTIVATION AND RECLAMATION--Continued

The raising of Xmas trees on desert land by means of irrigation and tilling the soil does not constitute cultivation as contemplated under the Desert Land Act, as amended, 43 U.S.C. §§ 321-339 (1988).

Robert J. Proctor et ux., 124 IBLA 363 (Dec. 8, 1992)

When, at the time of filing a desert land entry application, 1/8 of the desired land is being farmed through the use of irrigation, the land is considered effectively reclaimed and not subject to desert land entry.

Carl S. Hansen, 130 IBLA 369 (Sept. 15, 1994)

To the extent that a DLE application proposes to preserve acreage as desert, the application cannot be allowed since it conflicts with the Desert Land Act's primary goal of changing desert to agricultural land through actual and permanent cultivation of land which in its natural state is unproductive.

Max Wilson, 131 IBLA 306 (Dec. 5, 1994)

EXTENSION OF TIME

An application for an extension of time for the submission of final proof of a desert land entry is properly rejected where the entryperson is unable to show that failure to reclaim the land in the entry within the statutory life of the entry is due, without fault on his or her part, to unavoidable delay in the construction of intended irrigation works. Even though the entrypersons believed they were constrained from proceeding with development of their entries due to BLM's advice that their entries may be affected by an injunction in a pending lawsuit, their requests for extension of the statutory final proof period must be denied where they have not demonstrated that they did "all they could do." Where the entrypersons assert that they could not proceed with construction of the intended irrigation works because they could not obtain financing, they have not demonstrated they did all they could

DESERT LAND ENTRY--Continued

EXTENSION OF TIME--Continued

do when they failed to respond to BLM's request to submit information regarding the financial institutions who denied them financing.

Charlotte Peck et al., 116 IBLA 169 (Sept. 26, 1990)

An application for extension of time for submission of final proof of a desert land entry is properly rejected where there has been no showing that failure to reclaim the entry is due, without fault by the entryperson, to unavoidable delay in construction of irrigation works. An entryperson who has failed to make final proof within the 4-year period and has petitioned for an extension of time must, however, be allowed 90 days in which to submit final proof before her entry can be cancelled.

Carol Carlton, 117 IBLA 13 (Nov. 21, 1990)

In order to obtain an extension of time for the submission of final proof of a desert land entry, the entryman must show that the failure to reclaim the land within the entry during the statutory life of the entry was due, without fault on the entryman's part, to unavoidable delay in the construction of the necessary irrigation works. Where the entryman establishes that financial institutions were unwilling to lend money because of the inability of BLM to patent the land due to the existence of a Federal Court injunction, the entryman may be granted an extension of time to make the final proof, as provided by 43 U.S.C. § 333 (1988).

Roseanne M. Bell et al., 120 IBLA 153 (July 16, 1991)

BLM properly denies a request for an extension of time to make final proof for a desert land entry, pursuant to sec. 3 of the Act of Mar. 28, 1908, 43 U.S.C. § 333 (1988), based on the entryperson's inability to construct the necessary irrigation works absent evidence that this inability arose due to circumstances not reasonably foreseeable at the time of the allowance of the entry.

Robert B. Arnold et ux., 125 IBLA 158 (Jan. 28, 1993)

DESERT LAND ENTRY--Continued

FINAL PROOF

BLM properly cancels a desert land entry where the entryman has voluntarily granted an option to acquire the water rights submitted as the source of water for his entry and has presented no evidence of some other permanent source of water for the entry. Cancellation of the entry is appropriate even though the option has not been exercised and the events which render the option operative have not occurred.

Harry Gray Browne, Franklyn D. Jeans, Carl W. Rimbey, 121 IBLA 218 (Nov. 13, 1991)

BLM properly denies a request for an extension of time to make final proof for a desert land entry, pursuant to sec. 3 of the Act of Mar. 28, 1908, 43 U.S.C. § 333 (1988), based on the entryperson's inability to construct the necessary irrigation works absent evidence that this inability arose due to circumstances not reasonably foreseeable at the time of the allowance of the entry.

Robert B. Arnold et ux., 125 IBLA 158 (Jan. 28, 1993)

It is proper for BLM to cancel a desert land entry when the entrant had clearly failed to demonstrate that, during the statutory life of the entry, she acquired or was taking the necessary steps to acquire the legal and physical right to sufficient water to reclaim the entered land, thus fulfilling the purpose of the Act of Mar. 3, 1877.

Anna R. Williams, Frances L. Roylance, 126 IBLA 20 (Apr. 8, 1993)

LANDS SUBJECT TO

A decision rejecting a desert land entry application on the ground that the land is within an unpatented mining claim will be reversed and remanded where no final certificate of mineral entry was in effect at the time the desert land entry application was filed and where BLM records strongly suggest that

DESERT LAND ENTRY--Continued

LANDS SUBJECT TO--Continued

the unpatented mining claims are invalid and, therefore, have no segregative effect.

Nancy M. Swallow, A. Dean Martineau, 112 IBLA 321 (Jan. 12, 1990)

BLM properly rejects a desert land entry application where, at the time the application was filed, the land sought had already been effectually reclaimed by conducting water to the land in sufficient quantity so as to render it available for irrigation of the land; where, at some time in the past, one-eighth of the land had been cultivated using that irrigation system; and where the entryman fails to establish that the land has reverted to an unreclaimed state by deterioration of that system.

Nathan F. Gardiner, 114 IBLA 380 (May 24, 1990)

A decision rejecting a desert land entry application on the ground that the land is appropriated by unpatented mining claims will be reversed where a final certificate of mineral entry has not been issued for the land at the time the desert land entry application was filed.

Bobby L. Franklin, 116 IBLA 29 (Aug. 27, 1990)

BLM properly rejected a desert land entry application for lands that were classified unsuitable for agricultural development by a final order of the Secretary of the Interior.

Keith P. Gunderson, 127 IBLA 16 (July 12, 1993)

When, at the time of filing a desert land entry application, 1/8 of the desired land is being farmed through the use of irrigation, the land is considered effectively reclaimed and not subject to desert land entry.

Carl S. Hansen, 130 IBLA 369 (Sept. 15, 1994)

DESERT LAND ENTRY--Continued

LANDS SUBJECT TO--Continued

BLM properly declines to allow a DLE and returns the DLE application where the lands sought, situated within the California Desert Conservation Area, have been classified in a land-use plan, issued pursuant to secs. 202 and 601 of FLPMA, 43 U.S.C. §§ 1712 and 1781 (1988), so as to preclude agricultural uses. The propriety of the land-use classification set forth in the plan is not subject to review by the Board.

David R. Hinkson, 131 IBLA 251 (Nov. 22, 1994)

BLM properly refuses to allow a DLE and returns the DLE application where the land sought to be entered, located within the California Desert Conservation Area, has been classified as unavailable for agricultural use in the land-use plan promulgated for the area in accordance with 43 U.S.C. §§ 1712 and 1781 (1988). The Board has no authority to review such a land-use plan or the classifications contained therein.

Max Wilson, 131 IBLA 306 (Dec. 5, 1994)

WATER RIGHT

BLM properly cancels a desert land entry where the entryman has voluntarily granted an option to acquire the water rights submitted as the source of water for his entry and has presented no evidence of some other permanent source of water for the entry. Cancellation of the entry is appropriate even though the option has not been exercised and the events which render the option operative have not occurred.

Harry Gray Browne, Franklyn D. Jeans, Carl W. Rimbey, 121 IBLA 218 (Nov. 13, 1991)

BLM properly rejects a desert land entry application where the applicant has failed to submit proof that he has acquired, is seeking to acquire, or is qualified under state law to acquire a right to permanent use of sufficient water to irrigate and reclaim all irrigable portions of the land sought. It is not sufficient that an applicant establish that he is relying on a state water permit application of his deceased father that he

DESERT LAND ENTRY--Continued

WATER RIGHT--Continued

has not actively sought to have transferred to him and which has been denied.

Glen H. Wharton, 125 IBLA 165 (Jan. 28, 1993)

It is proper for BLM to cancel a desert land entry when the entrant had clearly failed to demonstrate that, during the statutory life of the entry, she acquired or was taking the necessary steps to acquire the legal and physical right to sufficient water to reclaim the entered land, thus fulfilling the purpose of the Act of Mar. 3, 1877.

Anna R. Williams, Frances L. Roylance, 126 IBLA 20 (Apr. 8, 1993)

WATER SUPPLY

An irrigation plan that would transfer an existing water license from private farmland which has been subdivided for residential use in order to irrigate a desert land entry does not comply with provision of the Desert Land Entry Act requiring that an entryman provide a permanent and sufficient source of water to the desert entry.

When the Department reviews an irrigation plan pursuant to 43 U.S.C. § 327 (1982), it may consider whether a plan of irrigation is speculative and may reject a plan which is contrary to existing agricultural practices.

M. Kent Hafen, 114 IBLA 239 (May 7, 1990)

BLM properly cancels a desert land entry where the entryman has voluntarily granted an option to acquire the water rights submitted as the source of water for his entry and has presented no evidence of some other permanent source of water for the entry. Cancellation of the entry is appropriate even though the option has

DESERT LAND ENTRY--Continued

WATER SUPPLY--Continued

not been exercised and the events which render the option operative have not occurred.

Harry Gray Browne, Franklyn D. Jeans, Carl W. Rimbey, 121 IBLA 218 (Nov. 13, 1991)

It is proper for BLM to cancel a desert land entry when the entrant had clearly failed to demonstrate that, during the statutory life of the entry, she acquired or was taking the necessary steps to acquire the legal and physical right to sufficient water to reclaim the entered land, thus fulfilling the purpose of the Act of Mar. 3, 1877.

Anna R. Williams, Frances L. Roylance, 126 IBLA 20 (Apr. 8, 1993)

ENDANGERED SPECIES ACT OF 1973

GENERALLY

It is proper for BLM to deny a protest to a proposed timber sale when it has fully considered all of the probably site-specific and cumulative environmental impacts of the sale (including the impact on the Northern spotted owl, a Federally listed threatened species) and concluded that there will be no significant environmental impact not previously considered in an applicable EIS, and the appellant has failed to demonstrate otherwise.

It is proper for BLM to deny a protest to a proposed timber sale based on a contention that the sale was devised in accordance with an overall BLM strategy for the interim protection of the Northern spotted owl (a Federally listed threatened species) generally called the Jamison Strategy, if BLM has fully complied with sec. 7(a)(2) of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536(a)(2) (1988), and there is no evidence that if an alternative strategy had been adopted the effect of the sale upon the owl would be any different.

In re Cedar Pot Thinning Sale et al., 122 IBLA 53 (Jan. 9, 1992)

ENDANGERED SPECIES ACT OF 1973--Continued

GENERALLY--Continued

When all other challenges to a proposed timber sale have been resolved by Federal court action and the record, as supplemented on appeal, establishes that BLM fulfilled all of its reponsibilities to conserve the Northern spotted owl (designated as threatened during the pendency of the appeal) imposed by the Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531-1543 (1988), the Board will affirm BLM's decision to proceed with the sale.

Headwaters, Inc., 122 IBLA 362 (Mar. 20, 1992)

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Denial of an application for a right-of-way on the grounds that the right-of-way would destroy plants of a Category 1 candidate species under the Endangered Species Act and its habitat will be affirmed when the decision is based on a reasoned analysis of the factors involved, made in due regard for the public interest, and no significant reason is shown to disturb the decision. A showing that there is a possible difference of scientific opinion on the issue of whether the candidate species is properly regarded as a subspecies is not sufficient to disturb BLM's decision.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

Where the FWS has already issued a formal consultation document on issuance of geothermal leases near a lake which harbors an endangered species of fish, and the FWS has continued to consult with BLM to help devise mitigating measures for geothermal lease issuance and exploratory drilling, BLM may correctly decline to request a second formal consultation for the geothermal test drilling.

Sierra Club, Inc., et al., 126 IBLA 142 (May 6, 1993)

ENDANGERED SPECIES ACT OF 1973--Continued

GENERALLY--Continued

The ESA directs agencies to "utilize their authorities" to carry out the ESA's objectives but does not expand the powers conferred by the agency's enabling Act.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Although an appellant bears the burden of demonstrating error where BLM has determined that a proposed action is not likely to affect a threatened or endangered species, the record on appeal must support BLM's action, and where BLM concludes that the drilling of a natural gas well will not affect the bald eagle because no active eyries or nests were located during the survey of the area, but the record fails to show that searches for bald eagles were conducted in the winter and early spring when bald eagles are known to inhabit the area, BLM's determination will be set aside and the case remanded.

Where, in response to a challenge to approval of an APD to drill a natural gas well, BLM states that no special status plant species, including threatened and endangered plants, were found during a survey of the proposed project area, such a determination must be supported by the record. When the record on appeal contains no evidence of who conducted the survey, any field report, or any description of the methodology employed in making the determination, that determination will be set aside and the case remanded.

A determination by BLM that approval of an APD to drill a natural gas well will not eliminate a river from eligibility for potential inclusion within the National Wild and Scenic River System, pursuant to sec. 5(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1276(d) (1988), is supported by the record where there is no evidence in the record that drilling the well in

ENDANGERED SPECIES ACT OF 1973--Continued

GENERALLY--Continued

question would adversely affect all the river's outstandingly remarkable values so as to render it ineligible for consideration.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

ENDANGERED SPECIES ACT OF 1973

GENERALLY

The Department and ESC staff undertook substantial and effective procedures to safeguard the integrity of this novel process. The ESC's decision is well supported by the evidentiary record. This litigation will establish important legal principles that will govern all future ESC decisional processes under sec. 7 of the ESA.

Appellate Review of the Decision of the Endangered Species Committee: Portland Audubon Society et al. v. The Endangered Species Committee, No. 92-70436 (9th Cir.), M-36976 (Jan. 14, 1993) 100 I.D. 395

SECTION 7

Generally

The absence of a biological opinion from the Fish and Wildlife Service under authority of sec. 7(a)(2) of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536(a)(2) (1988), does not preclude BLM from denying a permit for a motorcycle race when the denial is based on an environmental assessment showing that the anticipated impacts of the race, including cumulative impacts from holding the race in previous years, are unacceptably detrimental to a threatened species and its habitat.

American Motorcycle Ass'n, District 37, 119 IBLA 196 (May 7, 1991)

ENDANGERED SPECIES ACT OF 1973--Continued

SECTION 7--Continued

Generally--Continued

Where BLM determines that an action will not affect endangered or threatened species or their habitat, the ESA does not require consultation with the U.S. FWS unless requested by that agency. A finding that an action will not jeopardize endangered or threatened specied will not be affirmed unless it is a reasoned conclusion based upon facts of record.

Kendall's Concerned Area Residents, 129 IBLA 130 (Apr. 15, 1994)

Consultation

A decision denying a protest of a timber sale on the ground that BLM need not consult with FWS under sec. 7 of the ESA, 16 U.S.C. § 1536 (1988), when salvaging timber downed by a windstorm may be affirmed where the record fails to demonstrate that harvest plan features may affect the northern spotted owl.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

It is proper for BLM to deny a protest to a proposed timber sale based on a contention that the sale was devised in accordance with an overall BLM strategy for the interim protection of the Northern spotted owl (a Federally listed threatened species) generally called the Jamison Strategy, if BLM has fully complied with sec. 7(a)(2) of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536(a)(2) (1988), and there is no evidence that if an alternative strategy had been adopted the effect of the sale upon the owl would be any different.

In re Cedar Pot Thinning Sale et al., 122 IBLA 53 (Jan. 9, 1992)

ENDANGERED SPECIES ACT OF 1973--Continued

SECTION 7--Continued

Consultation--Continued

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

Where the record discloses that mining activities pursuant to a BLM-approved plan of operations are not likely to affect any threatened or endangered species, no formal consultation with FWS is required under sec. 7 of the ESA, 16 U.S.C. § 1536 (1988).

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency

ENDANGERED SPECIES ACT OF 1973--Continued

SECTION 7--Continued

Consultation--Continued

with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

Mitigation

BLM does not violate sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), by approving APDs before receiving a belated response from the U.S. Fish and Wildlife Service to a request for consultation when it plans to require the lessee to take an action that obviates the need for formal consultation.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991)

In order to have standing to appeal, an appellant must be both a party to the decision appealed and adversely affected by the decision. An organization which has not participated in the process for reviewing an EA is not a party to the case and therefore lacks standing to appeal.

Kendall's Concerned Area Residents, 129 IBLA 130 (Apr. 15, 1994)

ENVIRONMENTAL POLICY ACT
(See also National Environmental Policy Act of 1969)

The National Environmental Policy Act of 1969 requires that every agency study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement applies to the preparation of environmental assessments which serve as

ENVIRONMENTAL POLICY ACT--Continued

a basis for a Finding of No Significant Impact. Under this requirement, all reasonable alternatives must be considered and obvious alternatives may not be ignored. A site which poses sufficiently higher risks to the reliable provision of an essential public service is not a reasonable alternative that must be studied in preparing an environmental assessment for an amendment of a right-of-way for a gas pipeline compressor station.

Robert M. Perry et al., 114 IBLA 252 (May 9, 1990)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concerns have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

An environmental assessment must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are not significant. A finding of no significant impact will not be affirmed on appeal where the record suggests possible impacts on the environment, but the environmental assessment contains no discussion of environmental impacts of either the proposed action or the alternatives.

Rex Kipp, Jr., Justin Kipp, 115 IBLA 1 (May 30, 1990)

ENVIRONMENTAL POLICY ACT--Continued

Under the decision of the Court of Appeals for the Tenth Circuit in Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609 (1987), where an initial exploratory well has been successfully drilled and a lessee files an APD for additional development wells, the filing of the APD normally triggers the requirement for an environmental impact statement, unless an environmental impact statement has already been prepared which analyzes the impacts that can be expected from full-field development.

Michael Gold (On Reconsideration), 115 IBLA 218 (July 12, 1990)

A FONSI will be affirmed if the record supports a conclusion that all relevent areas of environmental concern were identified and carefully reviewed, and that the final determination of no significant impact is reasonable in light of the environmental analysis. A party challenging a FONSI determination must show that it was premised on a clear error of law or demonstrable error of fact, or that analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be established by objective proof. Mere expressions of a difference of opinion provide no basis for reversal.

Coy Brown, 115 IBLA 347 (Aug. 13, 1990)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

A decision to proceed with a timber sale will not be reversed due to an alleged failure to consider cumulative impacts in the sale EA where the EA is tiered to

ENVIRONMENTAL POLICY ACT--Continued

a programmatic EIS which adequately considered the cumulative impacts.

In re Grassy Overlook Timber Sale, 115 IBLA 359 (Aug. 14, 1990)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Uintah Mountain Club et al., 116 IBLA 269 (Oct. 22, 1990)

BLM properly denies a protest to a proposed timber sale where it has, in the course of its entire presale environmental review, fully considered all of the probable environmental impacts, both site-specific and cumulative, of the sale and concluded that no significant environmental impact will result which has not already been considered in an applicable environmental impact statement, and the appellant has failed to demonstrate otherwise.

Where, following a BLM decision denying a protest to a proposed timber sale and an appeal thereof, the U.S. Fish and Wildlife Service lists the northern spotted owl as a threatened species and BLM suspends the sale contracts pending the outcome of consultations with the U.S. Fish and Wildlife Service, the Board will set aside the BLM decision and remand the case to BLM for further review of the effect of the listing.

Oregon Natural Resources Council, 116 IBLA 355 (Nov. 5, 1990)

ENVIRONMENTAL POLICY ACT--Continued

A finding of no significant environmental impact associated with a special recreation use permit for an off-road vehicle tour may be affirmed where the record establishes that BLM took a "hard look" at the environmental impacts of the activity authorized by the permit, considered reasonable alternatives, and applied mitigating measures to avoid significant adverse environmental impacts.

Owen Severance et al., 118 IBLA 381 (Mar. 15, 1991)

The reasonableness of a FONSI will be upheld where the agency (1) has taken a hard look at the environmental consequences of the proposed action; (2) has identified relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project have sufficiently minimized such impact. When this does not occur, a FONSI cannot be upheld.

When a FONSI is based on mitigating measures designed to minimize the impacts, analysis of the proposed mitigating measures and how effective they would be in eliminating adverse environmental impacts is required. A mitigation plan must be sufficiently developed and explained to provide a convincing case that significant environmental impacts will be reduced to insignificance. A FONSI made before a mitigation plan is developed to this extent is premature because there is no basis for its finding, and it will be set aside and remanded.

Nez Perce Tribal Executive Committee et al., 120 IBLA 34 (July 11, 1991)

Issuance of oil and gas leases does not confer such an unfettered right to development of the oil and gas resources as to preclude detailed consideration of a range of alternatives, including the limitation or regulation of the manner and pace of development, when preparing an environmental analysis or EIS regarding development of methane gas from coal deposits underlying a 2,160-square mile area. Approval of applications for permit to drill for exploration and/or development of

ENVIRONMENTAL POLICY ACT--Continued

the gas is subject to regulation to avoid adverse environmental impacts in the interest of conservation of natural resources.

The Board is unable to affirm a finding that no significant impact to the environment will result from a proposal for drilling coalbed methane gas wells in a 2,160-acre study area where the environmental analysis upon which the finding is based fails to give appropriate consideration to obvious alternatives, such as staggering development over time, as required by 42 U.S.C. § 4332(2)(E) (1988), 40 CFR 1508.9(b), and 516 DM 3.4(A).

On appeal from a finding of no significant impact after completion of an environmental analysis of the effects of a proposed action, the issue is whether the record supports a finding that the agency took a "hard look" at the environmental consequences of the proposed action, identified relevant areas of environmental concern, and established that the impacts studied are insignificant, or, with respect to any potentially significant impacts, that mitigating measures incorporated in the proposal have reduced the potential impacts to insignificance.

The degree to which possible effects on the human environment are "highly uncertain or involve unique or unknown risks" is a relevant factor in determining the significance of the impact associated with a proposed action.

Powder River Basin Resource Council, Montana Dept. of Health & Environmental Sciences, Montana Dept. of Natural Resources & Conservation, 120 IBLA 47 (July 12, 1991)

Where appellants protest a timber sale because of BLM's failure to address in an EA the impacts of the sale on the marbled murrelet, a robin-sized bird proposed for listing as threatened, the decision may be affirmed where the record on appeal fails to discluse any impact to the murrelet from the salvage sale of dead and blown-down timber.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

ENVIRONMENTAL POLICY ACT--Continued

A determination that approval of an APD to drill exploratory wells will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

BLM is not required to provide for public review of an environmental assessment of APDs to drill exploratory wells before making a FONSI and deciding to approve the applications when the proposed action is not closely similar to one which normally requires the preparation of an EIS.

BLM does not violate sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), by approving APDs before receiving a belated response from the U.S. Fish and Wildlife Service to a request for consultation when it plans to require the lessee to take an action that obviates the need for formal consultation.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991)

It is proper for BLM to deny a protest to a proposed timber sale when it has fully considered all of the probably site-specific and cumulative environmental impacts of the sale (including the impact on the Northern spotted owl, a Federally listed threatened species) and concluded that there will be no significant environmental impact not previously considered in an applicable EIS, and the appellant has failed to demonstrate otherwise.

In re Cedar Pot Thinning Sale et al., 122 IBLA 53 (Jan. 9, 1992)

ENVIRONMENTAL POLICY ACT--Continued

It is proper for BLM to deny a protest to a proposed timber sale contending that BLM failed to consider the impact of permitted overstory removal, salvage operations, and road building on the Pacific yew and that the proposed timber sale does not conform with applicable State office policy regarding management of the yew when BLM specifically reserved the yew from cutting in the sale contract, and the protestant submits no evidence that the sale may adversely affect the yew or that BLM is not abiding by its stated policy.

In re Grizzly Knob Timber Sale, 122 IBLA 155 (Feb. 4, 1992)

A determination that approval of a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made; all relevant areas of environmental concern have been identified; and the final determination is reasonable in light of the environmental analysis. A party challenging the determination must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Mere differences of opinion provide no basis for reversal. A BLM decision approving a proposal to conduct seismic oil and gas geophysical exploration will be set aside where the EA upon which the decision was based failed to consider the no-action alternative and inadequately analyzed the effects of the proposed activity on wildlife in the project area, and BLM failed to provide a public comment period on the EA.

Southern Utah Wilderness Alliance, 122 IBLA 334 (Mar. 11, 1992)

An EIS need not be prepared if, on the basis of an adequate EA, BLM finds that the proposed action will produce "no significant impact." A FONSI will be affirmed on appeal if the record shows that a careful review of environmental problems has been made, relevant environmental concerns have been identified, and

ENVIRONMENTAL POLICY ACT--Continued

the final determination is reasonable. Appellants bear the burden of proving error; expressing disagreement with BLM's actions is not enough to succeed on appeal. Where the party challenging the FONSI fails to show that it was premised on a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial environmental question of material significance to the action; and where BLM's EA is an extensive analysis of environmental concerns, the issuance of the FONSI will be affirmed.

Power River Basin Resource Council, Wyoming Chapter of the Sierra Club, Wyoming Outdoor Council, 124 IBLA 83 (Sept. 15, 1992)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. A party challenging the determination must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party, and such burden must be met by objective proof. Mere differences of opinion provide no basis for reversal.

The reasonableness of a FONSI will be upheld where the agency (1) has taken a hard look at the environmental consequences of the proposed action; (2) has identified the relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project have sufficiently minimized such impact. When the EA prepared for a proposed action identifies significant environmental impacts and suggests mitigating measures designed to minimize those impacts, but BLM's decision record/FONSI fails to incorporate the identified mitigating measures into the proposed action, BLM's decision will be set aside.

Sierra Club Legal Defense Fund, Inc., Citizen Alert, 124 IBLA 130 (Sept. 30, 1992)

ENVIRONMENTAL POLICY ACT--Continued

When an EA of a proposed mining plan of operations for exploration does not include the analysis of whether potential mining is sufficiently specific to adequately analyze it at the exploration stage and of the details of the exploration process, the mining process, and other allegedly connected activities in the area that is necessary for BLM's decision to withstand judicial review, BLM's decision will be set aside and the matter remanded so the EA may be supplemented.

Concerned Citizens for Responsible Mining et al., 124 IBLA 191 (Oct. 15, 1992)

The mere fact that a proposed action is consistent with an approved Recreation Area Management Plan does not establish that no further environmental analysis is needed prior to implementing the proposal.

A proposal to regravel a 15-mile segment of a road which bisects two WSAs and provides access to an area of critical environmental concern is not subject to a categorical exclusion from the NEPA process as routine maintenance where the evidence establishes that the proposed action is not properly classified as "routine."

Oregon Natural Desert Ass'n, et al., 125 IBLA 52 (Jan. 5, 1993)

The general standard upon NEPA review of a BLM decision based on a FONSI for the proposed action is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. Where the action is further modified by stipulations designed to mitigate responding to the analysis in the EA, the appeal will be reviewed on the whole record including the modifications.

As a general rule, a FONSI for a proposed action may not be predicated solely on monitoring environmental

ENVIRONMENTAL POLICY ACT--Continued

impacts because doubt as to the nature of the impacts ordinarily precludes a rational basis for a FONSI. Where the record discloses an analysis of the impacts of the proposed action and the imposition of stipulations designed to mitigate any potentially significant impacts, use of monitoring to determine the choice of alternate methods of mitigation does not itself compel reversal of a FONSI. However, a FONSI may be set aside and remanded where it appears from the record that the mitigating measures stipulated may be inadequate to mitigate potentially significant impacts.

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

A determination that approval of an APD to drill a natural gas well will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

To determine whether approval of a plan of operations will cause unnecessary or undue degradation to public land, BLM is required to consider, in relation to operations of similar character, the extent of surface disturbance and the effects on resources and land use both within and outside the area of operations. Where an EA does not analyze whether there will be unnecessary or undue degradation, and other documentation does not show that BLM conducted the required review and came to a reasoned conclusion, the record does not support a decision that the plan of operations was adequate to prevent unnecessary and undue degradation of public lands.

Kendall's Concerned Area Residents, 129 IBLA 130 (Apr. 15, 1994)

ENVIRONMENTAL POLICY ACT--Continued

BLM Manual § 1601.09 requires that BLM prepare a RMP to fulfill a congressional requirement for a land-use plan, as set forth in legislation establishing a national conservation area. A RMP is considered a major Federal action signficantly affecting the quality of the human environment and, as such, is properly accompanied by an EIS.

New Mexico Wilderness Coalition, 129 IBLA 158 (Apr. 20, 1994)

Regulations promulgated under NEPA provide an exception when compliance would be inconsistent with other statutory requirements. NEPA does not apply when there is a clear and fundamental conflict of statutory duty. The time required to prepare an EA to review remedial measures to abate acid rock drainage prior to ordering them implemented would be fundamentally at odds with the need to abate damage to the environment and would be inconsistent with the duty to prevent unnecessary or undue degradation in 43 U.S.C. § 1732(b) (1988).

Red Thunder, Inc., 129 IBLA 219 (Apr. 29, 1994)
101 I.D. 52

A supplemental EIS may be required if an agency makes substantial changes in a proposed action that are relevant to environmental concerns. A decision to hold an oil and gas lease sale without preparation of a supplemental EIS is properly affirmed where the basis for appeal is the omission of stipulations from lands delineated on a map in the original EIS, it appears from the EIS that the stipulations were designed to mitigate impacts to certain specific resource values which may or may not be found in the delineated lands, and no showing has been made of the presence of such resources requiring protection within the lease parcels.

Colorado Environmental Coalition, 130 IBLA 61 (July 22, 1994)

ENVIRONMENTAL POLICY ACT--Continued

"Indirect effects." CEQ regulations define "indirect effects" that an agency must consider in its environmental analysis as effects caused by Federal action that are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

In deciding whether to issue an EIS, BLM must consider indirect environmental effects of development of private lands if caused by its action. Where the record shows that such development (construction of housing in a subdivision) will likely occur even if BLM does not take the action in question (granting a right-of-way for an access road across Federal land to the subdivision), it cannot be said that the effects of development were "caused by" the BLM action, and BLM need not consider those effects in an EA or EIS.

James Shaw, S. Eric Krasa, 130 IBLA 105 (Aug. 2, 1994)

A BLM ROD adopting a drilling alternative set out in a FEIS and approving permits to drill coalbed methane wells will not be disturbed by an appeal alleging failure to present an adequate number of alternatives and failure to properly evaluate the impacts on aquifers and groundwater in an EIS when the FEIS addresses a sufficient range of alternatives, adequately discusses the viability of those alternatives, and the anticipated impacts on groundwater and aquifers have been thoroughly evaluated and found to be either inconclusive or rendered acceptable by imposition of mitigating measures.

Western Colorado Congress, San Juan Citizens Alliance, 130 IBLA 244 (Aug. 5, 1994)

Under the doctrine of administrative finality, when a party has had an opportunity to obtain administrative review of a timber sale and the EA on which it is based and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in a later case except upon a showing of compelling legal reasons such as a violation of basic rights of the parties or the need to prevent an injustice. In the case of a modification or addition to a timber sale, reconsideration of the sale is ordinarily

ENVIRONMENTAL POLICY ACT--Continued

barred except to the extent of environmentally significant modifications or changed circumstances occurring between the time of the two sales.

The general standard upon NEPA review of a BLM decision based on a FONSI for the proposed action is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. When, as a consequence of new information, the action is the subject of a BLM biological evaluation and a FWS biological opinion subsequent to the EA, the appeal will be reviewed on the whole record including the reasonable and prudent measures incorporated by way of mitigation.

Oregon Natural Resources Council, 131 IBLA 180 (Nov. 3, 1994)

It is proper for BLM to deny a protest of a proposed timber sale if, in the course of its environmental review, it has fully considered the probable site-specific and cumulative environmental impacts and a reasonable range of alternatives, and has concluded that there will be no significant environmental impact not previously addressed in an applicable EIS.

In re Suce Creek Timber Sale, 131 IBLA 206 (Nov. 9, 1994)

NEPA does not require that BLM examine the environmental impacts of mine development when it approves a plan for exploration of a mineral property. Exploration and development are not connected actions as defined at 40 CFR 1508.25(a)(1). Mine development is not a reasonably foreseeable result of exploration and need not be examined as a cumulative impact of exploration.

Concerned Citizens for Responsible Mining (On Reconsideration), 131 IBLA 257 (Nov. 23, 1994)

ENVIRONMENTAL POLICY ACT--Continued

A party challenging BLM's FONSI bears the burden of proving error, and a mere disagreement with BLM's finding is insufficient. On appeal, an appellant must demonstrate that BLM's FONSI is premised on a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial environmental question of material significance to the action.

Sierra Club, Toiyabe Chapter, 131 IBLA 342 (Dec. 27, 1994)

A determination that a proposed action will not have a significant impact on the environment will be affirmed on appeal where the record establishes that environmental problems have been considered, relevant areas of environmental concern have been identified, and the determination is reasonable.

Bill Armstrong, 131 IBLA 349 (Dec. 28, 1994)

ENVIRONMENTAL QUALITY
(See also Water Pollution Control)

GENERALLY

Pursuant to 43 CFR 3162.3-4(a), an operator shall promptly plug and abandon, in accordance with a plan first approved in writing or prescribed by BLM, each newly completed or recompleted well in which oil or gas is not encountered in paying quantities or which, after being completed as a production well, is demonstrated to the satisfaction of the authorized officer to be no longer capable of producing oil or gas in paying quantities, unless BLM shall approve the use of the well as a service well for injection to recover additional oil or gas or for subsurface disposal of produced water. An order to plug and abandon a well will be affirmed where the record shows that the well has not produced for more than a decade and the operator's plans for a waterflood program have not been implemented despite over 18 months of delay awaiting favorable economic conditions.

ERC Industries, 124 IBLA 331 (Nov. 17, 1992)

ENVIRONMENTAL QUALITY--Continued

GENERALLY--Continued

Regulations promulgated under NEPA provide an exception when compliance would be inconsistent with other statutory requirements. NEPA does not apply when there is a clear and fundamental conflict of statutory duty. The time required to prepare an EA to review remedial measures to abate acid rock drainage prior to ordering them implemented would be fundamentally at odds with the need to abate damage to the environment and would be inconsistent with the duty to prevent unnecessary or undue degradation in 43 U.S.C. § 1732(b) (1988).

Red Thunder, Inc., 129 IBLA 219 (Apr. 29, 1994)
101 I.D. 52

When the record on appeal indicates that certain lands have been generally closed to mineral leasing, subject to BLM reconsideration of the exclusion if it can be shown that leasing would not impact the critical habitat, it is error for BLM to reject an oil and gas lease offer for such lands without first affording the offeror an opportunity to show that leasing subject to a no-surface occupancy stipulation would protect the critical habitat.

George G. Witter, 129 IBLA 359 (June 6, 1994)

ENVIRONMENTAL STATEMENTS

BLM may properly proceed with a proposed timber sale where the environmental assessment adequately considered all relevant matters of environmental concern, including the impact of clearcutting and road-building on moose and elk populations, the hydrologic and vegetative character of the sale area and water quality in local streams, and where the finding that the sale would not significantly affect the human environment was supported by the record and was reasonable.

G. Jon & Katherine M. Roush, 112 IBLA 293 (Jan 9, 1990)

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

The National Environmental Policy Act of 1969 requires that every agency study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement applies to the preparation of environmental assessments which serve as a basis for a Finding of No Significant Impact. Under this requirement, all reasonable alternatives must be considered and obvious alternatives may not be ignored. A site which poses sufficiently higher risks to the reliable provision of an essential public service is not a reasonable alternative that must be studied in preparing an environmental assessment for an amendment of a right-of-way for a gas pipeline compressor station.

Robert M. Perry et al., 114 IBLA 252 (May 9, 1990)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concerns have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

Where, on appeal, the principal objection to issuance of an application for permit to drill a coal-bed methane well is the failure to consider the cumulative impacts of drilling the well in question in conjunction with other proposed coal-bed methane drilling in the same area, the appeal may be dismissed as moot, where the record shows that the well has been drilled and the surface managing agency and BLM have

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

undertaken an environmental analysis designed to assess the cumulative impacts of such proposed drilling.

San Juan Citizens Alliance, Western Colorado Congress, 114 IBLA 366 (May 24, 1990)

An environmental assessment must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are not significant. A finding of no significant impact will not be affirmed on appeal where the record suggests possible impacts on the environment, but the environmental assessment contains no discussion of environmental impacts of either the proposed action or the alternatives

Rex Kipp, Jr., Justin Kipp, 115 IBLA 1 (May 30, 1990)

Compliance with the National Environmental Policy Act of 1969 requires BLM to take a hard look at the issues, identify relevant areas of environmental concern, and, where no EIS is prepared, make a convincing case that the potential environmental impacts are significant. Where a finding of no significant impact is based on mitigating measures designed to minimize the impacts, analysis of the proposed mitigating measures and how effective they would be in eliminating adverse environmental impacts is required.

Idaho Natural Resources Legal Foundation, Inc., et al., 115 IBLA 88 (June 21, 1990)

Under the decision of the Court of Appeals for the Tenth Circuit in Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609 (1987), where an initial exploratory well has been successfully drilled and a lessee files an APD for additional development wells, the filing of the APD normally triggers the requirement for an environmental impact statement, unless an environmental impact statement has already been prepared which analyzes the

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

impacts that can be expected from full-field development.

Michael Gold (On Reconsideration), 115 IBLA 218 (July 12, 1990)

A FONSI will be affirmed if the record supports a conclusion that all relevent areas of environmental concern were identified and carefully reviewed, and that the final determination of no significant impact is reasonable in light of the environmental analysis. A party challenging a FONSI determination must show that it was premised on a clear error of law or demonstrable error of fact, or that analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be established by objective proof. Mere expressions of a difference of opinion provide no basis for reversal.

Coy Brown, 115 IBLA 347 (Aug. 13, 1990)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

A decision to proceed with a timber sale will not be reversed due to an alleged failure to consider cumulative impacts in the sale EA where the EA is tiered to a programmatic EIS which adequately considered the cumulative impacts.

In re Grassy Overlook Timber Sale, 115 IBLA 359 (Aug. 14, 1990)

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Uintah Mountain Club et al., 116 IBLA 269 (Oct. 22, 1990)

BLM properly denies a protest to a proposed timber sale where it has, in the course of its entire presale environmental review, fully considered all of the probable environmental impacts, both site-specific and cumulative, of the sale and concluded that no significant environmental impact will result which has not already been considered in an applicable environmental impact statement, and the appellant has failed to demonstrate otherwise.

Where, following a BLM decision denying a protest to a proposed timber sale and an appeal thereof, the U.S. Fish and Wildlife Service lists the northern spotted owl as a threatened species and BLM suspends the sale contracts pending the outcome of consultations with the U.S. Fish and Wildlife Service, the Board will set aside the BLM decision and remand the case to BLM for further review of the effect of the listing.

Oregon Natural Resources Council, 116 IBLA 355 (Nov. 5, 1990)

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

BLM's FONSI with respect to a proposed expansion of a mining operation will be affirmed if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. The record must establish that the FONSI was based on reasoned decisionmaking. Thus, one challenging such a finding must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal.

Although an EA for a proposed expansion of a mining operation to build a new cyanide heap leaching pad may be "tiered" to an earlier EIS, the earlier document must contain adequate information to address the alternatives. Where the EIS does not address the full extent of cumulative impacts of retention of cyanide in abandoned heaps, and where BLM is actively reviewing this question prior to allowing leaching of ore to begin on the new pad, BLM's decision to allow the permit amendment will be modified to make clear that BLM must consider whether to prepare a supplemental EIS considering cumulative impacts before allowing leaching operations to begin.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)
97 I.D. 263

A finding of no significant environmental impact associated with a special recreation use permit for an off-road vehicle tour may be affirmed where the record establishes that BLM took a "hard look" at the environmental impacts of the activity authorized by the permit, considered reasonable alternatives, and applied mitigating measures to avoid significant adverse environmental impacts.

Owen Severance et al., 118 IBLA 381 (Mar. 15, 1991)

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

The reasonableness of a FONSI will be upheld where the agency (1) has taken a hard look at the environmental consequences of the proposed action; (2) has identified relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project have sufficiently minimized such impact. When this does not occur, a FONSI cannot be upheld.

When a FONSI is based on mitigating measures designed to minimize the impacts, analysis of the proposed mitigating measures and how effective they would be in eliminating adverse environmental impacts is required. A mitigation plan must be sufficiently developed and explained to provide a convincing case that significant environmental impacts will be reduced to insignificance. A FONSI made before a mitigation plan is developed to this extent is premature because there is no basis for its finding, and it will be set aside and remanded.

Nez Perce Tribal Executive Committee et al., 120 IBLA 34 (July 11, 1991)

Issuance of oil and gas leases does not confer such an unfettered right to development of the oil and gas resources as to preclude detailed consideration of a range of alternatives, including the limitation or regulation of the manner and pace of development, when preparing an environmental analysis or EIS regarding development of methane gas from coal deposits underlying a 2,160-square mile area. Approval of applications for permit to drill for exploration and/or development of the gas is subject to regulation to avoid adverse environmental impacts in the interest of conservation of natural resources.

The Board is unable to affirm a finding that no significant impact to the environment will result from a proposal for drilling coalbed methane gas wells in a 2,160-acre study area where the environmental analysis upon which the finding is based fails to give appropriate consideration to obvious alternatives, such as staggering development over time, as required by

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

42 U.S.C. § 4332(2)(E) (1988), 40 CFR 1508.9(b), and 516 DM 3.4(A).

On appeal from a finding of no significant impact after completion of an environmental analysis of the effects of a proposed action, the issue is whether the record supports a finding that the agency took a "hard look" at the environmental consequences of the proposed action, identified relevant areas of environmental concern, and established that the impacts studied are insignificant, or, with respect to any potentially significant impacts, that mitigating measures incorporated in the proposal have reduced the potential impacts to insignificance.

The degree to which possible effects on the human environment are "highly uncertain or involve unique or unknown risks" is a relevant factor in determining the significance of the impact associated with a proposed action.

Powder River Basin Resource Council, Montana Dept. of Health & Environmental Sciences, Montana Dept. of Natural Resources & Conservation, 120 IBLA 47 (July 12, 1991)

BLM is responsible for administering the public lands and it must be accorded the discretion necessary effectively to discharge that duty. Where a BLM decision to rehabilitate the Spanish Ridge Road within the King Range National Conservation Area is based on a consideration of all relevant factors, and is supported by the record, which includes an environmental assessment, it may not be overcome by a mere statement of a difference of opinion regarding the necessity for and effect of such action.

William R. Franklin, Linda Smith Franklin, 121 IBLA 37 (Oct. 16, 1991)

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

Where appellants protest a timber sale because of BLM's failure to address in an EA the impacts of the sale on the marbled murrelet, a robin-sized bird proposed for listing as threatened, the decision may be affirmed where the record on appeal fails to discluse any impact to the murrelet from the salvage sale of dead and blown-down timber.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

A determination that approval of an APD to drill exploratory wells will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

BLM is not required to provide for public review of an environmental assessment of APDs to drill exploratory wells before making a FONSI and deciding to approve the applications when the proposed action is not closely similar to one which normally requires the preparation of an EIS.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991)

It is proper for BLM to deny a protest to a proposed timber sale when it has fully considered all of the probably site-specific and cumulative environmental impacts of the sale (including the impact on the Northern spotted owl, a Federally listed threatened species) and concluded that there will be no significant environmental impact not previously considered in

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

an applicable EIS, and the appellant has failed to demonstrate otherwise.

In re Cedar Pot Thinning Sale et al., 122 IBLA 53 (Jan. 9, 1992)

It is proper for BLM to deny a protest to a proposed timber sale contending that BLM failed to consider the impact of permitted overstory removal, salvage operations, and road building on the Pacific yew and that the proposed timber sale does not conform with applicable State office policy regarding management of the yew when BLM specifically reserved the yew from cutting in the sale contract, and the protestant submits no evidence that the sale may adversely affect the yew or that BLM is not abiding by its stated policy.

In re Grizzly Knob Timber Sale, 122 IBLA 155 (Feb. 4, 1992)

It was proper for BLM to approve a notice of intent to conduct oil and gas geophysical exploration operations utilizing truck-mounted vibrating equipment and seismic wave-receiving stations after considering the environmental impact of the contemplated operations and alternatives thereto (including the no-action alternative), and concluding that no significant impact would result. Under the facts of this case, there was no error in BLM's failure to consider the possible subsequent drilling of a proposed well in the project area in conjunction with geophysical exploration operations.

Southern Utah Wilderness Alliance, Utah Chapter, Sierra Club, 122 IBLA 165 (Feb. 7, 1992)

A determination that approval of a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made; all relevant areas of environmental concern have been identified; and the final determination is reasonable in light of the environmental analysis. A party challenging the determination must show that it was premised on a clear error

of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Mere differences of opinion provide no basis for reversal. A BLM decision approving a proposal to conduct seismic oil and gas geophysical exploration will be set aside where the EA upon which the decision was based failed to consider the no-action alternative and inadequately analyzed the effects of the proposed activity on wildlife in the project area, and BLM failed to provide a public comment period on the EA.

Southern Utah Wilderness Alliance, 122 IBLA 334 (Mar. 11, 1992)

An EA may be tiered to an EIS. The purpose of tiering is to eliminate repetitive discussions of issues and allow focus on the issues ripe for decision. The similarity of environmental issues determines whether tiering is appropriate, not the nature of the decision made based upon the review. When an EA is tiered to an EIS, the question is whether the EIS adequately addresses the environmental effects of the proposed actions or whether, because the analysis is broad and does not address specific impacts, a supplemental statement is required.

When a programmatic EIS is sufficiently detailed, and there is not change in circumstances or departure from the policy in the programmatic EIS, no useful purpose would be served by requiring a site-specific EIS. Major variations between the actions considered in a broad EIS and a site-specific EA may vitiate compliance with NEPA. Conversely, the fact specific actions were anticipated in an EIS or matters addressed in the EIS were later carefully reviewed in regard to undertaking specific actions supports a finding of compliance with NEPA.

Absent an analysis of the possible consequences should proposed range-land improvement projects not be fully successful and lacking an anlysis of the immediate consequences of undertaking the projects, the Board cannot conclude that BLM has identified the relevant areas

of environmental concern and has taken a hard look at the environmental consequences of the projects.

Southern Utah Wilderness Alliance, The Wilderness Society, Utah Chapter Sierra Club, 123 IBLA 302 (June 25, 1992)

An EA of a proposal to exchange public for private land is sufficiently detailed where it considers, generally, the environmental impact of likely development where no plans for development have yet been proposed and such plans, if and when formulated, will be subject to State environmental review.

Where review of the reasonably foreseeable impacts of a proposed exchange of public for private land, including likely development of the land, failed to disclose a potentially significant impact and there was no evidence to the contrary an EIS was not required to be prepared.

In conducting an environmental review of a proposal to exchange public for private land, BLM need not consider the alternative of conveying other land if it is not desired by the private party involved in the exchange and conveyance of such land would not satisfy the purpose of the exchange.

Howard B. Keck, Jr., 124 IBLA 44 (Aug. 26, 1992)

An EIS need not be prepared if, on the basis of an adequate EA, BLM finds that the proposed action will produce "no significant impact." A FONSI will be affirmed on appeal if the record shows that a careful review of environmental problems has been made, relevant environmental concerns have been identified, and the final determination is reasonable. Appellants bear the burden of proving error; expressing disagreement with BLM's actions is not enough to succeed on appeal. Where the party challenging the FONSI fails to show that it was premised on a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial environmental question of material significance to the action; and where BLM's EA is an extensive

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

analysis of environmental concerns, the issuance of the FONSI will be affirmed.

Power River Basin Resource Council, Wyoming Chapter of the Sierra Club, Wyoming Outdoor Council, 124 IBLA 83 (Sept. 15, 1992)

Activity planning implementing an off-highway vehicle project management plan, based upon an environmental assessment sufficient to support an informed judgment, may not be overcome by a mere difference of opinion.

High Desert Multiple-Use Coalition et al., 124 IBLA 125 (Sept. 28, 1992)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. A party challenging the determination must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party, and such burden must be met by objective proof. Mere differences of opinion provide no basis for reversal.

The reasonableness of a FONSI will be upheld where the agency (1) has taken a hard look at the environmental consequences of the proposed action; (2) has identified the relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project have sufficiently minimized such impact. When the EA prepared for a proposed action identifies significant environmental impacts and suggests mitigating measures designed to minimize those impacts, but BLM's decision record/FONSI fails to incorporate the

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

identified mitigating measures into the proposed action, BLM's decision will be set aside.

Sierra Club Legal Defense Fund, Inc., Citizen Alert, 124 IBLA 130 (Sept. 30, 1992)

When an EA of a proposed mining plan of operations for exploration does not include the analysis of whether potential mining is sufficiently specific to adequately analyze it at the exploration stage and of the details of the exploration process, the mining process, and other allegedly connected activities in the area that is necessary for BLM's decision to withstand judicial review, BLM's decision will be set aside and the matter remanded so the EA may be supplemented.

Concerned Citizens for Responsible Mining et al., 124 IBLA 191 (Oct. 15, 1992)

BLM properly approves a plan for the drilling of a series of holes for the purpose of identifying the presence and extent of lead mineralization where it has adequately considered the impact of such drilling and associated activity on the environment, and determined that, given certain mitigation measures, any impact will be insignificant. BLM need not consider the impact of full-scale mining where approval of drilling does not commit BLM to approve further mining.

Missouri Coalition for the Environment et al., 124 IBLA 211 (Oct. 23, 1992)

BLM's decision to approve a mining plan amendment (1) to allow cyanide leaching operations at a gold mine to proceed and (2) to allow leach pads to be abandoned, and its accompanying FONSI will be affirmed where the record (including an extensive report demonstrating that abandonment of leach pads will not result in discharge of harmful levels of cyanide into the environment) reveals no unnecessary or undue degradation of the lands, and BLM's decision is not convincingly challenged on appeal.

The Board will affirm a FONSI with respect to a proposed action if the record establishes that a careful

review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination that the impact is insignificant is reasonable in light of the environmental analysis. When mitigating measures are imposed to reduce impacts of the environmental effects of the proposed action that might otherwise be significant, a FONSI is properly affirmed.

"Cumulative impact" is the impact on the environment that results from the incremental impact of an action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or persons undertake such other actions. An EA examining the cyanide retention qualities of a heap leach operation need not include a discussion of an exploration plan that, during the pendency of the appeal, is withdrawn by the operator.

Red Thunder, Inc., et al., 124 IBLA 267 (Nov. 3, 1992)

The mere fact that a proposed action is consistent with an approved Recreation Area Management Plan does not establish that no further environmental analysis is needed prior to implementing the proposal.

A proposal to regravel a 15-mile segment of a road which bisects two WSAs and provides access to an area of critical environmental concern is not subject to a categorical exclusion from the NEPA process as routine maintenance where the evidence establishes that the proposed action is not properly classified as "routine."

Oregon Natural Desert Ass'n, et al., 125 IBLA 52 (Jan. 5, 1993)

A BLM decision to issue a right-of-way grant for an irrigation ditch and associated structures will be affirmed on appeal when based on a reasoned analysis of all relevant factors, including the threat to the human environment from potential breaches of the ditch and to the rights of downstream water users from the diversion of water, and provided the decision was made with due

regard for the public interest and sufficient reasons for disturbing the decision have not been shown.

Daryl Richardson et al., 125 IBLA 132 (Jan. 15, 1993)

Where the record establishes that oil and gas leasing recommendations contained in an applicable land and RMP adopted by the FS were subject to revision upon site-specific examination and the FS, pursuant to such an examination, consents to leasing lands formerly designated as unavailable or as available for leasing with NSO restrictions, objections to a decision by BLM to issue leases in reliance on the FS recommendations will be rejected where the party objecting fails to show that the FS site-specific analysis was, in any way, flawed.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

The general standard upon NEPA review of a BLM decision based on a FONSI for the proposed action is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. Where the action is further modified by stipulations designed to mitigate responding to the analysis in the EA, the appeal will be reviewed on the whole record including the modifications.

As a general rule, a FONSI for a proposed action may not be predicated solely on monitoring environmental impacts because doubt as to the nature of the impacts ordinarily precludes a rational basis for a FONSI. Where the record discloses an analysis of the impacts of the proposed action and the imposition of stipulations designed to mitigate any potentially significant impacts, use of monitoring to determine the choice of alternate methods of mitigation does not itself compel reversal of a FONSI. However, a FONSI may be set aside and remanded where it appears from the record that the

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

mitigating measures stipulated may be inadequate to mitigate potentially significant impacts.

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

Where BLM has prepared an EA and FONSI specific to a proposal to drill two exploratory geothermal observation/flow test wells and deepen an existing exploratory test well, and its analysis of possible full-field development is limited by the absence of any development proposal, that assessment is sufficient in scope and a site-specific EIS is not necessary.

Where review of the reasonably forseeable impacts of geothermal test drilling failed to disclose a potentially significant impact and there was no evidence to the contrary, an EIS was not required.

Sierra Club, Inc., et al., 126 IBLA 142 (May 6, 1993)

A BLM decision to implement a management plan by closing part of a road on public lands in a recreation area to motor vehicle use in order to promote other recreational activities beyond the closure point will be affirmed where the decision was made after a reasoned analysis of all relevant factors, including the impact of closure on the human environment and alternatives to closure, and where the decision is supported by the record, and there has been no showing of compelling reasons for modification or reversal of the decision.

Larry Griffin, 126 IBLA 304 (June 15, 1993)

A decision approving a right-of-way for an oil and gas pipeline on public lands on the basis of an EA finding no significant impact which is tiered to a programmatic EIS for oil and gas leasing in the area will be affirmed where BLM has considered the cumulative impact of the right-of-way and the foreseeable oil and gas development to be served thereby and the record provides a reasonable basis for the conclusion that

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

there will be no significant impacts other than those addressed in the EIS.

Southern Utah Wilderness Alliance, 127 IBLA 282 (Oct. 7, 1993)

A determination that approval of an application for a permit to drill an exploratory well and the grant of an associated right-of-way will not have a significant impact on the quality of the human environment will be affirmed on appeal where the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a FONSI has the burden of establishing by a preponderance of the evidence that the finding was based on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 127 IBLA 331 (Oct. 19, 1993) 100 I.D. 370

A determination that approval of an APD to drill a natural gas well will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

A BLM decision to implement a RMP will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is supported by the record, including an EA which establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of environmental analysis. A party challenging the BLM decision must show that it was premised on an error of law or fact or that the analysis failed to consider a material environmental question. Unsupported differences of opinion provide no basis for reversal.

Southern Utah Wilderness Alliance et al., 128 IBLA 382 (Mar. 11, 1994)

BLM properly confined review of the environmental consequences of allowing a limited number of coalbed methane gas wells to be drilled on tribal lands within an Indian reservation to the impact of such activity where there was no evidence that approval of the project would necessarily lead to additional drilling throughout a larger oil and gas field.

BLM was not required by sec. 102(2)(C) of NEPA, as amended, 42 U.S.C. § 4332(2)(C) (1988), to prepare an EIS assessing the impact of drilling coalbed methane gas wells and related activity on tribal lands within an Indian reservation when it had taken a hard look at the environmental consequences of such activity, taking into account all relevant matters of environmental concern, and made a convincing case either that no significant impact would result or that any potentially significant impact would be reduced to insignificance by mitigating measures.

San Juan Citizens Alliance et al., 129 IBLA 1 (Mar. 14, 1994)

A BLM decision to reject a right-of-way application calling for removal of vegetation and shaping the banks of a stream because the contemplated activity would conflict with BLM's riparian management policy will be affirmed when the record supports a finding that the

decision was based upon a reasoned analysis of all relevant factors and made with due regard for the public interest.

Thomas L. Watson et al., 129 IBLA 18 (Mar. 15, 1994)

BLM prepares an EA to evaluate both whether approval of a plan of operations would constitute a major Federal action significantly affecting the quality of the human environment and whether mitigation measures and reclamation procedures are adequate to prevent unnecessary and undue degradation of the public lands and their resources. A finding that a plan of operations would not cause unnecessary or undue degradation of public lands does not preclude the possibility that it would cause significant environmental effects requiring preparation of an EIS.

Where BLM finds, based on an EA prepared by a state agency, that approval of a plan of operations will not cause significant impact to the quality of the human environment, the record must show that BLM critically reviewed the EA in relation to the plan of operations, took a hard look at the relevant areas of environmental concern, considered mitigation measures, and independently reached a reasoned conclusion that significant impact will not occur. Absent documentation of BLM's independent review and FONSI, the Board cannot conclude that BLM has complied with NEPA.

Kendall's Concerned Area Residents, 129 IBLA 130 (Apr. 15, 1994)

BLM Manual § 1601.09 requires that BLM prepare a RMP to fulfill a congressional requirement for a land-use plan, as set forth in legislation establishing a national conservation area. A RMP is considered a major Federal action signficantly affecting the quality of the human environment and, as such, is properly accompanied by an EIS.

New Mexico Wilderness Coalition, 129 IBLA 158 (Apr. 20, 1994)

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

Challenges to the approval or amendment of a RMP and its related EIS are accorded administrative review only in conformity with the protest procedures prescribed by 43 CFR Part 1600. Such challenges are properly distinguished from an appeal challenging implementing actions undertaken without preparation of a supplemental EIS which may be appealed to the Board of Land Appeals.

A supplemental EIS may be required if an agency makes substantial changes in a proposed action that are relevant to environmental concerns. A decision to hold an oil and gas lease sale without preparation of a supplemental EIS is properly affirmed where the basis for appeal is the omission of stipulations from lands delineated on a map in the original EIS, it appears from the EIS that the stipulations were designed to mitigate impacts to certain specific resource values which may or may not be found in the delineated lands, and no showing has been made of the presence of such resources requiring protection within the lease parcels.

Colorado Environmental Coalition, 130 IBLA 61 (July 22, 1994)

"Indirect effects." CEQ regulations define "indirect effects" that an agency must consider in its environmental analysis as effects caused by Federal action that are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

In deciding whether to issue an EIS, BLM must consider indirect environmental effects of development of private lands if caused by its action. Where the record shows that such development (construction of housing in a subdivision) will likely occur even if BLM does not take the action in question (granting a right-of-way for an access road across Federal land to the subdivision), it cannot be said that the effects of development were "caused by" the BLM action, and BLM need not consider those effects in an EA or EIS.

James Shaw, S. Eric Krasa, 130 IBLA 105 (Aug. 2, 1994)

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

A BLM ROD adopting a drilling alternative set out in a FEIS and approving permits to drill coalbed methane wells will not be disturbed by an appeal alleging failure to present an adequate number of alternatives and failure to properly evaluate the impacts on aquifers and groundwater in an EIS when the FEIS addresses a sufficient range of alternatives, adequately discusses the viability of those alternatives, and the anticipated impacts on groundwater and aquifers have been thoroughly evaluated and found to be either inconclusive or rendered acceptable by imposition of mitigating measures.

Western Colorado Congress, San Juan Citizens Alliance, 130 IBLA 244 (Aug. 5, 1994)

The Board will affirm a FONSI for proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination that the impact is significant is reasonable in light of the environmental analysis.

When making its determination that proposed mining activity would not impair the suitability of the area for preservation as wilderness, BLM was required to make subjective judgment decisions. Those decisions are entitled to considerable deference, even though reasonable men might differ in making such assessments. When BLM's subjective decisions are challenged on appeal there must be a showing of clear error of law or demonstrable error of fact.

Committee for Idaho's High Desert, 130 IBLA 327 (Sept. 12, 1994)

Under the doctrine of administrative finality, when a party has had an opportunity to obtain administrative review of a timber sale and the EA on which it is based and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in a later case except upon a showing of compelling legal reasons such as a violation of basic rights of the parties or the need to prevent an injustice. In the case of a modification or addition to a timber sale, reconsideration of the sale is ordinarily

barred except to the extent of environmentally significant modifications or changed circumstances occurring between the time of the two sales.

The general standard upon NEPA review of a BLM decision based on a FONSI for the proposed action is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. When, as a consequence of new information, the action is the subject of a BLM biological evaluation and a FWS biological opinion subsequent to the EA, the appeal will be reviewed on the whole record including the reasonable and prudent measures incorporated by way of mitigation.

Oregon Natural Resources Council, 131 IBLA 180 (Nov. 3, 1994)

It is proper for BLM to deny a protest of a proposed timber sale if, in the course of its environmental review, it has fully considered the probable site-specific and cumulative environmental impacts and a reasonable range of alternatives, and has concluded that there will be no significant environmental impact not previously addressed in an applicable EIS.

In re Suce Creek Timber Sale, 131 IBLA 206 (Nov. 9, 1994)

An EIS need not be prepared if BLM finds, based on an adequate EA, that a proposed action will produce no significant impact. The Board will affirm a FONSI if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination that the impact is insignificant is reasonable in light of the environmental analysis.

A party challenging a FONSI finding must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question

of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Steamboaters, Oregon Rivers Council & Oregon Trout, Inc., Douglas County (Intervenor), 131 IBLA 223 (Nov. 17, 1994)

NEPA does not require that BLM examine the environmental impacts of mine development when it approves a plan for exploration of a mineral property. Exploration and development are not connected actions as defined at 40 CFR 1508.25(a)(1). Mine development is not a reasonably foreseeable result of exploration and need not be examined as a cumulative impact of exploration.

Concerned Citizens for Responsible Mining (On Reconsideration), 131 IBLA 257 (Nov. 23, 1994)

A party challenging BLM's FONSI bears the burden of proving error, and a mere disagreement with BLM's finding is insufficient. On appeal, an appellant must demonstrate that BLM's FONSI is premised on a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial environmental question of material significance to the action.

Sierra Club, Toiyabe Chapter, 131 IBLA 342 (Dec. 27, 1994)

A determination that a proposed action will not have a significant impact on the environment will be affirmed on appeal where the record establishes that environmental problems have been considered, relevant areas of environmental concern have been identified, and the determination is reasonable.

Bill Armstrong, 131 IBLA 349 (Dec. 28, 1994)

ENVIRONMENTAL QUALITY--Continued

HERBICIDES

An appeal from a BLM decision approving the use of herbicides as a means to control undesirable vegetation on public lands (based on a programmatic environmental impact statement) is properly dismissed where BLM has reserved the decision of whether and where to authorize actual herbicide spraying until after preparation of site-specific environmental assessments or environmental impact statements.

Salmon River Concerned Citizens et al., Lois Hollingsworth, 114 IBLA 344 (May 22, 1990)

EQUAL ACCESS TO JUSTICE ACT

GENERALLY

Attorney fees incurred for review of the contracting officer's final decision before filing appellants' notice of appeal were not "routine claims processing," as alleged by the Government, but were reasonable and related to the adversary adjudication.

Under the EAJA, an eligible applicant that has prevailed before the Board in an appeal in which the Government's position clearly was not substantially justified, is entitled to attorney fees and other expenses based upon a constructive attorney charge of $75 per hour. The Department of the Interior has not issued regulations determining that any special factors justify higher fees, and the Board is without authority to decided otherwise.

In an EAJA application, expenses for law clerk and paralegal time are allowable only at actual salary cost, not at the rate billed by the firm.

Application for Attorney Fees of Gracon Corp., IBCA-2582-F (Feb. 22, 1990)

EQUAL ACCESS TO JUSTICE ACT--Continued

ADVERSARY ADJUDICATION

Attorney fees incurred for review of the contracting officer's final decision before filing appellants' notice of appeal were not "routine claims processing," as alleged by the Government, but were reasonable and related to the adversary adjudication.

Application for Attorney Fees of Gracon Corp., IBCA-2582-F (Feb. 22, 1990)

Cancellation of overriding royalty interests in an oil and gas lease and the requirement to repay overriding royalties does not constitute an adversary adjudication under sec. 203(a)(1) of the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 (Supp. IV 1986), thus entitling the prevailing party on appeal to recover attorney fees and expenses.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)
97 I.D. 137

An application for attorney fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (West Supp. 1989), for services rendered in obtaining BLM approval of an allotment under the General Allotment Act of 1887, 25 U.S.C. § 334 (1982), is properly denied when no adversary adjudication has occurred or when the Office of Hearings and Appeals has not conducted an adjudication.

Ann Marie Sayers, 115 IBLA 40 (June 8, 1990)

Two applications for attorney's fees and expenses filed with the Board under the Equal Access to Justice Act, 5 U.S.C. § 504 (West Supp. 1990), one for services rendered in connection with an appeal of a BLM decision which was dismissed by the Board as premature, and the other in connection with a BLM decision which was withdrawn by BLM, are both properly denied because no adversary adjudication has occurred and the Office of Hearing and Appeals has not conducted an adjudication.

Rife Oil Properties, Inc., 116 IBLA 18 (Aug. 24, 1990)

EQUAL ACCESS TO JUSTICE ACT--Continued

ADVERSARY ADJUDICATION--Continued

Under the EAJA, 5 U.S.C. § 504 (1988), and 43 CFR 4.603, an adversary adjudication is one required by statute to be determined on the record after an opportunity for an agency hearing in accordance with 5 U.S.C. § 554 (1988). Where the Board of Land Appeals orders a hearing in an omitted lands survey case, in accordance with 43 CFR 4.415, such a proceeding is not an adversary adjudication within the meaning of the EAJA and 43 CFR 4.603.

Herbert J. Hansen, 119 IBLA 29 (Mar. 21, 1991)

APPLICATION

The Department's regulations implementing the EAJA provide a two-tier adjudicatory procedure in which an application for an award of fees and expenses is filed with the adjudicative officer who presided at the adversary adjudication, and the decision of that officer on the application is then appealable to the appropriate appeals board. When an application is filed in the first instance with the Board of Land Appeals, it will ordinarily be transferred to the appropriate adjudicative officer; however, where, as a matter of law, the application must be denied, the Board may adjudicate the application, since transfer of the application would serve no useful purpose.

Herbert J. Hansen, 119 IBLA 29 (Mar. 21, 1991)

AWARDS

Under the EAJA, an eligible applicant that has prevailed before the Board in an appeal in which the Government's position clearly was not substantially justified, is entitled to attorney fees and other expenses based upon a constructive attorney charge of $75 per hour. The Department of the Interior has not issued regulations determining that any special factors justify higher fees, and the Board is without authority to decided otherwise.

EQUAL ACCESS TO JUSTICE ACT--Continued

AWARDS--Continued

In an EAJA application, certain attorney billings were found to be excessive, redundant, and otherwise unnecessary, and thus unallowable under 5 U.S.C. § 504. In such circumstances, the Board was justified in employing the jury verdict approach to determine the amount of allowable attorney fees.

In an EAJA application, expenses for law clerk and paralegal time are allowable only at actual salary cost, not at the rate billed by the firm.

Application for Attorney Fees of Gracon Corp., IBCA-2582-F (Feb. 22, 1990)

CONTRACT DISPUTES ACT OF 1978

Allowable Expenses

Under the EAJA, a pro se applicant may recover "expenses," which is defined by the Federal Circuit to include "those reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of the specific case before the court, which expenses are customarily charged to the client where the case is filed." Oliveira v. United States, 827 F.2d 735, 744 (Fed. Cir. 1987).

A contractor was allowed to recover attorney fees and expenses for out-of-state counsel under an EAJA application, despite the Government's position that the fees be disallowed as the contractor could have retained an attorney located closer to its place of business. The Board rejected the Government's argument, concluding that it would impair a party's right to competent counsel of its choice.

When attorney fees were actually billed at the statutory maximum rate of $75 per hour in accordance with the EAJA, the Board made no distinction between the hourly rate charged for partner or associate time. Otherwise, associate attorney time was allowed at the lower rate billed the applicant.

Attorney fees and expenses incurred by an applicant as a result of a change in law firms were found to be reasonable under an EAJA application, when the evidence showed that the legal services provided by the second

EQUAL ACCESS TO JUSTICE ACT--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Allowable Expenses--Continued

firm were not duplicative of the first and were in connection with the underlying adjudication.

Application of White Buffalo Construction, Inc., for Fees & Expenses Under EAJA, IBCA-2918-F, -2919-F (Aug. 2, 1991)

In the exercise of the Board's discretion in determining the amount of an EAJA award, the degree of success obtained by a litigant is a critical factor. Tribunals have used various approaches when a litigant is not fully successful. Although not required, and not always appropriate, apportionment methods can be applied. One acceptable method is based upon the amount of time expended on the issue or issues upon which the litigant prevailed. Another, when warranted, is based upon the degree of recovery compared to the total recovery sought. The Board found the 10-percent-based award for preremand efforts advocated by the applicant to be reasonable based upon both methods. Regarding remand efforts, although the applicant eschewed the apportionment approach, it had prevailed on only one of its two contentions. The Board found the record insufficient to make a comparative analysis of the time expended on remand and based the remand-related part of its EAJA award upon the applicant's 56-percent relative recovery.

The Board noted that a successful EAJA applicant is entitled to fees and expenses incurred in prosecuting its application and, once the Government fails to prove its position substantially justified on the underlying merits, there is no additional substantial justification defense to the EAJA application.

In reaching the amount of its EAJA award, the Board noted that the applicant had modified its application either to eliminate, to allocate correctly, or to support as proper, amounts contested by BOR. In the context of its proportionate recovery approach, the Board found the applicant's records to be sufficiently detailed. The applicant did not seek attorney fees in excess of EAJA's basic $75-per-hour rate, although its

EQUAL ACCESS TO JUSTICE ACT--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Allowable Expenses--Continued

actual rates were higher, and its claimed paralegal rates also were less than its normal billing rates. BOR did not object to claimed paralegal or law clerk rates. In allowing them, the Board found that the paralegal and law clerk expenses were reasonable and approximated the law firm's costs. On the applicant's claim for fees in connection with its EAJA application, the Board allowed fees supported by time sheets and disallowed those based upon counsel's unsupported estimate.

Application of White & McNeil Excavating, Inc., for Fees & Expenses under EAJA, IBCA-3108-F (Sept. 23, 1993)
100 I.D. 321

Application and Jurisdiction

Absent a motion for reconsideration or an appeal to the Federal Circuit, under the EAJA an applicant has 150 days from receipt of the Board's decision or order dismissing the appeal to file a request for attorney fees and expenses.

An EAJA application for attorney fees and expenses arising out of a CDA adjudication is not governed by the procedural requirements of 43 CFR Part 4.6 of the Departmental regulations, which apply to certain "adversary adjudications conducted by the Secretary under 5 U.S.C. § 554" (Administrative Procedures Act). CDA appeals are not pursuant to the Administration Procedures Act, nor conducted by the Secretary. Thus, a contractor's EAJA application was found to meet all EAJA eligibility requirements, although it did not satisfy the more stringent rules set forth in the Part 4.6 regulations.

Application of White Buffalo Construction, Inc., for Fees & Expenses Under EAJA, IBCA-2918-F, -2919-F (Aug. 2, 1991)

EQUAL ACCESS TO JUSTICE ACT--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Prevailing Party

In finding the applicant to be a prevailing party under EAJA, the Board noted that, under appropriate circumstances, a litigant may be a prevailing party for EAJA purposes even if it recovers as little as 10 percent of the total amount claimed, as with the applicant's appeal. BOR had alleged that the contractor was not a prevailing party because the issue upon which the contractor ultimately prevailed on remand--whether there had been any deduction from payment quantities on account of a defective riprap specification--had been raised by the Board. The Board found, however, that the contractor's success arose out of, and was linked to, its overall claims and documentation that the defective specification had caused it monetary damage.

Application of White & McNeil Excavating, Inc., for Fees & Expenses under EAJA, IBCA-3108-F (Sept. 23, 1993)
100 I.D. 321

Substantially Justified

The position of the Government in denying a claim for excess costs incurred during construction of an aqueduct is not substantially justified where the Government has wrongfully rejected the contractor's hoist gate gear motors based on faulty tests and erroneous application of an industry practice which should have shown that the contractor's gear motors met the technical requirements of the contract.

Application for Attorney Fees of Gracon Corp., IBCA-2582-F (Feb. 22, 1990)

A construction contractor's application under the EAJA for an award of attorney fees and expenses was granted, because the Government's position in the underlying adjudication lacked substantial justification. Under the EAJA, "substantial justification" means more than merely the existence of a colorable legal basis for the Government's case. The Government must show its

EQUAL ACCESS TO JUSTICE ACT--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Substantially Justified--Continued

position to be "clearly reasonable," which it failed to do.

Application of White Buffalo Construction, Inc., for Fees & Expenses Under EAJA, IBCA-2918-F, -2919-F (Aug. 2, 1991)

The Government does not carry its burden to show substantial justification such as would bar recovery under the EAJA by merely reciting the great size of the quantum request; the great size of the quantum request may well counsel a vigorous litigatory defense by the Government, but it does not substitute for a showing that the position taken in that litigation was substantially justified. Similarly, the disparity between the amount requested and the decision's quantum amount does not substitute for a showing of substantial justification, especially where the great bulk of the difference is attributable to the contractor's failure to prevail on a legitimate issue which took a relatively small part of the entire litigatory effort in the case.

Application of Harvey C. Jones, Inc., for Fees & Expenses Under EAJA, IBCA-2758-F (June 2, 1992)
99 I.D. 73

In concluding that BOR had failed to establish a substantial justification defense under EAJA, the Board noted that BOR bore the burden of proof. Whether its position was substantially justified was to be determined based upon the administrative record as a whole. BOR had to prove substantial justification in the context of the litigation and its administrative actions. It failed to make the necessary proof that its position was justified to a degree that could satisfy a reasonable person, that is, justified in law and in fact.

Application of White & McNeil Excavating, Inc., for Fees & Expenses under EAJA, IBCA-3108-F (Sept. 23, 1993)
100 I.D. 321

EQUITABLE ADJUDICATION

GENERALLY

When a U.S. Court of Appeals has held that a claimant is entitled to equitable adjudication of his untimely application to purchase a trade and manufacturing site and the NPS has neither submitted any evidence contradicting the facts underpinning that holding nor demonstrated that the claimant's failure to timely comply with the law indicated bad faith, BLM properly considers the purchase application on the merits under the principles of equitable adjudication.

Although sec. 1870.33B of the BLM Manual requires BLM to contact the agency that has jurisdiction over the claimed land and request its concurrence in the allowance of an application, the refusal of the holding agency to concur in the allowance of the application does not preclude BLM from approving the application under its equitable adjudication authority.

A party appealing from a BLM decision has the burden of establishing error in the decision under appeal, and conclusory allegations of error, standing alone, do not discharge this burden.

Nat'l Park Service (Stuart G. Ramstad), 125 IBLA 335 (Mar. 29, 1993)

Where unrebutted evidence shows that BLM never advised a trespasser (in writing or orally) that a pending land exchange application would resolve all outstanding trespasses, and where it was clear both from a notice of realty action published in the Federal Register and from the issuance of patent that lands where an agricultural trespass was ongoing were not in fact covered by the exchange, BLM is not estopped from prosecuting either that agricultural trespass or the subsequent construction in trespass of a dam and pond on the same public lands. The trespasser, as the exchange applicant, properly bore the burden of bringing the question of the ownership of the lands covered by the agricultural trespass into the exchange negotiations.

Double J Land & Cattle Co., Peter A. Jaffe, 126 IBLA 101 (Apr. 21, 1993)

ESTOPPEL

An alleged misrepresentation by BLM of a requirement concerning the proper form of remittance for a bid deposit for a competitive oil and gas lease sale is not an appropriate basis for equitable estoppel where the party asserting estoppel could have become aware of the true requirements by reference to Departmental regulations and the notice of competitive lease sale. Furthermore, a claim of estoppel based on appellant's allegation that BLM advised it that a company check would be acceptable for a bid deposit, fails because appellant has not established that BLM made a crucial misstatement in an official decision or otherwise engaged in any "official misconduct."

Gulf States Petroleum, Inc., 113 IBLA 55 (Jan. 31, 1990)

Where a prior final Departmental administrative decision has expressly declined to consider an issue, the doctrine of res judicata or its administrative counterpart, the doctrine of administrative finality, ordinarily will not bar an appellant from raising the issue in a subsequent appeal. Further, the Secretary, acting through the Board, is not estopped by the principles of finality of administrative adjudication from correcting or reversing an erroneous decision by his subordinates or predecessors in interest.

Seldovia Native Ass'n, Inc., 113 IBLA 218 (Feb. 27, 1990)

Reliance on erroneous or incomplete information given by an employee of the Department cannot create any rights not authorized by law.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

One who deals with the Government is presumed to know the applicable laws and regulation, and the United States cannot be bound or estopped by an act of its officers or agents if to estop the Government would undermine the correct enforcement of a particular statute or regulation.

Thomas L. Sawyer, 114 IBLA 135 (Apr. 18, 1990)

ESTOPPEL--Continued

Verbal permission to drill from a BLM employee prior to approval by BLM of an application for permit to drill, even if established in the record, would not provide a defense to the issuance of an incident of noncompliance for drilling without approval, where such verbal permission is contrary to controlling Departmental regulations, knowledge of which is limited to the operator.

Jack J. Grynberg dba Grynberg Petroleum Co., 114 IBLA 225 (Apr. 26, 1990)

A party claiming estoppel must demonstrate that it relied on its adversary's conduct in such a manner as to change his position for the worse.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

In order to estop the Government, the party seeking estoppel must show, at least, that the traditional elements of estoppel are present. Thus, the party seeking estoppel must show that: (1) the party to be estopped knew the facts; (2) he intended that his conduct should be acted on or so acted that the party asserting the estoppel had a right to believe it was so intended; (3) the latter was ignorant of the true facts; and (4) he relied on the former's conduct to his injury. Additionally, the party seeking estoppel must show that the Government engaged in affirmative misconduct and that the allegedly estopping statements were made in writing by an official at a policymaking level.

Scott W. Bradshaw et al. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 339 (July 3, 1990)

Application of the doctrine of equitable estoppel requires a demonstration of affirmative misrepresentation or affirmative concealment of a material fact by the Government. A statement by a BLM employee that it was his personal opinion that farm tap gas was royalty free, with the express caveat that further advice would be sought from superiors and from counsel before the

ESTOPPEL--Continued

issue was resolved, cannot be the basis for a claim of estoppel.

Norfolk Energy Inc., 115 IBLA 265 (July 25, 1990)

An alleged conflict between Departmental oil and gas regulations and a policy guideline used by MMS to govern royalty administration failed to establish a foundation for a claim of equitable estoppel where no factual or legal conflict was shown to exist between the regulations and the guideline so as to establish the claimed misrepresentation by Federal employees.

Eighty-Eight Oil Co., 115 IBLA 386 (Aug. 16, 1990)

The Board of Land Appeals generally applies the elements of estoppel described in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970); i.e., that estoppel is an extraordinary remedy, especially as it relates to public lands; and that estoppel against the Government must be based upon affirmative misconduct.

As a precondition for invoking the defense of estoppel, the erroneous advice upon which reliance is predicated must be in the form of a crucial misstatement in an official bulletin.

Martin Faley, 116 IBLA 398 (Nov. 14, 1990)

A party claiming estoppel must demonstrate that it relied on its adversary's conduct in such a manner as to change its position for the worse.

Eastern Minerals Internat'l, Inc., 117 IBLA 221 (Dec. 21, 1990)

Silence by Departmental officials cannot support a claim of estoppel against the Department. Where officials of BLM issued a notice of drainage to an operator in 1982, but took no further action to enforce the

ESTOPPEL--Continued

notice until 1985, the Department was not estopped to assess compensatory royalty.

Kerr-McGee Corp., 118 IBLA 119 (Mar. 6, 1991)

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in U.S. v. Georgia-Pacific, 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct. The existence of a crucial misstatement of material fact upon which another party relied to its asserted detriment is a prerequisite to the invocation of estoppel.

United States v. Willie White et al., 118 IBLA 266 (Mar. 12, 1991) 98 I.D. 129

A party claiming reliance upon a misrepresentation by a Department employee must be ignorant of the true facts. When a party successfully bidding at an oil and gas lease sale receives a Receipt and Accounting Advice Statement indicating less than full payment of the monies owing, the bidder cannot claim ignorance of the fact that additional monies are due. BLM properly rejected the lease offer upon the bidder's failure to pay the balance of the bonus bid within 10 working days after the sale.

Partnership One, Inc., 119 IBLA 7 (Mar. 15, 1991)

While situations may arise where the Government can be estopped because a private party, acting in reliance upon Governmental conduct, was prevented from obtaining a right which might have been obtained, the Government can never be estopped where the effect of the estoppel is to grant someone a right which was not available in the first instance.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

ESTOPPEL--Continued

An agency is bound to adhere to criteria previously published by the agency to control future conduct. Where it is alleged that there has been a breach of this duty to be consistent in dealings with affected persons, there must be shown to be previously published criteria or pattern of conduct from which there has been a deviation. Where there is no such showing, there is no foundation for a finding of estoppel on this ground.

The allegation that a mining claimant refrained from opening a collapsed portal on a lode claim in reliance on a conversation with a FS employee was insufficient to establish grounds for estoppel of the Government to contest the validity of the claim where the portal was found.

United States v. American Independence Mines & Minerals, 122 IBLA 177 (Feb. 10, 1992)

When OSM and a coal miner agree that OSM will suspend enforcement of SMCRA while the miner pursues litigation in Federal court to determine whether a Federal coal mining permit is needed, enforcement may proceed when the Federal court litigation is ended.

Gabriel Energy Corp. v. Office of Surface Mining Reclamation & Enforcement, 122 IBLA 316 (Mar. 11, 1992)

The Board will apply the doctrine of estoppel to a situation where certificates of location are filed for recordation with a BLM State Office and that office informs the claimant by letter, which constitutes an official decision, of its refusal to accept them due to a postdated check for the recordation fees, but fails to inform him that the office is not the "proper office of BLM" in which to file the certificates. Where the claimant in reliance thereon refiles the certificates with the same State Office and they are rejected, such failure constitutes the affirmative concealment of a material fact.

Leitmotif Mining Co., Inc., 124 IBLA 344 (Dec. 1, 1992)

ESTOPPEL--Continued

BLM properly requires the holder of a communications site right-of-way to pay rental charges, in addition to those originally estimated at the time of issuance of the right-of-way grant, based upon an appraisal of the fair market rental value of the right-of-way.

Voice Ministries of Farmington, Inc., 124 IBLA 358 (Dec. 4, 1992)

Where unrebutted evidence shows that BLM never advised a trespasser (in writing or orally) that a pending land exchange application would resolve all outstanding trespasses, and where it was clear both from a notice of realty action published in the Federal Register and from the issuance of patent that lands where an agricultural trespass was ongoing were not in fact covered by the exchange, BLM is not estopped from prosecuting either that agricultural trespass or the subsequent construction in trespass of a dam and pond on the same public lands. The trespasser, as the exchange applicant, properly bore the burden of bringing the question of the ownership of the lands covered by the agricultural trespass into the exchange negotiations.

Double J Land & Cattle Co., Peter A. Jaffe, 126 IBLA 101 (Apr. 21, 1993)

One element for invoking estoppel is that the person asserting it must be ignorant of the true facts. Where appellant had constructive knowledge of regulation 30 CFR 701.5 and the conditions under which the Virginia program obtained primacy, which included the requirement to conform to 30 CFR 701.5, and where appellant had actual knowledge that OSM would require reclamation in accordance with applicable program standards, appellant cannot be said to be ignorant of the true facts.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

ESTOPPEL--Continued

In order to estop the Government, the party seeking estoppel must show, at least, that the traditional elements of estoppel are present. Thus, the party seeking estoppel must show that: (1) the party to be estopped knew the facts; (2) he intended that his conduct should be acted on or so acted that the party asserting the estoppel had a right to believe it was so intended; (3) the latter was ignorant of the true facts; and (4) he relied on the former's conduct to his injury.

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

Circumstances may exist where the Government can be estopped because a private party, acting in reliance upon Governmental conduct, was prevented from obtaining a right which might have been otherwise obtained. However, the Government can never be estopped if the effect of invoking estoppel would grant a right which was not available in the first instance.

Edgar Sebastian Roberts, 127 IBLA 217 (Sept. 21, 1993)

The Board will apply the doctrine of estoppel in reversing a 1991 decision of BLM declaring mining claims situated in the Death Valley National Monument abandoned and void for failure to file a notice of intent to hold the claims in 1979, where confusion existed regarding recordation and filing requirements under the Mining in the Parks Act and FLPMA and the claimants inquired of BLM in 1979 whether they were required to make additional filings for their claims during 1979, and in response BLM not only provided inaccurate information about the proper place of filing but also concealed a material fact from claimants.

Carl Dresselhaus et al., 128 IBLA 26 (Nov. 16, 1993)

A claim of estoppel against the Government will be rejected in the absence of affirmative misconduct in the nature of an erroneous statement of fact in an official written decision.

While situations may arise where the Government may be estopped because a private party, acting in reliance upon a Governmental representation, was prevented from

ESTOPPEL--Continued

obtaining a right which might have been obtained, the Government cannot be estopped where the effect of the estoppel is to grant someone a right which was not available in the first instance.

James W. Bowling, 129 IBLA 52 (Mar. 25, 1994)

OSM was not estopped to issue a NOV and CO requiring reclamation of highwalls by an OSM inspector's oral statement concerning alternative highwall reclamation made during discussion of permit amendments when no provision for such reclamation was included in the amended permit.

Fremont Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 130 IBLA 41 (July 12, 1994)

Knowledge acquired by an agent in the course of his activities pursuant to the agency is properly imputed to the principal. Similarly, since all persons dealing with the Government are presumed to have knowledge of duly promulgated rules and regulations, both an agent and the principal are properly charged with knowledge of both the terms and applicability of Onshore Oil and Gas Order No. 2.

Conley P. Smith Oil Producers, 131 IBLA 313 (Dec. 13, 1994)

EVIDENCE

GENERALLY

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

James L. Gleave, 112 IBLA 281 (Jan. 5, 1990)

EVIDENCE--Continued

GENERALLY--Continued

The Board has full authority to reverse findings of fact made by an Administrative Law Judge. However, when the resolution of disputed facts is influenced by the Judge's findings of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best position to judge the weight to be given to conflicting testimony.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

A petition for permission to appeal an interlocutory ruling by an Administrative Law Judge that a party is not precluded from introducing evidence on the issue of whether his mining operation caused damage off the permit is properly denied when the governing law has changed and a significant time has elapsed between the finding in a state proceeding that the operation did cause such damage and the issuance of a Federal notice of violation.

Muskingum Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Delbert Lacy (Intervenor), 113 IBLA 352 (Mar. 22, 1990)

Stipulations in a proceeding in which a second party did not appear should not serve as the basis for concluding there was privity between the second party and a party to the previous action (a prerequisite for applying collateral estoppel) because the second party was not a party to the proceeding in which the stipulations were entered.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

EVIDENCE--Continued

GENERALLY--Continued

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Howard G. Willison, 114 IBLA 323 (May 22, 1990)

To show that parties were engaged in a joint venture there must be evidence of (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Madeline Maynard, NOR Mining, & Blackhawk Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 49 (June 12, 1990)

In determining whether a land mass was an island omitted from an original public land survey, the inquiry focuses on the existance and condition of the land at the time of the original survey. Evidence concerning its condition at later times is relevant only to the extent it reflects on the status of the land at the critical time.

Exxon Corp., et al. v. Bureau of Land Management, 118 IBLA 38 (Feb. 21, 1991)

EVIDENCE--Continued

GENERALLY--Continued

Evidence that valuable mineral had been successfully produced from the claims is not sufficient to establish a discovery without additional evidence that material of a similar grade remains on the claims. Without a showing that additional mineral material of a similar quality remains on the claims, the logical conclusion is that the mined material was an isolated showing.

Standing alone, the Government's reason for conducting a mineral examination or initiating a contest is not sufficient to establish error in a finding that a mining claim is not supported by a discovery. Without a showing that evidence was deliberately or inadvertently skewed to support a finding that the claims were invalid, it cannot be said that the mineral examiner's motivation has affected the evidence or the presentation at the hearing, or that the Government's motivation ultimately affected the ALJ's conclusion that the claims were not supported by a valuable mineral deposit.

When presenting evidence to overcome a Government's prima facie case that the claim is not supported by a discovery the claimants are not limited to rebutting the evidence submitted by the mineral examiners, and may present evidence of the location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners.

United States v. Estate of Melvin E. Viles, Mary S. Viles, 126 IBLA 162 (May 10, 1993)

When a royalty payor alleged that a request for a refund under sec. 10 of the OCSLA, 43 U.S.C. § 1339 (1988), was timely filed with the proper MMS office, but failed to corroborate timely receipt by MMS of the request by other evidence, MMS properly found that the agency's datestamp on the refund request proved that it was late.

Chevron U.S.A. Inc., 127 IBLA 96 (July 27, 1993)

EVIDENCE--Continued

GENERALLY--Continued

Where, on appeal from a decision declaring mining claims abandoned and void ab initio on the basis that they were located on school lands, the claimant tenders persuasive evidence in support of its contention that the lands in question were known mineral in character on the date of acceptance of the survey, but there is no evidence in the record regarding the position of the state and/or its successors-in-interest on the issue, we will decline to make a definitive determination on that issue and set aside BLM's decision and refer the case to the Hearings Division.

Butte Lode Mining Co., 131 IBLA 284 (Nov. 30, 1994)

BURDEN OF PROOF

When a hearing is held pursuant to 43 CFR 3563.4(c), affording a sodium preference right lease applicant an opportunity to demonstrate entitlement, the applicant has both the burden of going forward and the ultimate burden of proof of showing that a valuable sodium deposit has been discovered. If there is an appeal from the Administrative Law Judge decision following the hearing, the appealing party has the burden of showing error in the Administrative Law Judge's decision.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

An appellant before the Department bears the burden of proof to show, by a preponderance of the evidence, that a challenged decision is in error.

Galand Haas, 114 IBLA 198 (Apr. 24, 1990)

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan first approved in writing or prescribed by the authorized officer, as required by regulation 43 CFR 3152.3-4(a). Where the record establishes that the Secretary's technical experts have evaluated unapproved plugging and abandonment work performed by an operator

EVIDENCE--Continued

BURDEN OF PROOF--Continued

and have found such work deficient, the Secretary is entitled to rely on their professional opinion, absent a showing of error by a preponderance of the evidence.

Daniel C. Wychgram, 116 IBLA 89 (Sept. 17, 1990)

Where BLM attempts to establish that lands were omitted from an officially filed original survey as a result of gross error or fraud, it may prove by clear and convincing evidence that the original survey was grossly in error. However, it need only demonstrate by a preponderance of the evidence that the omitted land was land in place at the time of the original survey and was similar to the surveyed land at that time.

Lawyers Title Insurance Corp. v. Bureau of Land Management, 117 IBLA 63 (Dec. 3, 1990)

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

Implementation of the Act of Sept. 1, 1937 (Reindeer Industry Act), is committed to the discretion of the Secretary of the Interior, as delegated to BLM. Where, as required by 43 CFR 4310.1, BLM rejects the application for reindeer grazing privileges only after consulting with the Alaska Department of Fish and Game, which also expressly opposes approval, and where the applicant fails to show error in BLM's and ADF&G's findings, BLM's decision is properly affirmed on appeal.

Donald C. Olson, 120 IBLA 166 (July 22, 1991)

EVIDENCE--Continued

BURDEN OF PROOF--Continued

If payment is required for use of the public lands, either with or without prior approval of the Department, a fair market rental value determination must be made pursuant to 43 CFR 2920.

Fair market rental value may be assessed from a flat rate fee schedule established by BLM appraisal staff.

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)

Where the current fair market value of a cabin site has been determined in accordance with accepted appraisal procedures and appellant fails to establish by positive, substantial evidence that the appraisal is in error, adjustment of the annual rental to the current fair market value rental will be affirmed.

Norman P. Steiner, William A. Phillips, M.D., Gloria M. Williams, Robert A. Smith, & Grace E. Fullerton, 9 OHA 108 (Nov. 12, 1991)

Implementation of the Act of Sept. 1, 1937 (the Reindeer Industry Act) is committed to the discretion of the Secretary of the Interior. When BLM rejects an application for a reindeer grazing permit after consulting with the Alaska Dept. of Fish and Game, which opposes approval, and the applicant fails to show error in BLM's findings or an abuse of discretion, BLM's decision is properly affirmed on appeal.

Thomas L. Gray, 121 IBLA 295 (Dec. 3, 1991)

When considering what evidentiary burden should be placed upon BLM in an appeal from a rejection of a prospecting permit application, it is proper to weigh the cost of that burden against the nature of the appellant's interest and the risk that an appellant would be improperly deprived of that interest if the greater burden were not placed on BLM. A prospecting permit applicant holds an expectancy and not an interest in the land and BLM is not required to sustain its workability determinations with the same quantum of evidence needed

EVIDENCE--Continued

BURDEN OF PROOF--Continued

to sustain a discovery determination under the 1872 Mining Law.

Vanderbilt Gold Corp., 126 IBLA 72 (Apr. 19, 1993)

CREDIBILITY OF WITNESSES

An appraiser's interest in a case is a proper subject for cross-examination, however, a claim of bias on the part of an appraiser must be based on personal interest rather than employment.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

HEARSAY

Hearsay evidence is admissible in an administrative proceeding if it is relevant and material, and may constitute "substantial evidence" within the meaning of 5 U.S.C. § 706(2)(E) (1988), if it is reliable and probative. A multifactor analysis is used to assure reliability when hearsay evidence is the sole basis for agency action, and a decision by an Administrative Law Judge is properly reversed if the resolution of a dispositive issue is based solely on hearsay evidence that fails to satisfy the required analysis.

R.C.T. Engineering, Inc. v. Office of Surface Mining Reclamation & Enforcement, 121 IBLA 142 (Oct. 28, 1991)

Hearsay evidence is admissible in an administrative proceeding reviewing issuance by OSM of a CO for exceeding the acreage limitations of a 2-acre permit, if it is relevant and material, and may constitute "substantial evidence" within the meaning of 5 U.S.C. § 706(2)(E) (1988), if it is reliable and probative. However, where such evidence is the sole basis for issuance of the CO, a multifactor analysis is used to

EVIDENCE--Continued

HEARSAY--Continued

assure its reliability, and when such evidence fails to withstand such analysis, the CO cannot be sustained.

Ron Deaton/Barwick Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 320 (June 16, 1993)

PAROL

Despite the parol evidence rule, and prior to contract interpretation, extrinsic evidence was admissible to establish that the settlement agreement was, or was not, completely integrated. The Board found appellant's several affidavits and declaration, which BIA did not controvert successfully, persuasive that the agreement was complete and final.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

PREPONDERANCE

An appellant before the Department bears the burden of proof to show, by a preponderance of the evidence, that a challenged decision is in error.

Galand Haas, 114 IBLA 198 (Apr. 24, 1990)

If a lessee contends that a prudent operator would not have drilled a protective well in 1982 because it would not have been profitable, to prevail, the lessee must also prove by a preponderance of evidence that a protective well drilled in 1982 would not then have been profitable.

Kerr-McGee Corp., 118 IBLA 119 (Mar. 6, 1991)

EVIDENCE--Continued

PREPONDERANCE--Continued

In a Government contest of an Alaska Native allotment application, the contestant bears the burden of presenting sufficient evidence to establish a prima facie case of ineligibility and the Native applicant bears the burden of proof by a preponderance of the evidence should a prima facie case be established. While a limited field examination presenting no significant evidence will not support a prima facie case, the applicant's statements, which if unrebutted would contradict the applicant's use of the allotment lands, may constitute a prima facie case.

The ultimate burden of proof in an Alaska Native allotment application is on the applicant to establish compliance with the use and occupancy requirements of the Native Allotment Act. Where the evidence has been reviewed and the allotment approved, an appellant before the Board is to show by a preponderance of the evidence that the challenged decision is in error. Thus, the parties in an appeal from a decision approving a Native allotment application must seek to establish their respective positions at some point by a preponderance of the evidence, which means that there must be a showing that something is more likely than not.

United States v. The Heirs of David F. Berry, 127 IBLA 196 (Sept. 14, 1993)

In a private contest initiated by a state following a BLM decision holding a Native allotment for approval, the state must show by a preponderance of the evidence that the Native allotment application is not valid. A private contest is properly dismissed where a state, as contestant, fails to present a prima facie case that the Native allotment applicant has not used his allotment in conformity with applicable law.

State of Alaska v. William T. Bryant, 129 IBLA 35 (Mar. 21, 1994)

EVIDENCE--Continued

PRESUMPTIONS

There is a presumption that land granted to a state for school purposes was of the character contemplated by the grant, and that title to the land has consequently passed to the state. Where a mining claimant contends that land within a state school grant was mineral in character when surveyed, and was therefore excluded from the grant, the mining claimant bears the burden of proving the land was mineral in character.

George McDevitt, 113 IBLA 287 (Mar. 12, 1990)

The BLM manual requires the issuance of a receipt for affidavit of assessment work. Thus, where BLM date stamps and returns a cover letter which lists the affidavits of assessment submitted for filing without noting thereon or in the case file that any of the documents referred to in the letter were not enclosed, it is presumed that the return of the cover letter was intended to acknowledge receipt of all the documents listed therein.

International Metals & Energy, 114 IBLA 221 (Apr. 25, 1990)

Where an appellant seeks to rebut the presumption of regularity attending the official acts of public officers upon an offer of proof that her Native allotment application was filed, and that procedures operative in the Bureau of Indian Affairs during the mid-to-latter part of 1970 resulted in the absence of her Native allotment application from the file, a fact-finding hearing is warranted.

June I. Degnan (On Reconsideration), 114 IBLA 373 (May 24, 1990)

A contestee overcomes the presumption that his answer to a contest complaint was not filed within 30 days from the date of receipt of the complaint by establishing that 14 days before the end of the 30-day period his answer was received by a DOI employee at the street address at which the answer was to be filed. It is proper to assume that the Department employee signing the return receipt card forwarded the answer to the

EVIDENCE--Continued

PRESUMPTIONS--Continued

addressee identified on the face of the answer, and it is reasonable to expect that it would take less than 14 days to deliver a letter to that addressee.

George M. Reedy et al., 120 IBLA 274 (Aug. 28, 1991)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is rebutted where the mining claimant provides copies of affidavits of assessment work timely filed with BLM for 45 claims, a copy of a document filed with BLM stating that evidence of assessment work for 52 claims was being filed along with $260, and a "Receipt and Accounting Advice" acknowledging receipt of that amount of money, and BLM has not refunded any of that money. Such evidence of assessment work was filed for all 52 claims.

Silver King Mining Co., 122 IBLA 357 (Mar. 19, 1992)

While the legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence that the document was received by them, the presumption is not rebutted by the assertion that the document in question was mailed to the appropriate office and an appellant submits no evidence that it was actually received in that office.

Robert L. Mendenhall et al., 127 IBLA 73 (July 20, 1993)

When the presumption of regularity supporting the official acts of public officers in the discharge of their duties conflicts with the presumption that documents properly mailed are duly delivered, greater weight is accorded to the presumption of regularity. Thus, when Government files do not indicate that a document was received, an appellant must show that it was, in fact, actually received.

Marathon Oil Co., 128 IBLA 168 (Feb. 3, 1994)

EVIDENCE--Continued

PRESUMPTIONS--Continued

For summary judgment there must be no true issue of fact when all factual inferences are drawn in the light most favorable to the opposing party. Therefore, the party seeking permission to file an interlocutory appeal from the denial of a motion for summary dismissal, pursuant to 43 CFR 4.28, must show that there is no true issue of fact and that an immediate appeal from the denial order will materially advance the final decision. The degree to which a FWS Biological Opinion may or may not have foreclosed BLM's obligation and discretionary authority to act in accordance with the Taylor Grazing Act and other applicable laws is an unresolved issue of sufficient magnitude and import to justify denying a motion for summary dismissal.

Edwin O. Larson v. Bureau of Land Management (On Reconsideration), 129 IBLA 250 (May 2, 1994)

A Native allotment application bearing a BLM datestamp of Dec. 27, 1971, and a BIA certification of Dec. 22, 1971, will be regarded as timely filed prior to the Dec. 18, 1971, deadline imposed by sec. 18(a) of ANSCA, 43 U.S.C. § 1617(a) (1988), where the record supports a finding that the application was timely filed with BIA. An affidavit of an individual who states that she assisted the applicant in completing the application on Dec. 31, 1970, and regularly mailed such applications within a few weeks of completion; evidence that applications were not routinely datestamped upon receipt by BIA; and the fact that the application bears a metes and bounds description of the allotment parcel, coupled with the fact that such descriptions were generally prepared by BIA officials, supports a finding that the application was timely filed.

State of Alaska, Dept. of Transportation & Public Facilities, 131 IBLA 121 (Oct. 25, 1994)

There is a presumption that land granted to a state for school purposes was of the character contemplated by the grant, and that title to the land consequently passed to the state. If a mining claimant contends that land within a state school grant was mineral in character when survey was completed, and was therefore excluded from the statutory grant, the mining claimant

EVIDENCE--Continued

PRESUMPTIONS--Continued

bears the burden of proving the land was mineral in character.

Butte Lode Mining Co., 131 IBLA 284 (Nov. 30, 1994)

PRIMA FACIE CASE

When the Government contests a mining claim alleging lack of discovery of a valuable mineral deposit it has the burden of going forward with sufficient evidence to establish a prima facie case. When a Government mineral examiner testifies that he has examined a mining claim and found the quantity and quality of the minerals insufficient to support a finding of discovery, a prima facie case is established.

United States v. Michael R. Ware, 113 IBLA 1 (Jan. 25, 1990)

In a Government contest of an Alaska Native allotment application, the contestant bears the burden of presenting sufficient evidence to establish a prima facie case of ineligibility and the Native applicant bears the burden of proof by a preponderance of the evidence should a prima facie case be established. While a limited field examination presenting no significant evidence will not support a prima facie case, the applicant's statements, which if unrebutted would contradict the applicant's use of the allotment lands, may constitute a prima facie case.

United States v. The Heirs of David F. Berry, 127 IBLA 196 (Sept. 14, 1993)

In a private contest initiated by a state following a BLM decision holding a Native allotment for approval, the state must show by a preponderance of the evidence that the Native allotment application is not valid. A private contest is properly dismissed where a state, as contestant, fails to present a prima facie case that the

EVIDENCE--Continued

PRIMA FACIE CASE--Continued

Native allotment applicant has not used his allotment in conformity with applicable law.

State of Alaska v. William T. Bryant, 129 IBLA 35 (Mar. 21, 1994)

STIPULATIONS

A stipulation is a contract and should be read as a whole in a manner which gives a reasonable meaning to all of its provisions and leaves none of them superfluous. Where a particular interpretation of isolated provisions of a stipulation would negate other provisions, it may be concluded that such an interpretation was not intended by the parties.

Exxon Corp., et al. v. Bureau of Land Management, 118 IBLA 38 (Feb. 21, 1991)

SUFFICIENCY

The Board has full authority to reverse findings of fact made by an Administrative Law Judge. However, when the resolution of disputed facts is influenced by the Judge's findings of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best position to judge the weight to be given to conflicting testimony.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

EVIDENCE--Continued

SUFFICIENCY--Continued

The BLM manual requires the issuance of a receipt for affidavit of assessment work. Thus, where BLM date stamps and returns a cover letter which lists the affidavits of assessment submitted for filing without noting thereon or in the case file that any of the documents referred to in the letter were not enclosed, it is presumed that the return of the cover letter was intended to acknowledge receipt of all the documents listed therein.

International Metals & Energy, 114 IBLA 221 (Apr. 25, 1990)

A Private Maintenance and Care Agreement for a wild horse is properly cancelled and the horse is properly repossessed by the Federal Government where there is sufficient evidence of improper care of the adopted horse to establish that the adopter violated the terms of the agreement by "inhumanely treating" the horse, in that it was allowed to suffer stress and injury owing to action or failure to act that was not compatible with animal husbandry practices accepted in the veterinary community.

Where the record establishes that a wild free-roaming horse that has been placed for adoption was found in a deteriorated condition, the burden of proving that the horse was in satisfactory condition rests with the adopter. This burden is not met by uncorroborated assertions and statements of neighbors as to the general well-being of the horse.

Thana Conk, 114 IBLA 263 (May 9, 1990)

BLM may properly cancel a Private Maintenance and Care Agreement for an adopted wild horse when there is sufficient evidence of improper care of the horse to establish that the adopter violated the terms of the Agreement.

Kathleen Chapman, 115 IBLA 59 (June 12, 1990)

EVIDENCE--Continued

SUFFICIENCY--Continued

Where BLM attempts to establish that lands were omitted from an officially filed original survey as a result of gross error or fraud, it may prove by clear and convincing evidence that the original survey was grossly in error. However, it need only demonstrate by a preponderance of the evidence that the omitted land was land in place at the time of the original survey and was similar to the surveyed land at that time.

Lawyers Title Insurance Corp. v. Bureau of Land Management, 117 IBLA 63 (Dec. 3, 1990)

A decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. When the record is not adequate for the Board to determine whether such a situation exists, it may refer the question for hearing, findings of fact, and conclusions of law.

William J. Thoman v. Bureau of Land Management, Roberts Ranch et al. (Intervenors), 120 IBLA 302 (Sept. 9, 1991)

BLM may properly cancel private maintenance and care agreements for wild horses and repossess the horses when there is sufficient evidence of improper care of the adopted animals to establish that the adopter violated the terms of the agreement.

Vickie L. Fontenot, Allen J. Fontenot, Jr., 120 IBLA 47 (Oct. 22, 1991)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is rebutted where the mining claimant provides copies of affidavits of assessment work timely filed with BLM for 45 claims, a copy of a document filed with BLM stating that evidence of assessment work for 52 claims was being filed along with $260, and a "Receipt and Accounting Advice" acknowledging receipt of that amount of money,

EVIDENCE--Continued

SUFFICIENCY--Continued

and BLM has not refunded any of that money. Such evidence of assessment work was filed for all 52 claims.

Silver King Mining Co., 122 IBLA 357 (Mar. 19, 1992)

BLM may properly cancel private maintenance and care agreements for wild horses and repossess the horses when there is sufficient evidence of improper care of the adopted animals to establish that the adopter violated the terms of the agreement.

Freddie R. Mason, 126 IBLA 28 (Apr. 13, 1993)

Evidence that valuable mineral had been successfully produced from the claims is not sufficient to establish a discovery without additional evidence that material of a similar grade remains on the claims. Without a showing that additional mineral material of a similar quality remains on the claims, the logical conclusion is that the mined material was an isolated showing.

Standing alone, the Government's reason for conducting a mineral examination or initiating a contest is not sufficient to establish error in a finding that a mining claim is not supported by a discovery. Without a showing that evidence was deliberately or inadvertently skewed to support a finding that the claims were invalid, it cannot be said that the mineral examiner's motivation has affected the evidence or the presentation at the hearing, or that the Government's motivation ultimately affected the ALJ's conclusion that the claims were not supported by a valuable mineral deposit.

When presenting evidence to overcome a Government's prima facie case that the claim is not supported by a discovery the claimants are not limited to rebutting the evidence submitted by the mineral examiners, and may present evidence of the location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners.

United States v. Estate of Melvin E. Viles, Mary S. Viles, 126 IBLA 162 (May 10, 1993)

EVIDENCE--Continued

SUFFICIENCY--Continued

A BLM decision notifying the adopter that his wild horses had been repossessed and cancelling his private maintenance and care agreement will be reversed where the record on appeal contains insufficient evidence of improper care or abandonment of the adopted animals or any other failure to comply with the terms of the agreement sufficient to justify such action.

Noel Benoist, 131 IBLA 138 (Oct. 31, 1994)

WEIGHT

When a hearing is held pursuant to 43 CFR 3563.4(c), affording a sodium preference right lease applicant an opportunity to demonstrate entitlement, the applicant has both the burden of going forward and the ultimate burden of proof of showing that a valuable sodium deposit has been discovered. If there is an appeal from the Administrative Law Judge decision following the hearing, the appealing party has the burden of showing error in the Administrative Law Judge's decision.

The Board has full authority to reverse findings of fact made by an Administrative Law Judge. However, when the resolution of disputed facts is influenced by the Judge's findings of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best position to judge the weight to be given to conflicting testimony.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

EVIDENCE--Continued

WEIGHT--Continued

An appraiser's training and experience are properly considered in determining the weight to be given testimony. When an appraisal lacks an analysis showing why a specific value was selected from a range of values, the ALJ who presides at a hearing is in the best position to decide the weight to be accorded the appraiser's testimony.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

EXCHANGES OF LAND
(See also Indians, Private Exchanges, State Exchanges, Wildlife Refuges & Projects)

GENERALLY

Protests against an exchange are properly denied where protestants do not establish that the proposed exchange would be contrary to provisions of FLPMA, 43 U.S.C. § 1716 (1982), applicable regulations, operative land-use management plans, or that the exchange will contravene the public interest.

Where a Federal land exchange results in the diminution of a grazing allotment, provisions of 43 CFR 4110.4-2 require that affected permits be modified to reflect the changed area of use. When such a diminution of a permit takes place, the grazier is entitled to prior notice of 2 years duration, and compensation for any improvements authorized to be placed on the land.

John S. Peck, Owen K. Speirs, Claire T. Speirs, 114 IBLA 393 (May 30, 1990)

BLM properly denies a protest of a proposed exchange of public for private land where the protestant fails to establish that BLM did not properly consider any relevant factor bearing on whether the exchange would be in the public interest.

BLM's appraisal of the value of the land to be involved in an exchange pursuant to sec. 206 to FLPMA,

EXCHANGES OF LAND--Continued

GENERALLY--Continued

as amended, 43 U.S.C. § 1716 (1988), will not be overturned where the protestant fails to submit any evidence of a contrary value or that BLM erred in its appraisal method or results.

Burton A. & Mary H. McGregor et al., 119 IBLA 95 (Apr. 15, 1991)

Lands conveyed to the United States under 16 U.S.C. § 485 (1988), become, upon acceptance of title, a part of the national forest within whose external boundaries they are located. Forest Service documents indicate that authority to accept title to exchanged land has been delegated to the Regional Forester. It is therefore the date the Regional Forester or his authorized designee accepts title which determines when exchanged land is subject to location of mining claims.

Robert N. Shanahan et al., 120 IBLA 187 (July 29, 1991)

The fluctuation in value and addition of lands to equalize values are contemplated by the statutory exchange program by the original Notice of Realty Action published by BLM. Such fluctuations are acceptable provided: (1) they are predicated upon appraisals updated in a manner consistent with the Uniform Appraisal Standards for Federal Land Acquisitions; and (2) the equalizing monetary payment does not exceed 25 percent of the value of the public lands and other interests being conveyed at the time of the exchange.

Under 43 CFR 2201.1(c) the publication of a notice of realty action constitutes the notice to grazing permittees and lessees required by 43 CFR 4110.4-2(b).

A grazing permittee received the regulatory 2-year notice when, subsequent to receipt of an allegedly defective notice, the permittee was served with a copy of the notice of realty action.

City of Santa Fe et al. (On Judicial Remand), 120 IBLA 308 (Sept. 11, 1991)

EXCHANGES OF LAND--Continued

GENERALLY--Continued

BLM has no authority to approve a proposed partial exchange independent of review of the non-Federal lands to be acquired.

Sierra Club, Utah Chapter, 120 IBLA 347 (Sept. 13, 1991)

Protests against an exchange of public land for private land under the authority of sec. 206 of FLPMA are properly dismissed if the protestants do not establish that the proposed exchange would violate the Act, applicable regulations, or contravene the public interest. While an oil and gas lessee may be individually inconvenienced by an exchange that transfers the surface estate out of Federal control, this fact alone, in the absence of a showing that lease rights have been diminished, is insufficient to establish that the exchange is not in the interest of the United States.

Barrett S. Duff, 122 IBLA 244 (Feb. 26, 1992)

BLM's appraisal of the values of land involved in a proposed exchange under sec. 206 of FLPMA, 43 U.S.C. § 1716 (1988), as amended, will not be overturned when an independent appraisal does not establish its methodology or results were in error.

W. J. & Betty Lo Wells, 122 IBLA 250 (Feb. 28, 1992)

Lands conveyed to the U.S. under 16 U.S.C. § 485 (1988), become, upon acceptance of title, a part of the national forest within whose external boundaries they are located. The Office of the General Counsel for the U.S. Dept. of Agriculture has stated that acceptance of title is not final until the final title opinion is issued by that office. It is therefore the date on which the Office of the General Counsel accepts title that determines when exchanged land is subject to location of mining claims.

Robert S. Glenn, DeLoyd Cazier, 124 IBLA 104 (Sept. 17, 1992)

EXCHANGES OF LAND--Continued

GENERALLY--Continued

Where unrebutted evidence shows that BLM never advised a trespasser (in writing or orally) that a pending land exchange application would resolve all outstanding trespasses, and where it was clear both from a notice of realty action published in the Federal Register and from the issuance of patent that lands where an agricultural trespass was ongoing were not in fact covered by the exchange, BLM is not estopped from prosecuting either that agricultural trespass or the subsequent construction in trespass of a dam and pond on the same public lands. The trespasser, as the exchange applicant, properly bore the burden of bringing the question of the ownership of the lands covered by the agricultural trespass into the exchange negotiations.

Double J Land & Cattle Co., Peter A. Jaffe, 126 IBLA 101 (Apr. 21, 1993)

Regulations governing state land exchanges under sec. 8 of the Taylor Grazing Act required publication of notice in local newspapers providing an opportunity to protest the exchange application. Where the record discloses exchanges were not protested and were approved by a final decision, the doctrine of administrative finality precludes review of the propriety of the terms of the conveyances at the behest of a mining claimant who located claims on the lands more than 40 years later.

UOP, 127 IBLA 105 (Aug. 9, 1993)

A protest against an exchange of public for private land made pursuant to sec. 206 of FLPMA was properly denied when it was not established, as alleged, that the exchange would violate the Oregon and California Railroad and Reconveyed Coos Bay Grant Lands Act, statutory and regulatory requirements establishing minimum allowable value for exchange lands, or adversely affect local economies directly concerned with the exchange, or contravene the public interest. An allegation that a timber processor would be competitively disadvantaged by an exchange of a timbered tract to another timber company is found to be sufficient to establish standing to appeal from a denial of a protest against the proposed exchange but insufficient to

EXCHANGES OF LAND--Continued

GENERALLY--Continued

establish that the exchange was not in the interest of the United States.

Swanson-Superior Forest Products, Inc., 127 IBLA 379 (Oct. 27, 1993)

A protest against an exchange of public and private land was properly denied when it was not shown that the proposal was contrary to valuation requirements imposed by FLPMA sec. 206 and applicable regulations, or that it violated operative land-use plans, or that the exchange was contrary to the public interest. The fact that the exchange resolved a trespass did not establish that it was contrary to public policy.

Brent Hansen et al., 128 IBLA 17 (Nov. 4, 1993)

FOREST EXCHANGES

Lands conveyed to the United States under 16 U.S.C. § 485 (1988), become, upon acceptance of title, a part of the national forest within whose external boundaries they are located. Forest Service documents indicate that authority to accept title to exchanged land has been delegated to the Regional Forester. It is therefore the date the Regional Forester or his authorized designee accepts title which determines when exchanged land is subject to location of mining claims.

Robert N. Shanahan et al., 120 IBLA 187 (July 29, 1991)

Lands conveyed to the U.S. under 16 U.S.C. § 485 (1988), become, upon acceptance of title, a part of the national forest within whose external boundaries they are located. The Office of the General Counsel for the U.S. Dept. of Agriculture has stated that acceptance of title is not final until the final title opinion is issued by that office. It is therefore the date on which the Office of the General Counsel accepts title that determines when exchanged land is subject to location of mining claims.

Robert S. Glenn, DeLoyd Cazier, 124 IBLA 104 (Sept. 17, 1992)

FEDERAL EMPLOYEES AND OFFICERS
(See also Administrative Authority, Claims Against the United States, Officers & Employees)

GENERALLY

A rental rate adjustment determination, modified below as a result of errors in the record necessitating such corrective action, will be affirmed on appeal in the absence of evidence by appellant which would warrant any further adjustment in the rental.

In the Matter of the Quarters Rental Rate Appeal of Mr. Cliff Walker, 8 OHA 232 (Oct. 24, 1990)

Rental rate adjustment determinations, modified below to change the effective date for implementation of the adjustments, will be affirmed on appeal where appellants fail to submit evidence which would warrant any further adjustment in the rental rates concerned.

Quarters Rental Rate Appeals of Messrs. Frank S. Alby & Hamilton Greely, 9 OHA 155 (Apr. 29, 1992)

A decision signed by an Acting Area Director of BIA has the same status as a decision signed by the Area Director.

Navajo Precision Built Systems, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 22 IBIA 153 (June 26, 1992)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105

FEDERAL EMPLOYEES AND OFFICERS--Continued

GENERALLY--Continued

(1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

AUTHORITY TO BIND GOVERNMENT

An alleged misrepresentation by BLM of a requirement concerning the proper form of remittance for a bid deposit for a competitive oil and gas lease sale is not an appropriate basis for equitable estoppel where the party asserting estoppel could have become aware of the true requirements by reference to Departmental regulations and the notice of competitive lease sale. Furthermore, a claim of estoppel based on appellant's allegation that BLM advised it that a company check would be acceptable for a bid deposit, fails because appellant has not established that BLM made a crucial misstatement in an official decision or otherwise engaged in any "official misconduct."

Gulf States Petroleum, Inc., 113 IBLA 55 (Jan. 31, 1990)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations, and reliance on allegedly incomplete or inaccurate information provided by Federal employees cannot create any rights not authorized by law.

Magness Petroleum Corp., 113 IBLA 214 (Feb. 23, 1990)

FEDERAL EMPLOYEES AND OFFICERS--Continued

AUTHORITY TO BIND GOVERNMENT--Continued

Reliance on erroneous or incomplete information given by an employee of the Department cannot create any rights not authorized by law.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

Unauthorized acts by an employee of the Bureau of Indian Affairs cannot serve as the basis for conferring rights not authorized by law.

Death Valley Timbi-Sha Shoshone Tribe v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 196 (Mar. 16, 1990)

Verbal permission to drill from a BLM employee prior to approval by BLM of an application for permit to drill, even if established in the record, would not provide a defense to the issuance of an incident of noncompliance for drilling without approval, where such verbal permission is contrary to controlling Departmental regulations, knowledge of which is limited to the operator.

Jack J. Grynberg dba Grynberg Petroleum Co., 114 IBLA 225 (Apr. 26, 1990)

A decision by a BLM officer which does not fall within any of the exceptions enumerated in 43 CFR 4.410 or provided by other duly promulgated regulation is subject to appeal to the Board of Land Appeals and a BLM official is without authority to state otherwise.

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

Application of the doctrine of equitable estoppel requires a demonstration of affirmative misrepresentation or affirmative concealment of a material fact by the Government. A statement by a BLM employee that it was his personal opinion that farm tap gas was royalty free, with the express caveat that further advice would be sought from superiors and from counsel before the

FEDERAL EMPLOYEES AND OFFICERS--Continued

AUTHORITY TO BIND GOVERNMENT--Continued

issue was resolved, cannot be the basis for a claim of estoppel.

Norfolk Energy Inc., 115 IBLA 265 (July 25, 1990)

An alleged conflict between Departmental oil and gas regulations and a policy guideline used by MMS to govern royalty administration failed to establish a foundation for a claim of equitable estoppel where no factual or legal conflict was shown to exist between the regulations and the guideline so as to establish the claimed misrepresentation by Federal employees.

Eighty-Eight Oil Co., 115 IBLA 386 (Aug. 16, 1990)

Silence by Departmental officials cannot support a claim of estoppel against the Department. Where officials of BLM issued a notice of drainage to an operator in 1982, but took no further action to enforce the notice until 1985, the Department was not estopped to assess compensatory royalty.

Kerr-McGee Corp., 118 IBLA 119 (Mar. 6, 1991)

A party claiming reliance upon a misrepresentation by a Department employee must be ignorant of the true facts. When a party successfully bidding at an oil and gas lease sale receives a Receipt and Accounting Advice Statement indicating less than full payment of the monies owing, the bidder cannot claim ignorance of the fact that additional monies are due. BLM properly rejected the lease offer upon the bidder's failure to pay the balance of the bonus bid within 10 working days after the sale.

Partnership One, Inc., 119 IBLA 7 (Mar. 15, 1991)

FEDERAL EMPLOYEES AND OFFICERS--Continued

AUTHORITY TO BIND GOVERNMENT--Continued

Unauthorized acts of a BIA employee cannot serve as the basis for conferring rights not authorized by law.

D. G. & D. Logging Co. v. Billings Area Director, Bureau of Indian Affairs, 20 IBIA 229 (Aug. 29, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976
(See also Hearings, Rights-of-Way)

GENERALLY

Allowing the harvesting of timber on O&C lands does not violate the broad principle of multiple-use management governing BLM's actions under the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. §§ 1701-1784 (1988), where such land is, instead, to be managed for permanent forest production pursuant to the Act of Aug. 28, 1937, as amended, 43 U.S.C. §§ 1181a-1181f (1988).

Oregon Natural Resources Council, 116 IBLA 355 (Nov. 5, 1990)

A right-of-way grant for a water pipeline issued in 1990 pursuant to regulations published at 43 CFR Part 2800, implementing the Federal Land Policy and Management Act of 1976, was made subject to payment of rental under 43 CFR 2803.1-2(a).

Kevin C. Kehoe, 119 IBLA 257 (May 16, 1991)

If payment is required for use of the public lands, either with or without prior approval of the Department, a fair market rental value determination must be made pursuant to 43 CFR 2920.

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

GENERALLY--Continued

Where the current fair market value of a cabin site has been determined in accordance with accepted appraisal procedures and appellant fails to establish by positive, substantial evidence that the appraisal is in error, adjustment of the annual rental to the current fair market value rental will be affirmed.

Norman P. Steiner, William A. Phillips, M.D., Gloria M. Williams, Robert A. Smith, & Grace E. Fullerton, 9 OHA 108 (Nov. 12, 1991)

The O&C Act makes clear that the primary use of O&C lands is for timber production to be managed in conformity with the principle of sustained yield. BLM did not err in construing the O&C Act as establishing timber production as the dominant use, notwithstanding the provisions of FLPMA calling for multiple use.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

Where, under the general authority of the Secretary of the Interior to regulate the use of public lands pursuant to FLPMA, and other acts and Executive Orders, BLM makes a determination to limit off-road vehicle use in a certain area of public lands, one challenging that determination must provide compelling reasons for modification or reversal. Failure to do so will result in the determination being affirmed on appeal when it is supported by the record.

Stan Rachesky, 124 IBLA 67 (Sept. 2, 1992)

The decision to sell mineral materials is discretionary. When BLM considers relevant factors and concludes that removal of boulders from an area classified as Category I desert tortoise habitat would cause adverse impacts on the tortoise habitat which cannot be mitigated, BLM may properly reject an application for sale of the boulders.

Glenn B. Sheldon, 128 IBLA 188 (Feb. 8, 1994)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

GENERALLY--Continued

A $450 service charge paid for filing a mineral patent appliction pursuant to Departmental regulation 43 CFR 3862.1-2 could not be refunded after the claims for which patent was sought were declared abandoned and void under sec. 314 of FLPMA.

William R. Smith, 129 IBLA 384 (June 14, 1994)

ASSESSMENT WORK

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

James L. Gleave, 112 IBLA 281 (Jan. 5, 1990)

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim located on or after Oct. 21, 1976, is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office on or before Dec. 30 of each year following the calendar year of location of the claim. Failure to file one of the instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

James R. Tucker, 116 IBLA 222 (Oct. 4, 1990)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

ASSESSMENT WORK--Continued

Under 43 U.S.C. § 1744 (1988), an owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the claim. An unpatented mining claim is not exempt from the filing requirement when the estate of the owner is in probate.

Estate of Steve Pederson, 118 IBLA 210 (Mar. 7, 1991)

Where, in the absence of an approved plan of operations, a mining claimant cuts live trees in the course of road improvement activities on his mining claims, which are situated within a WSA, the impact of such activities exceeds in manner and degree the activities on the claims on Oct. 21, 1976, or temporarily suspended on that date, and impairs the suitability of the land for preservation as wilderness, BLM properly requires him to immediately rehabilitate the impact of those activities.

Richard C. Behnke, 122 IBLA 131 (Jan. 27, 1992)

CALIFORNIA DESERT CONSERVATION AREA

The California Desert Conservation Area Plan created four multiple-use classes for planning purposes, requiring that subsequent planners use those classes by following guidelines established for each class.

Within an area of critical environmental concern designated by the California Desert Conservation Area Plan, Departmental planners may sanction land use without regard to multiple-use guidelines. Outside the area of critical environmental concern, planners must abide by established multiple-use guidelines.

A decision to close travel routes in an area designated "Multiple-Use Class L" by the California Desert Conservation Area Plan that failed to apply

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

CALIFORNIA DESERT CONSERVATION AREA--Continued

multiple-use guidelines in designating routes is set aside and remanded to permit application of the required class "L" guidelines.

Planning decisions made when the California Desert Conservation Area Plan was approved in 1980 are not subject to review on appeal of the 1989 Afton Canyon Management Plan.

High Desert Multiple-Use Coalition, Inc., California Assn of 4WD Clubs, Inc., California Off-Road Vehicle Assn, Inc., 116 IBLA 47 (Sept. 5, 1990)

When BLM rejects a plan of operations affecting lands in the California Desert Conservation Area because the proposed activity will result in unnecessary or undue degradation of the affected lands, and will result in the undue impairment of the scenic, scientific, and environmental values of those lands, the question on review is whether the decision was reasonable and is supported by the record. If so, absent some showing of error by the appellant, the decision will be affirmed.

Eric L. Price, James C. Thomas, 116 IBLA 210 (Oct. 4, 1990)

BLM properly declines to allow a DLE and returns the DLE application where the lands sought, situated within the California Desert Conservation Area, have been classified in a land-use plan, issued pursuant to secs. 202 and 601 of FLPMA, 43 U.S.C. §§ 1712 and 1781 (1988), so as to preclude agricultural uses. The propriety of the land-use classification set forth in the plan is not subject to review by the Board.

David R. Hinkson, 131 IBLA 251 (Nov. 22, 1994)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

CALIFORNIA DESERT CONSERVATION AREA--Continued

BLM properly refuses to allow a DLE and returns the DLE application where the land sought to be entered, located within the California Desert Conservation Area, has been classified as unavailable for agricultural use in the land-use plan promulgated for the area in accordance with 43 U.S.C. §§ 1712 and 1781 (1988). The Board has no authority to review such a land-use plan or the classifications contained therein.

Max Wilson, 131 IBLA 306 (Dec. 5, 1994)

CONVEYANCES

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)
98 I.D. 398

CONVEYANCES--Continued

When BLM finds that a tract of land has no significant mineral potential, approves conveyance of the Federal Government's mineral interest in the tract pursuant to sec. 209(b)(1) of FLPMA, 43 U.S.C. § 1716(b)(1) (1988), and calls for payment for the Government's mineral estate at its fair market value, the Government's fair market value determination must be supported by the record.

Todd L. Nicholson, 129 IBLA 213 (Apr. 28, 1994)

COORDINATION WITH STATE AND LOCAL GOVERNMENTS

Where BLM finds, based on an EA prepared by a state agency, that approval of a plan of operations will not cause significant impact to the quality of the human environment, the record must show that BLM critically reviewed the EA in relation to the plan of operations, took a hard look at the relevant areas of environmental concern, considered mitigation measures, and independently reached a reasoned conclusion that significant impact will not occur. Absent documentation of BLM's independent review and FONSI, the Board cannot conclude that BLM has complied with NEPA.

Kendall's Concerned Area Residents, 129 IBLA 130 (Apr. 15, 1994)

CORRECTION OF CONVEYANCE DOCUMENTS

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has the authority to correct factual errors in patent documents at any time correction is deemed necessary or appropriate. However, only mistakes of fact may be corrected, not mistakes of law, and where a patent holder applies to have a patent corrected to eliminate an easement, that application was not erroneously included in the patent on the basis of a mistake of fact.

BLM has the authority to initiate and make corrections to a patent on its own motion, if all existing owners agree. Where the State of Alaska has an interest in the patent due to the inclusion of an easement for its benefit and, as such, is a concerned administrative agency, its objection to the reduction

CORRECTION OF CONVEYANCE DOCUMENTS--Continued

of the width of the easement in the patent precludes BLM from changing the patent on its own motion.

Lloyd Schade, State of Alaska, 116 IBLA 203 (Oct. 4, 1990)

To show entitlement under 43 U.S.C. § 1746 (1988), to the extraordinary remedy of correction of a mineral patent, an applicant must show both that there was an error in fact that requires correction and that considerations of equity and justice favor such correction. A purchaser of a tax deed to a mineral patent failed to make a sufficient showing to warrant correction of the patent when the evidence offered to show error in the patent was inconclusive and he failed to show that equity favored granting his application.

Frank L. Lewis, 127 IBLA 307 (Oct. 7, 1993)

EXCHANGES

Protests against an exchange are properly denied where protestants do not establish that the proposed exchange would be contrary to provisions of FLPMA, 43 U.S.C. § 1716 (1982), applicable regulations, operative land-use management plans, or that the exchange will contravene the public interest.

Where a Federal land exchange results in the diminution of a grazing allotment, provisions of 43 CFR 4110.4-2 require that affected permits be modified to reflect the changed area of use. When such a diminution of a permit takes place, the grazier is entitled to prior notice of 2 years duration, and compensation for any improvements authorized to be placed on the land.

John S. Peck, Owen K. Speirs, Claire T. Speirs, 114 IBLA 393 (May 30, 1990)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

EXCHANGES--Continued

BLM properly denies a protest of a proposed exchange of public for private land where the protestant fails to establish that BLM did not properly consider any relevant factor bearing on whether the exchange would be in the public interest.

BLM's appraisal of the value of the land to be involved in an exchange pursuant to sec. 206 to FLPMA, as amended, 43 U.S.C. § 1716 (1988), will not be overturned where the protestant fails to submit any evidence of a contrary value or that BLM erred in its appraisal method or results.

Burton A. & Mary H. McGregor et al., 119 IBLA 95 (Apr. 15, 1991)

The fluctuation in value and addition of lands to equalize values are contemplated by the statutory exchange program by the original Notice of Realty Action published by BLM. Such fluctuations are acceptable provided: (1) they are predicated upon appraisals updated in a manner consistent with the Uniform Appraisal Standards for Federal Land Acquisitions; and (2) the equalizing monetary payment does not exceed 25 percent of the value of the public lands and other interests being conveyed at the time of the exchange.

Under 43 CFR 2201.1(c) the publication of a notice of realty action constitutes the notice to grazing permittees and lessees required by 43 CFR 4110.4-2(b).

A grazing permittee received the regulatory 2-year notice when, subsequent to receipt of an allegedly defective notice, the permittee was served with a copy of the notice of realty action.

City of Santa Fe et al. (On Judicial Remand), 120 IBLA 308 (Sept. 11, 1991)

BLM has no authority to approve a proposed partial exchange independent of review of the non-Federal lands to be acquired.

Sierra Club, Utah Chapter, 120 IBLA 347 (Sept. 13, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

EXCHANGES--Continued

Protests against an exchange of public land for private land under the authority of sec. 206 of FLPMA are properly dismissed if the protestants do not establish that the proposed exchange would violate the Act, applicable regulations, or contravene the public interest. While an oil and gas lessee may be individually inconvenienced by an exchange that transfers the surface estate out of Federal control, this fact alone, in the absence of a showing that lease rights have been diminished, is insufficient to establish that the exchange is not in the interest of the United States.

Barrett S. Duff, 122 IBLA 244 (Feb. 26, 1992)

BLM's appraisal of the values of land involved in a proposed exchange under sec. 206 of FLPMA, 43 U.S.C. § 1716 (1988), as amended, will not be overturned when an independent appraisal does not establish its methodology or results were in error.

W. J. & Betty Lo Wells, 122 IBLA 250 (Feb. 28, 1992)

It is proper for BLM to reject an application to amend an existing F&PP lease to permit substantial expansion of a solid-waste management station for collection of household refuse for transfer to a sanitary landfill because the intended expansion is contrary to existing BLM policy restricting authorization of sites for solid-waste disposal and related purposes to FLPMA sales and exchanges pending implementation of the R&PP Amendment Act of 1988, P.L. 100-648, 102 Stat. 3813.

Clark County, Nevada, 123 IBLA 150 (May 28, 1992)

An EA of a proposal to exchange public for private land is sufficiently detailed where it considers, generally, the environmental impact of likely development where no plans for development have yet been proposed and such plans, if and when formulated, will be subject to State environmental review.

Where review of the reasonably foreseeable impacts of a proposed exchange of public for private land, including likely development of the land, failed to disclose a potentially significant impact and there was no

EXCHANGES--Continued

evidence to the contrary an EIS was not required to be prepared.

In conducting an environmental review of a proposal to exchange public for private land, BLM need not consider the alternative of conveying other land if it is not desired by the private party involved in the exchange and conveyance of such land would not satisfy the purpose of the exchange.

Howard B. Keck, Jr., 124 IBLA 44 (Aug. 26, 1992)

An application to lease land for agricultural purposes to one applicant was properly rejected where another applicant had applied to acquire title to the land by exchange and BLM decided, for the sake of consistency in management of the land, to lease it to the exchange applicant pending completion of the exchange.

Rolling Stone, Inc., 124 IBLA 242 (Nov. 2, 1992)

A protest against an exchange of public for private land made pursuant to sec. 206 of FLPMA was properly denied when it was not established, as alleged, that the exchange would violate the Oregon and California Railroad and Reconveyed Coos Bay Grant Lands Act, statutory and regulatory requirements establishing minimum allowable value for exchange lands, or adversely affect local economies directly concerned with the exchange, or contravene the public interest. An allegation that a timber processor would be competitively disadvantaged by an exchange of a timbered tract to another timber company is found to be sufficient to establish standing to appeal from a denial of a protest against the proposed exchange but insufficient to establish that the exchange was not in the interest of the United States.

Swanson-Superior Forest Products, Inc., 127 IBLA 379 (Oct. 27, 1993)

EXCHANGES--Continued

A protest against an exchange of public and private land was properly denied when it was not shown that the proposal was contrary to valuation requirements imposed by FLPMA sec. 206 and applicable regulations, or that it violated operative land-use plans, or that the exchange was contrary to the public interest. The fact that the exchange resolved a trespass did not establish that it was contrary to public policy.

Brent Hansen et al., 128 IBLA 17 (Nov. 4, 1993)

GRAZING LEASES AND PERMITS

A decision by BLM to grant a sheep grazing application subject to restrictions in order to facilitate multiple-use management objectives by keeping a portion of an allotment off limits to domestic sheep so that it might be available for the introduction of bighorn sheep, will not be disturbed absent substantial evidence showing that the decision is improper.

Joe Saval Co. v. Bureau of Land Management, State of Nevada, Department of Wildlife (Intervenor), 119 IBLA 202 (May 7, 1991)

It is within the authorized officer's discretionary authority to grant "affected interest" status pursuant to 43 CFR 4100.0-5, for purposes of being involved in grazing management pursuant to the applicable regulations in 43 CFR Part 4100, to a person who has used grazing allotment lands for recreation and filed a written request for affected interest status.

Donald K. Majors, 123 IBLA 142 (May 28, 1992)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present

GRAZING LEASES AND PERMITS--Continued

evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

A decision by BLM denying an organization "affected interest status" in grazing matters is properly set aside where BLM did not state therein why it felt the organization did not meet relevant criteria. That failure violated not only the terms of a governing BLM State Office IM, but also the more general requirement, imposed by well-established precedent, that its decision must contain a reasoned and factual explanation providing a basis for understanding and accepting the decision, or alternatively, for appealing and disputing it before this Board.

Southern Utah Wilderness Alliance, 131 IBLA 293 (Nov. 30, 1994)

HEARINGS

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

HEARINGS--Continued

evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

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Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

If the applicable statute does not expressly require a formal evidentiary hearing "on the record" and no contrary Congressional intent is evident, formal proceedings before an ALJ are not mandated. The language of 43 U.S.C. § 1732(c) (1988), allowing for revocation or suspension of a special recreation use permit after "notice and hearing," does not dictate a formal hearing before an ALJ, and a special recreation permittee's hearing rights under 43 U.S.C. § 1732(c) (1988), are satisfied when the permittee is given notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

LAND-USE PLANNING

A BLM decision implementing a resource management plan will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal.

Pursuant to 43 CFR 1610.5-3(a), all resource management authorizations and actions, as well as budget or other action proposals and subsequent more detailed or specific planning, shall conform to the

approved resource management plan. A BLM off-road vehicle designation which does not conform to the applicable, approved resource management plan shall be set aside.

Uintah Mountain Club, 112 IBLA 287 (Jan. 5, 1990)

Congress has limited the exercise of the authority to make, modify, extend, or revoke withdrawals to the Secretary and individuals in the Office of the Secretary, appointed by the President by and with the advice and consent of the Senate, to whom he has delegated his authority. Unless the order making a withdrawal specifies when it terminates, lands remain withdrawn until the Secretary or his properly authorized delegate issues a formal order published in the Federal Register. A resource management plan is properly distinguished from an order revoking a withdrawal.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of clear reasons for modification or reversal. When an appellant has challenged a timber sale located in an area of critical environmental concern on the basis that the sale is allegedly inconsistent with the applicable management plan, but such inconsistency has not been established, the timber sale shall be allowed to occur.

In re Grassy Overlook Timber Sale, 115 IBLA 359 (Aug. 14, 1990)

The California Desert Conservation Area Plan created four multiple-use classes for planning purposes, requiring that subsequent planners use those classes by following guidelines established for each class.

Within an area of critical environmental concern designated by the California Desert Conservation Area

Plan, Departmental planners may sanction land use without regard to multiple-use guidelines. Outside the area of critical environmental concern, planners must abide by established multiple-use guidelines.

A decision to close travel routes in an area designated "Multiple-Use Class L" by the California Desert Conservation Area Plan that failed to apply multiple-use guidelines in designating routes is set aside and remanded to permit application of the required class "L" guidelines.

Planning decisions made when the California Desert Conservation Area Plan was approved in 1980 are not subject to review on appeal of the 1989 Afton Canyon Management Plan.

High Desert Multiple-Use Coalition, Inc., California Assn of 4WD Clubs, Inc., California Off-Road Vehicle Assn, Inc., 116 IBLA 47 (Sept. 5, 1990)

A BLM decision implementing a resource management plan will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal.

Pursuant to 43 CFR 1610.5-2(b) approval or amendment of resource management plans are not appealable to the Board of Land Appeals and an appeal is properly dismissed to the extent that it seeks review of such a plan.

Pursuant to 43 CFR 1610.5-3(a) all resource management authorizations and actions, as well as budget or other action proposals and subsequent more detailed or specific planning, shall conform to the approved resource management plan. A BLM decision to deny a grazing permit application based on incompatibility between the applicable resource management plan and the application shall be affirmed.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LAND-USE PLANNING--Continued

The Copco timber sale is reviewable as a specific action proposed to implement part of the Jackson-Klamath Sustained Yield Units Ten Year Management Plan.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)

A BLM decision to gather wild free-roaming horses from within and outside a wild horse herd management area will be affirmed on appeal when: (1) a conclusion that the dormant season utilization levels have exceeded the utilization levels called for in an approved resource management plan is supported by field-monitoring data; (2) the actual size of the wild horse herd exceeds an appropriate management level identified in approved land-use plans; and (3) it is necessary to remove the "excess" horses to restore and maintain a thriving natural ecological balance to the range and protect it from deterioration associated with overpopulation.

Animal Protection Institute of America, 117 IBLA 208 (Dec. 21, 1990)

A tract of public land may be sold only where, as a result of land-use planning under 43 U.S.C. § 1712 (1988), the Secretary determines that the sale meets one of the criteria of 43 U.S.C. § 1713(a) (1988). When a tract is nominated to be offered for sale under 43 CFR 2710.0-6(b) but the proposed sale does not conform to the existing land-use planning document, the proposed sale must be considered in accordance with either plan amendment or planning analysis procedures.

Joyce & Tony Padilla, 119 IBLA 33 (Mar. 25, 1991)

Activity planning implementing an off-highway vehicle project management plan, based upon an environmental assessment sufficient to support an informed judgment, may not be overcome by a mere difference of opinion.

High Desert Multiple-Use Coalition et al., 124 IBLA 125 (Sept. 28, 1992)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LAND-USE PLANNING--Continued

A BLM decision implementing a final project plan for the development of a recreation site on public land will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons of modification or reversal.

Gerry Zamora, Joe Zamora, 125 IBLA 10 (Dec. 14, 1992)

A BLM decision to implement a RMP by reintroducing pronghorn antelope onto public lands pursuant to a cooperative agreement with the State will be affirmed on appeal if the decision is based on a consideration of all relevant factors, including the threat of damage to adjacent private land resources, and is supported by the record, absent a showing of clear reasons for modification or reversal.

Lands of Sierra, Inc., 125 IBLA 15 (Dec. 17, 1992)

A decision to redraw the boundary of a grazing allotment to inhibit the transmission of disease from cattle to bighorn sheep will be affirmed if the decision rests upon a rational basis, reflects consideration of all relevant factors, is supported by the record, and the appellant fails to show the decision was improper.

Jerry W. Blair, Howard P. Blair v. Bureau of Land Management, 126 IBLA 296 (June 14, 1993)

A BLM decision to implement a management plan by closing part of a road on public lands in a recreation area to motor vehicle use in order to promote other recreational activities beyond the closure point will be affirmed where the decision was made after a reasoned analysis of all relevant factors, including the impact of closure on the human environment and alternatives to closure, and where the decision is supported by the record, and there has been no showing of compelling reasons for modification or reversal of the decision.

Larry Griffin, 126 IBLA 304 (June 15, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LAND-USE PLANNING--Continued

A decision to gather wild horses from a herd management area in order to avert deterioration of the range and to pursue a thriving natural ecological balance in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1988), is properly affirmed where the record demonstrates that the decision is based upon a reasonable analysis of data collected on an ongoing basis.

Audubon Society of Portland et al., 128 IBLA 370 (Mar. 11, 1994)

A BLM decision to implement a RMP will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is supported by the record, including an EA which establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of environmental analysis. A party challenging the BLM decision must show that it was premised on an error of law or fact or that the analysis failed to consider a material environmental question. Unsupported differences of opinion provide no basis for reversal.

Southern Utah Wilderness Alliance et al., 128 IBLA 382 (Mar. 11, 1994)

BLM Manual § 1601.09 requires that BLM prepare a RMP to fulfill a congressional requirement for a land-use plan, as set forth in legislation establishing a national conservation area. A RMP is considered a major Federal action signficantly affecting the quality of the human environment and, as such, is properly accompanied by an EIS.

New Mexico Wilderness Coalition, 129 IBLA 158 (Apr. 20, 1994)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LAND-USE PLANNING--Continued

Under sec. 203(a) of FLPMA, 43 U.S.C. § 1713(a) (1988), in order to be eligible for public sale a tract of public land must be identified for disposal in the applicable land-use planning documents.

A BLM decision denying a request to purchase a tract of public land will be affirmed where disposal of the tract does not conform to the approved management framework plan and the record supports a finding that the request does not warrant further consideration.

Mr. & Mrs. Michael Bosch, Howard C. Bosch, 129 IBLA 373 (June 8, 1994)

A BLM decision to implement a wild and scenic river management plan including a FONSI decision will be affirmed on appeal if the decision is based on a consideration of all relevant factors, including an evaluation of the impacts on fisheries resources, is supported by the record, and accords with statutory directives, absent a showing of clear reasons for modification or reversal.

A party challenging a FONSI finding must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Steamboaters, Oregon Rivers Council & Oregon Trout, Inc., Douglas County (Intervenor), 131 IBLA 223 (Nov. 17, 1994)

BLM properly declines to allow a DLE and returns the DLE application where the lands sought, situated within the California Desert Conservation Area, have been classified in a land-use plan, issued pursuant to secs. 202 and 601 of FLPMA, 43 U.S.C. §§ 1712 and 1781 (1988), so as to preclude agricultural uses. The propriety of the land-use classification set forth in the plan is not subject to review by the Board.

David R. Hinkson, 131 IBLA 251 (Nov. 22, 1994)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LAND-USE PLANNING--Continued

BLM properly refuses to allow a DLE and returns the DLE application where the land sought to be entered, located within the California Desert Conservation Area, has been classified as unavailable for agricultural use in the land-use plan promulgated for the area in accordance with 43 U.S.C. §§ 1712 and 1781 (1988). The Board has no authority to review such a land-use plan or the classifications contained therein.

Max Wilson, 131 IBLA 306 (Dec. 5, 1994)

LEASES

An appraisal of fair market rental value for an agricultural lease site will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charge is excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Phyllis E. Lewis, 113 IBLA 376 (Mar. 28, 1990)

In accordance with 43 U.S.C. § 1732(b) (1982), BLM may regulate the use, occupancy, and development of the public lands by issuing a lease to an individual occupying the land in excess of that authorized under a range improvement permit, rather than selling or exchanging such land, where the land-use plan for the area, pending reevaluation and revision, calls for the land to be retained in Federal ownership.

Steve Medlin, 115 IBLA 92 (June 21, 1990)

An appraisal will be affirmed where no error was shown in the appraisal which used market data to establish annual fair market rental value for an irrigation pond right-of-way where it was not proved that the appraised rental was excessive.

James E. Payne & Evon Payne, 115 IBLA 294 (July 26, 1990)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LEASES--Continued

Sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), authorizes the Secretary to lease public lands for various uses including the development of small trade or manufacturing concerns. 43 CFR 2920.0-6(a) requires that land-use authorizations be issued only at fair market value. An appraisal of fair market value for a commercial-use lease will not be set aside on appeal if appellant fails to show error in the appraisal method used or fails to show by convincing evidence that the charge is excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

A decision determining back rental for a period of unauthorized use of a site used as an oil well servicing facility will be set aside and remanded where the record fails to establish how BLM arrived at the determination of past annual fair market rental value.

Sierra Production Service, 118 IBLA 259 (Mar. 11, 1991)

Sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), authorizes the Secretary to lease public lands for various uses including agriculture. 43 CFR 2920.0-6(a) requires that land-use authorizations be issued only at fair market value. An appraisal of fair market rental value for an agricultural lease will be affirmed on appeal where an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charge is excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Russell A. Beaver, J. F. Beaver, 121 IBLA 386 (Dec. 26, 1991)

It is within BLM's authority to require an owner of a tract of private land within a designated widerness area to obtain a lease of lands used for vehicular access to the inholding pursuant to sec. 302(b) of FLPMA, 43 U.S.C. § 732(b) (1988).

If the appraisal setting fair market rental value fails to consider the effect of restrictive clauses limiting the use and enjoyment of the leased land on the fair market rental value, the appraisal will be set

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LEASES--Continued

aside and the case file will be remanded to consider rental reductions reflecting those restrictions.

Mathilda B. Williams, Jack F. Brown, 124 IBLA 7 (Aug. 13, 1992)

An application to lease land for agricultural purposes to one applicant was properly rejected where another applicant had applied to acquire title to the land by exchange and BLM decided, for the sake of consistency in management of the land, to lease it to the exchange applicant pending completion of the exchange.

Rolling Stone, Inc., 124 IBLA 242 (Nov. 2, 1992)

MINERAL REVENUES

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

PERMITS

An appraisal of fair market rental value will be affirmed unless an appellant either demonstrates error in the appraisal method or presents convincing evidence that the charges are excessive. Generally, it is proper to use the comparable lease appraisal method for determining fair market rental value of nonlinear land use. However, a comparable lease appraisal may be set aside and the case remanded if it appears from the record that the use of the lands designated as comparable significantly differs from the intended use of the subject site.

Thomas L. Sawyer, 114 IBLA 135 (Apr. 18, 1990)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PERMITS--Continued

"Providing an unauthorized trip." Where the holder of a special recreation permit for commercial use of a wild and scenic river, during the 1987 period of regulated use of the river, put boats into the water on the day of a scheduled river trip, but did not load passengers and begin the scheduled trip downriver until 2 days later, the trip was unauthorized as that term is used by an operating plan governing such excursions.

The holder of a special recreation permit for commercial use on a wild and scenic river may be required to forfeit two scheduled trips where it is established the permittee provided an unauthorized trip by starting a trip on an unscheduled date without reporting his departure as required by an operating plan made part of his permit.

Galand Haas, 114 IBLA 198 (Apr. 24, 1990)

If a party protests and refuses to comply with a requirement that is found to be incorrect on review, he is not subject to sanctions for not complying. Thus, where a special use permittee refuses to pay use fees and demands a deduction, he is not subject to sanctions for failure to pay timely if BLM allows his request for deduction.

A decision by BLM to suspend special use permits will be affirmed where a special use permittee violates the terms of his permit by failing to provide BLM with timely trip logs containing relevant trip data and by failing to report in writing an accident in which a person suffered an injury requiring medical attention beyond first aid, and where the permit expressly provides for suspension of the permits and the procedural steps set out in the stipulation and substantially followed.

A BLM decision suspending yearly special use permits issued for commercial river rafting is properly reversed insofar as it purports to affect a period beyond the expiration date of the permits.

Patrick G. Blumm, dba Rio Grande Rapid Transit, 116 IBLA 321 (Oct. 29, 1990)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PERMITS--Continued

A party seeking a waiver of fees due for a special recreation permit is not barred from receiving the waiver simply because it is engaged in "commercial use" as that term is defined in the regulations. Rather, the party may receive the waiver if it meets the criteria set out in 43 CFR 8372.4(c)(1) and (2).

Pacific Crest Outward Bound School, 117 IBLA 309 (Jan. 23, 1991)

Issuance of a special recreation permit for off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impact to cultural resources was carefully considered, routes were altered accordingly, and protective stipulations were attached to the permit.

Owen Severance et al., 118 IBLA 381 (Mar. 15, 1991)

The issuance of special use permits is discretionary, and BLM may properly reject a permit application for an organized off-road motorcycle event when there is evidence that the event would result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the impacted public lands.

American Motorcycle Ass'n, District 37, 119 IBLA 196 (May 7, 1991)

If payment is required for use of the public lands, either with or without prior approval of the Department, a fair market rental value determination must be made pursuant to 43 CFR 2920.

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PERMITS--Continued

The provisions of 43 CFR 2920.1-2 concerning trespass do not apply to violations of 43 CFR 8372.0-7(a) governing special recreation permits. Rather, the appropriate penalties are provided by 43 CFR 8372.0-7(b).

Summit Quest, Inc., 120 IBLA 374 (Sept. 19, 1991)

The number of passenger days allocated to a holder of a commercial special recreation permit was properly reduced from 200 to 190 days for lack of use under a permit provision establishing a mechanism whereby past performance was to be used to fix passenger allocations.

Colorado River & Trail Expeditions, Inc., 123 IBLA 374 (July 23, 1992)

Under sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), and the implementing regulations in 43 CFR Subpart 2920, BLM has discretion to reject a proposal for use of lands which conflicts with BLM policy for management of the public lands involved. BLM properly rejects a proposal for a permit authorizing the use of assault weapons on public lands where such rejection is based on the State Director's IM. No. CA-90-155 in which he establishes a policy of closing BLM lands in California to the possession of assault weapons as defined by State law.

Where, under the authority of the Secretary of the Interior to issue permits pursuant to sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), and 43 CFR Subpart 2920, BLM rejects a proposal for a permit authorizing the use of assault weapons on public lands based on the State Director's IM No. CA-90-155 in which he establishes a policy of closing BLM land in California to the possession of assault weapons as defined by State law, on challenging that determination must provide compelling reasons for modification or reversal. Failure to do so will result in the determination being affirmed on appeal when it is supported by the record.

Organized Sportsmen of Lassen County, 124 IBLA 325 (Nov. 6, 1992)

PERMITS--Continued

BLM has the discretionary authority under 43 U.S.C. § 1732(b) (1988), and 43 CFR Subpart 8372 to issue special recreation use permits for commercial float boating operations and to set permit conditions. There must be a compelling reason for modification or reversal of an exercise of this discretionary authority, and the Board will affirm a decision exercising this authority if the decision is not arbitrary, capricious, or an abuse of discretion.

BLM may limit commercial jet back service during the peak summer use period to protect public safety. The fact that BLM was contemplating revisions to the recreation management plan concerning commercial jet back services when the restrictions were imposed did not render the imposition arbitrary, capricious, or an abuse of discretion.

The Exodus Corp., 126 IBLA 1 (Apr. 1, 1993)

Issuance of a special recreation permit for off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impacts were carefully considered and protective stipulations and mitigating measures were applied to avoid significant adverse environmental impacts.

Eastern Sierra Audubon Society, 126 IBLA 222 (May 21, 1993)

Issuance of a special recreation permit is discretionary, and BLM properly rejects an application for a permit for an organized off-road motorcycle event when there is evidence that the event could result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the public lands involved.

Checker Motorcycle Club, 126 IBLA 251 (June 1, 1993)

PERMITS--Continued

If the applicable statute does not expressly require a formal evidentiary hearing "on the record" and no contrary Congressional intent is evident, formal proceedings before an ALJ are not mandated. The language of 43 U.S.C. § 1732(c) (1988), allowing for revocation or suspension of a special recreation use permit after "notice and hearing," does not dictate a formal hearing before an ALJ, and a special recreation permittee's hearing rights under 43 U.S.C. § 1732(c) (1988), are satisfied when the permittee is given notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

PLAN OF OPERATIONS

An appellant bears the burden of showing error in a BLM decision denying approval of a mining plan of operations. Unsubstantiated allegations of error do not satisfy this burden.

The fact that BLM does not intend to propose a WSA for inclusion in the wilderness system does not alter BLM's obligation to manage lands within the WSA in a manner that will not impair the land's suitability for preservation as wilderness. BLM must continue to manage the land under the nonimpairment standard established by statute until the lands are removed from the WSA.

A BLM determination that a proposed plan of operations for mining activities on unpatented mining claims located within a WSA would impair the area's suitability for inclusion in the wilderness system is sufficient reason for denying approval of the proposed mining plan.

Robert L. Baldwin, Sr., & E. Rose Baldwin, 116 IBLA 84 (Sept. 17, 1990)

When BLM rejects a plan of operations affecting lands in the California Desert Conservation Area because the proposed activity will result in unnecessary or undue degradation of the affected lands, and will result in the undue impairment of the scenic, scientific, and environmental values of those lands, the question on review is whether the decision was reasonable and is supported by the record. If so,

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PLAN OF OPERATIONS--Continued

absent some showing of error by the appellant, the decision will be affirmed.

Eric L. Price, James C. Thomas, 116 IBLA 210 (Oct. 4, 1990)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1988), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of their suitability for inclusion in the wilderness system. However, operations that impair wilderness suitability may be allowed if they are conducted in the same manner or degree as on Oct. 21, 1976, or if denial of exercise of valid existing rights will preclude the claimant's development of the claim.

BLM may properly reject a proposal in a mining plan of operations to construct a road within a wilderness study area if the record supports a conclusion that the road would impair the suitability of the area for preservation of wilderness. BLM's decision will be affirmed where BLM's judgment has not been shown to be in error.

A claimant may proceed, pursuant to 43 CFR 3802.1-5(e), with activities proposed in a plan of operations before agency approval is obtained. Nonetheless, BLM may later properly determine that the action taken impairs wilderness suitability of affected lands and take action to modify or terminate the offending activity.

Murray Perkins, Internat'l Silica Corp., 116 IBLA 288 (Oct. 23, 1990)

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PLAN OF OPERATIONS--Continued

Where, in the absence of an approved plan of operations, a mining claimant cuts live trees in the course of road improvement activities on his mining claims, which are situated within a WSA, the impact of such activities exceeds in manner and degree the activities on the claims on Oct. 21, 1976, or temporarily suspended on that date, and impairs the suitability of the land for preservation as wilderness, BLM properly requires him to immediately rehabilitate the impact of those activities.

Richard C. Behnke, 122 IBLA 131 (Jan. 27, 1992)

The Secretary of the Interior is required by sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), to manage lands under review for wilderness suitability so as to prevent impairment of their wilderness characteristics, subject to grandfathered uses and valid existing rights. Under this standard, a plan of operations for a mining claim located after 1976 is properly rejected if it entails impacts which cannot be reclaimed to the point of being substantially unnoticeable by the time the Secretary is to make his recommendation regarding wilderness designation.

Enactment of sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), had the effect of amending the Mining Law of 1872 to the extent of precluding mining-related activities on lands within a WSA which would impair the wilderness characteristics of the area except for valid existing rights and the continuation of pre-FLPMA mining activities in the same manner and degree as conducted on Oct. 21, 1976.

Under the regulations at 43 CFR Subpart 3802 governing mining operations within a WSA, a failure of BLM to adjudicate the plan of operations within the time allowed does not constitute approval of the plan. Although a claimant may proceed, pursuant to 43 CFR 3802.1-5(e), with activities proposed in a plan of operations before agency approval is obtained, if BLM later determines that the action taken impairs wilderness suitability of affected lands it may properly take action to modify or terminate the offending activity.

A mineral entry final certificate is prepared by BLM for a mining claim after it has determined on the basis of the documents submitted that the claim is apparently valid in that: the land was available at the

time of location; acts necessary to keep it in force including annual assessment work have been done; no adverse claim exists; and the applicant has paid the purchase price. However, a mineral examination to establish the discovery of a locatable valuable mineral deposit on the claim is still required to support a patent and, as long as title remains in the United States, mining activities are properly regulated pursuant to relevant statutes and regulations to protect the surface resources.

Internat'l Silica Corp., 124 IBLA 155 (Sept. 30, 1992)

The raising of buffalo on the surface of an unpatented mining claim is barred where the record establishes that raising buffalo is not reasonably incidental to the mining operation.

United States v. Lee Jesse Peterson, 125 IBLA 72 (Jan. 6, 1993)

In order to qualify under the "grandfathered uses" exception to the non-impairment standard applicable to lands within WSAs, the use in question must have been in existence either on Oct. 21, 1976, or temporarily suspended on that date, and must have continued thereafter following the logical pace and progression of development.

Southern Utah Wilderness Alliance et al., 125 IBLA 175 (Feb. 5, 1993) 100 I.D. 14

BLM properly required the operator of a placer mining claim to conform suction dredging operations in a river designated for potential addition to the national wild and scenic rivers system and related occupancy to a modified plan of operations because such operations do not constitute casual use under 43 CFR 3809.0-5 (1991).

Pierre J. Ott, 125 IBLA 250 (Feb. 11, 1993)

FLPMA, 43 U.S.C. § 1782(c) (1988), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of the suitability of these areas for potential inclusion in the wilderness system. A claim located after enactment of FLPMA that includes both WSA lands and lands that contain pre-FLPMA mining operations situated outside the WSA does not qualify as a mining operation on WSA lands that may continue if its operations are occurring in the same manner and degree as on Oct. 21, 1976.

Although an operator is free under 43 CFR 3802.1-5(e) to regrade an existing access road if BLM does not notify the operator of any action on a plan of operations, the operator assumes the risk that BLM will later find the action impaired the suitability of the land for wilderness and require necessary changes. BLM is required under 43 CFR 3802.4-1(b) to issue a notice of noncompliance when it determines an operator is failing to comply with the provisions of the regulations in 43 CFR Subpart 3802 and the noncompliance is causing impairment of wilderness suitability.

When the boundary of a WSA excluding mining operations conducted before Oct. 21, 1976, is uncertain, it is appropriate to set aside the portion of a BLM decision requiring reclamation of slopes in the mined area and remand the matter for a delineation of the boundary.

Ceminex, Ltd., 129 IBLA 64 (Mar. 25, 1994)

A finding by BLM that a proposal in a mining plan of operations for construction of a road and other mechanized surface-disturbing activity on unpatented post-FLPMA mining claims located within a WSA would impair the area's suitability for inclusion in the wilderness system provided sufficient reason to deny approval of the proposed mining plan.

Dave Paquin, 129 IBLA 76 (Mar. 25, 1994)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PLAN OF OPERATIONS--Continued

BLM prepares an EA to evaluate both whether approval of a plan of operations would constitute a major Federal action significantly affecting the quality of the human environment and whether mitigation measures and reclamation procedures are adequate to prevent unnecessary and undue degradation of the public lands and their resources. A finding that a plan of operations would not cause unnecessary or undue degradation of public lands does not preclude the possibility that it would cause significant environmental effects requiring preparation of an EIS.

Where BLM finds, based on an EA prepared by a state agency, that approval of a plan of operations will not cause significant impact to the quality of the human environment, the record must show that BLM critically reviewed the EA in relation to the plan of operations, took a hard look at the relevant areas of environmental concern, considered mitigation measures, and independently reached a reasoned conclusion that significant impact will not occur. Absent documentation of BLM's independent review and FONSI, the Board cannot conclude that BLM has complied with NEPA.

To determine whether approval of a plan of operations will cause unnecessary or undue degradation to public land, BLM is required to consider, in relation to operations of similar character, the extent of surface disturbance and the effects on resources and land use both within and outside the area of operations. Where an EA does not analyze whether there will be unnecessary or undue degradation, and other documentation does not show that BLM conducted the required review and came to a reasoned conclusion, the record does not support a decision that the plan of operations was adequate to prevent unnecessary and undue degradation of public lands.

Kendall's Concerned Area Residents, 129 IBLA 130 (Apr. 15, 1994)

When the record supports the State Director's determination under 43 CFR 3809.1-7(c)(2) and (c)(3) that a proposed modification of a mine plan of operations must be submitted and his determination under 43 CFR 3809.1-7(c)(4) that measures are needed to avoid

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PLAN OF OPERATIONS--Continued

unnecessary or undue degradation, the decision will be affirmed on appeal.

Red Thunder, Inc., 129 IBLA 219 (Apr. 29, 1994)
101 I.D. 52

A written statement admitting that construction work had been performed on a road across Federal land providing access to mining claims was not the prior notice to BLM required by 43 CFR 3809.1-3(a), but instead supported issuance of a notice of noncompliance pursuant to 43 CFR 3809.3-2(a).

Wayne D. Klump, 130 IBLA 98 (Aug. 2, 1994)

A BLM decision notifying a claimant that continued occupancy of mining claims is unauthorized, requiring reclamation of the site, and demanding the removal of a mobile home, generators, and other personal property from mining claims because the property is located within a WSA is properly affirmed where the IMP provides that any temporary impacts must be removed and reclaimed by June 30, 1989, the date the Secretary was scheduled to send his recommendation on that WSA to the President.

Virgil Schuette, 131 IBLA 332 (Dec. 22, 1994)

PUBLIC PARTICIPATION

BLM is required to fully adjudicate a protest against a proposed land sale where it raises reasonable doubt about the correctness of BLM's proposed action. BLM should specifically address the substantive questions in its decision ruling on the protest and, if it decides to reject them, should explain its reasons for doing so.

Joyce & Tony Padilla, 119 IBLA 33 (Mar. 25, 1991)

PUBLIC PARTICIPATION--Continued

It is within the authorized officer's discretionary authority to grant "affected interest" status pursuant to 43 CFR 4100.0-5, for purposes of being involved in grazing management pursuant to the applicable regulations in 43 CFR Part 4100, to a person who has used grazing allotment lands for recreation and filed a written request for affected interest status.

Donald K. Majors, 123 IBLA 142 (May 28, 1992)

Where BLM fails to accommodate a third party's desire to participate in its decisionmaking process concerning ADC, and where BLM issues on Feb. 25, 1993, a decision authorizing ADC commencing on Oct. 1, 1992, BLM's decision may be properly set aside and remanded to allow third parties to participate to ensure that BLM's ADC decisions predate the authorized ADC activity.

Predator Project, 127 IBLA 50 (July 20, 1993)

A decision by BLM denying an organization "affected interest status" in grazing matters is properly set aside where BLM did not state therein why it felt the organization did not meet relevant criteria. That failure violated not only the terms of a governing BLM State Office IM, but also the more general requirement, imposed by well-established precedent, that its decision must contain a reasoned and factual explanation providing a basis for understanding and accepting the decision, or alternatively, for appealing and disputing it before this Board.

Southern Utah Wilderness Alliance, 131 IBLA 293 (Nov. 30, 1994)

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

filing where there is no evidence of receipt of the documents in the file.

James L. Gleave, 112 IBLA 281 (Jan. 5, 1990)

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

When a single mining claim has been recorded with BLM pursuant to 43 U.S.C. § 1744 (1982), on two occasions and given two mining recordation serial numbers, the files should be merged and one of the serial numbers canceled. If between the two serial numbers all requisite filings have been made, the claim should not be deemed abandoned pursuant to 43 U.S.C. § 1744(c) (1982).

The BLM manual requires the issuance of a receipt for affidavit of assessment work. Thus, where BLM date stamps and returns a cover letter which lists the affidavits of assessment submitted for filing without noting thereon or in the case file that any of the documents referred to in the letter were not enclosed, it is presumed that the return of the cover letter was intended to acknowledge receipt of all the documents listed therein.

International Metals & Energy, 114 IBLA 221 (Apr. 25, 1990)

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Howard G. Willison, 114 IBLA 323 (May 22, 1990)

If a mining claimant files an affidavit of assessment work or notice of intention to hold without sufficient service charges as required by 43 CFR 3833.1-3, regulation 43 CFR 3833.1-4 provides for a 30-day compliance period during which this deficiency may be corrected prior to rejection. Because rejection of annual filings does not occur, if at all, until expiration of the compliance period pursuant to 43 CFR 3833.1-4, a decision notifying the claimant of the deficiency is interlocutory, i.e., not final for purposes of appeal. A notice of appeal filed by the claimant during the compliance period may be dismissed as premature and, in such case, the substance of the "appeal" should be treated as a protest.

Bennie Sinerius, 115 IBLA 312 (Aug. 7, 1990)

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim located on or after Oct. 21, 1976, is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office on or before Dec. 30 of each year following the calendar year of location of the claim.

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Failure to file one of the instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

James R. Tucker, 116 IBLA 222 (Oct. 4, 1990)

Departmental regulation 43 CFR 3833.1-3(c) requires that annual filings made pursuant to 43 CFR 3833.2 regarding evidence of assessment work and/or notice of intention to hold be accompanied by a nonrefundable service charge of $5 for each mining claim, millsite, or tunnel site. This requirement became effective on Jan. 3, 1989, the first business day of that year, and applies to any filing made on or after that date. The fact that a mining claimant may have performed his assessment work and executed the documents prior to that date does not relieve him of the obligation to comply with this requirement.

Amada Mineral Corp., 116 IBLA 257 (Oct. 17, 1990)

Unpatented mining claims located on land conveyed to Doyon, Ltd., an Alaska Native corporation, pursuant to provision of sec. 22 of ANCSA, may no longer be administered by the Department, because the filing and recording provisions of sec. 314 of FLPMA apply only to public lands of the United States and do not permit continued administration of lands conveyed out of Federal ownership.

Margaret L. Mespelt & Theodore J. Almasy, 118 IBLA 60 (Feb. 21, 1991)

As a general rule, where BLM's records do not contain evidence that one of the two documents required to be filed by sec. 314 of FLPMA has been filed for each unpatented mining claim within the prescribed filing period, the claims will be properly declared abandoned and void. However, where a claimant submits a certified mail receipt proving that a document was in fact received by the proper BLM office within the prescribed time period, and where there is no evidence that the claimant filed any other document with BLM on that date, the presumption of nonfiling is rebutted. Where an

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

appellant alleges that he timely mailed the required documents to the correct BLM office and supplies the Board with a copy of a certified mail receipt indicating that an agent of the "US Dept. of the Interior" received documents from him on Dec. 15, 1986, and where BLM is unable to certify that this card does not indicate that it received the documents as alleged by appellant, BLM's decision declaring the claims abandoned and void for failure to make timely filing will be reversed.

Paul & Sandra Harvey, 119 IBLA 25 (Mar. 19, 1991)

An affidavit of labor was timely received by BLM pursuant to 43 CFR 3833.0-5(m) when it was received before Jan. 19, after it had been sent to BLM in an envelope postmarked prior to Dec. 31 of the preceding year.

Joe H. Vozza, 121 IBLA 370 (Dec. 19, 1991)

Failure to file in the proper BLM office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1988), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim.

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is rebutted where the mining claimant provides copies of affidavits of assessment work timely filed with BLM for 45 claims, a copy of a document filed with BLM stating that evidence of assessment work for 52 claims was being filed along with $260, and a "Receipt and Accounting Advice" acknowledging receipt of that amount of money, and BLM has not refunded any of that money. Such evidence of assessment work was filed for all 52 claims.

Silver King Mining Co., 122 IBLA 357 (Mar. 19, 1992)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

In accordance with 43 CFR 3833.1-3, annual filings for mining claims must be accompanied by a nonrefundable service charge of $5 for each claim. Annual filings received by BLM on or after Jan. 1, 1991, which are not accompanied by the proper service charges are, according to 43 CFR 3833.1-4(b), not to be accepted and are to be returned to the claimant/owner without further action. Thus, there can be no timely annual filing without the accompanying service charge and if the filing deadline passes without proper payment, the claims may be properly declared abandoned and void.

Where a mining claimant timely files evidence of annual assessment work for 15 claims, but only timely tenders sufficient service charges to cover the filing of eight of those claims, and the record contains no evidence of how the service fee is to be applied, BLM shall require the claimant to select the eight claims to which the money tendered should be applied. The remaining seven claims may be properly declared abandoned and void.

Norman Filip, 124 IBLA 122 (Sept. 24, 1992)

The Board will apply the doctrine of estoppel in reversing a 1991 decision of BLM declaring mining claims situated in the Death Valley National Monument abandoned and void for failure to file a notice of intent to hold the claims in 1979, where confusion existed regarding recordation and filing requirements under the Mining in the Parks Act and FLPMA and the claimants inquired of BLM in 1979 whether they were required to make additional filings for their claims during 1979, and in response BLM not only provided inaccurate information about the proper place of filing but also concealed a material fact from claimants.

Carl Dresselhaus et al., 128 IBLA 26 (Nov. 16, 1993)

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

In accordance with 43 CFR 3833.1-3, annual filings for mining claims must be accompanied by a nonrefundable service charge of $5.00 for each claim. Annual filings received by BLM on or after Jan. 1, 1991, which are not accompanied by the proper service charges are, according to 43 CFR 3833.1-4(b), not to be accepted and are to be returned to the claimant/owner without further action. Thus, there can be no timely annual filing without the accompanying service charge and if the filing deadline passes without proper payment, the claims may be properly declared abandoned and void.

Where a mining claimant makes a timely filing of a notice of intention to hold during the filing year, but the check accompanying the notice, tendered in payment of the service charges, is correctly returned, after the filing deadline, as uncollectible by the bank upon which it is drawn, subsequent payment of the service fee could not cure what had become, because of the dishonored check, an untimely filing, and the claims are properly declared abandoned and void.

N.T.M., Inc., 128 IBLA 77 (Dec. 7, 1993)

Where a mining claimant makes a timely filing of an affidavit of assessment work during the filing year, but the check accompanying that affidavit, tendered in payment of the service charges, is correctly returned after the filing deadline as uncollectible by the bank upon which it is drawn, the filing must be considered untimely and the mining claims declared abandoned and void. However, by initially processing the timely filing, BLM earned the service charges and a subsequent payment will be retained and not returned to the claimant.

M & A Mining, Inc., 130 IBLA 333 (Sept. 12, 1994)

RECORDATION OF MINING CLAIM CERTIFICATES OR NOTICES OF LOCATION

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under California law, it is the date of posting location notice on the claim. Where the notice of location expressly states the date of location as a date after the land was segregated from location by the filing and notation of a forest exchange application, the mining claim is properly held to be null and void.

The owner of mining claims located after Oct. 21, 1976, must file copies of the notices of location of the claims with BLM within 90 days of the location of the claims, failing which the claims are properly declared abandoned and void.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on or before Oct. 21, 1976, was required to file with the proper office of BLM a copy of the official record of the notice or certificate of location and a copy of the evidence of assessment work on or before Oct. 22, 1979. Failure to make the required filings constitutes an abandonment of the claim by the owner.

Rights acquired under a relocation of a mining claim abandoned pursuant to 43 U.S.C. § 1744 (1982), will not relate back to the date of location of the original claim but only to the date of the relocation.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

When a mineral locator has filed a location certificate with BLM within 90 days of the date of the location of the claim as required by 43 U.S.C. § 1744(b) (1982), it is error for BLM to later reject the recordation of the claim. BLM's decision cannot change the fact the locator has complied with the statute. The fact the claim has been recorded with BLM, however, does not establish its validity.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

RECORDATION OF MINING CLAIM CERTIFICATES OR NOTICES OF LOCATION--Continued

A mining claimant may correct the misidentification of a township on a map filed pursuant to the regulations implementing 43 U.S.C. § 1744 (1982).

The Carrow Co., 115 IBLA 102 (June 26, 1990)

Regulation 43 CFR 3833.1-3(b), which increased the service charge to $10 for recording a notice of location with BLM, was effective Jan. 3, 1989. Notices of location mailed on Dec. 31, 1988, received by BLM on Jan. 4, 1989, and accompanied by a $5 service charge per claim are properly rejected by BLM upon expiration of a 30-day compliance period authorized by 43 CFR 3833.1-4(a) without payment of a $5 balance per claim. At the conclusion of the 30-day compliance period, an appeals period of 30 days commences.

Instruction Memorandum No. 89-222 (Jan. 18, 1989) directs BLM to indicate, in its interlocutory decisions giving notice of deficient fees, that the agency will apply the submitted fees to process the claims in the order listed on the document submitted by the owner.

Herbert M. Cole et al., 115 IBLA 272 (July 26, 1990)

The Federal Land Policy and Management Act of 1976 requires the owner of a mining claim located on public land to file with the proper BLM office a copy of the official record of the notice or certificate of location within 90 days after the date of location. 43 U.S.C. § 1744(b) (1988). The "date of location" of a mining claim is the date determined under state law in the jurisdiction in which the mining claim is situated. 43 CFR 3833.0-5(h). Under Nevada law the date a mining claim is located is the date which is stated in the notice of location posted on the claim and repeated in the certificate of location filed with the county recorder. Upon a failure to timely file a copy of the notice of location with BLM, a claim is conclusively deemed abandoned and void.

Richard Bargen, 117 IBLA 239 (Jan. 3, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIM CERTIFICATES OR NOTICES OF LOCATION--Continued

Under 43 U.S.C. § 1744 (1988), an owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the claim. An unpatented mining claim is not exempt from the filing requirement when the estate of the owner is in probate.

Estate of Steve Pederson, 118 IBLA 210 (Mar. 7, 1991)

Under 43 U.S.C. § 1744 (1988), the owner of an unpatented mining claim located on or before Oct. 21, 1976, was required to file a copy of the official record of the notice or certificate of location with BLM on or before Oct. 22, 1979, and failure to do so constituted an abandonment of the claim by the owner.

A BLM decision notifying the occupant of public land of the initiation of trespass proceedings and requiring the removal of unauthorized property, based on the fact that the holder of a life estate occupancy lease for the land in question had relinquished the lease, will be set aside where the record shows that the land was the subject of a mining claim properly recorded with BLM in 1982 and questions exist regarding present ownership of the claim and whether occupancy of the claim is reasonably incident to mining.

Mr. & Mrs. Michael Bosch, 119 IBLA 370 (June 26, 1991)

It is proper for BLM to reject location notices for placer mining claims submitted for recordation under 43 CFR 3833.1-4(a) because the claimants failed to tender the proper service charge within 30 days from the date claimants were deemed to have constructively received a deficiency notice requiring such payment. The record establishes that the deficiency notice was addressed to and the post office properly attempted delivery to the claimants' last address of record.

Gerhard W. Befeld, Marie D. Befeld, 123 IBLA 118 (May 19, 1992)

RECORDATION OF MINING CLAIM CERTIFICATES OR NOTICES OF LOCATION--Continued

Under 43 CFR 3833.1-4(a), where a mining claimant submitted affidavits of assessment work and the accompanying check for service charges was not honored by his bank, it was improper for BLM to reject the affidavits without first providing him with a deficiency notice informing him that he had 30 days from receipt of the notice in which to submit the required service fee.

R. Keith Barrett, 123 IBLA 240 (June 12, 1992)

The "proper office of BLM" for purposes of recording mining claims is defined in 43 CFR 3833.0-5(g) as the BLM office listed in 43 CFR 1821.1-2(d) as having jurisdiction over the area in which the claims are located.

The Board will apply the doctrine of estoppel to a situation where certificates of location are filed for recordation with a BLM State Office and that office informs the claimant by letter, which constitutes an official decision, of its refusal to accept them due to a postdated check for the recordation fees, but fails to inform him that the office is not the "proper office of BLM" in which to file the certificates. Where the claimant in reliance thereon refiles the certificates with the same State Office and they are rejected, such failure constitutes the affirmative concealment of a material fact.

Leitmotif Mining Co., Inc., 124 IBLA 344 (Dec. 1, 1992)

Upon the failure of a mining claimant to appeal from a decision cancelling recordation of a mining claim under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988), all rights under the location are conclusively deemed to be abandoned and void.

In light of the adoption of sec. 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1988), the provisions of 30 U.S.C. § 38 (1988), may not be used to establish rights under the mining laws of the U.S. for claims which have not been duly recorded with BLM under sec. 314(b).

While the legal presumption that administrative officials have properly discharged their duties and not

RECORDATION OF MINING CLAIM CERTIFICATES OR NOTICES OF LOCATION--Continued

lost or misplaced documents filed with them is rebuttable by probative evidence that the document was received by them, the presumption is not rebutted by the assertion that the document in question was mailed to the appropriate office and an appellant submits no evidence that it was actually received in that office.

Robert L. Mendenhall et al., 127 IBLA 73 (July 20, 1993)

Placer mining claimants who rely on the provisions of 30 U.S.C. § 38 (1988), to prove location and posting of a mining claim at a time when the land embraced by the location was open to location must comply with the recordation requirements of sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988). Where such a claim has not been recorded, it is a nullity.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

REPEALERS

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Duane L. & Wyoma I. Pearson et al., 113 IBLA 393 (Mar. 28, 1990)

A mining claim located on land withdrawn under a first-form reclamation withdrawal pursuant to the Act of June 17, 1902, is null and void ab initio. A first-form reclamation withdrawal effective before Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the 1902 Act. The Mining Claims Rights Restoration Act of 1955 does not confer a

right to enter and locate mining claims on lands withdrawn under a first-form reclamation withdrawal.

Glenn Freeman, Judith L. D. Freeman, 116 IBLA 105 (Sept. 17, 1990)

RESERVATION AND CONVEYANCE OF MINERAL INTERESTS

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

BLM properly rejects an application for conveyance of a Federally owned mineral interest, pursuant to sec. 209(b) of FLPMA, 43 U.S.C. § 1719(b) (1988), where the applicant fails to establish that there are no known mineral values in the land or that reservation of the mineral interest is interfering with or precluding appropriate nonmineral development, and that such development is a more beneficial use of the land than mineral development.

William Y. Ganus et ux., 122 IBLA 255 (Feb. 28, 1992)

Under sec. 209(b) of FLPMA and implementing regulations, lands that do not have "known mineral values" may be conveyed to the owner of the surface estate. BLM's decision that the lands possess locatable and fluid leasable minerals that constitute "known mineral values" is properly affirmed on appeal where it is based on a thorough mineral report citing reliable sources, and where the applicants for conveyance fail to meet their burden of showing that it is inaccurate.

Under 43 CFR 2720.0-5, land may be properly found to possess "known mineral values" for locatable minerals even if there is no exposure of mineralization at the surface. The presence of minerals under the surface may

be established, subject to being disproved by the applicant, by inference from geologic conditions. Where BLM prepares a mineral report relying on authorities that have so established, its finding will be affirmed.

An absence of proof of discoveries of valuable mineral deposits under the General Mining Law of 1872 in the vicinity of lands subject to applications for conveyance of Federal mineral interests is not relevant to whether those lands possess "known mineral values" for locatable minerals under 43 CFR 2720.0-5, which establishes an entirely different, and far less stringent, requirement than the "discovery" rule applicable to the validity of mining claims. Thus, the lack of valid claims in the area does not preclude a finding that the lands possess "known mineral values."

If lands possess "known mineral values," the mineral estate for such lands may nevertheless be conveyed to the record owner of the surface under sec. 209(b) of FLPMA if the reservation of mineral rights in the United States would interfere with appropriate "nonmineral development" of the land, provided that the nonmineral development is a more beneficial use of the land than mineral development. However, use of the surface of lands patented under the Stock-Raising Homestead Act for grazing is not "nonmineral development" under the meaning of the statute.

Where applicants for conveyance of retained mineral interest under sec. 209(b) of FLPMA merely assert that there is a chance that homes and businesses will be built on the lands applied for, but submit no proof of imminent development, they have failed to establish that there has been nonmineral development. Allegation, hypothesis, or speculation that appropriate nonmineral development might take placce at some future time is not a sufficient basis for conveyance. 43 CFR 2720.0-6.

An applicant for conveyance of retained mineral interest is required to cover administrative costs of the application and to pay a deposit against which those costs may be charged. 43 U.S.C. § 209(b)(3) (1988); 43 CFR 2720.1-3(b)(1). Where applicants do not show that BLM's charges have been excessive, they will not be disturbed on appeal.

Wayne D. Klump et al., 123 IBLA 51 (May 11, 1992)

RIGHTS-OF-WAY

When BLM adjusts a linear right-of-way rental, in accordance with the rental fee schedule set forth at 43 CFR 2803.1-2(c)(1)(i), and the grantee files an appeal completely agreeing with that action, but complaining that BLM failed to adjust the rental for prior years, the grantee has failed to point out error in the action taken by BLM or to show how he has been adversely affected by the decision, and the appeal will be dismissed.

Jesse H. Johnson, 112 IBLA 369 (Jan. 19, 1990)

When Congress has enacted legislation to provide for rights-of-way for particular purposes, authorization to use public land for such purposes must be consistent with that legislation. Under the right-of-way provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), and its implementing regulations, 43 CFR Part 2800, authorization to use public land for a permanent access road to a wind energy park can only be accomplished through the issuance of a right-of-way grant. Approval of a plan of operations for a wind energy facility right-of-way does not constitute the authorization for an access road, which is not located on the lands described in the wind energy facility right-of-way grant.

Mesa Wind Developers, 113 IBLA 61 (Feb. 7, 1990)

A Bureau of Land Management decision rejecting a right-of-way application for sewage stabilization lagoons filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

Pete Zanetti, 113 IBLA 239 (Feb. 28, 1990)

RIGHTS-OF-WAY--Continued

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A Bureau of Land Management decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

Ben J. Trexel, 113 IBLA 250 (Mar. 8, 1990)

The appraised value of a communication site right-of-way pertains to each individual user and is not to be prorated among site users.

In establishing the fair market rental value for a communication site right-of-way, BLM shall not be limited by the estimated value at the time of issuance of the right-of-way.

An appraisal of fair market rental value for a communication site right-of-way may be set aside and the case remanded where the record on appeal shows insufficient analysis of the leases considered in the appraisal.

Pursuant to 43 CFR 2803.1-2(b)(2)(ii), a reduction or waiver of rental for a communication site right-of-way may be granted when the holder provides without charge, or at a reduced rate, a valuable public service.

BLM may reduce rental payments for communication site rights-of-way if it determines pursuant to 43 CFR 2803.1-2(b)(2)(iv) that the imposition of the fair market value rental would cause undue hardship on the right-of-way holder and it is in the public interest to do so.

Lone Pine Television, Inc., 113 IBLA 264 (Mar. 9, 1990)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

A Bureau of Land Management appraisal of fair market value will not be set aside for failure to include five comparable electronic communication sites alleged to afford similar coverage to the appraised site, where no alternative appraisal or evidence is submitted to demonstrate that the allegedly comparable sites afford similar coverage, access, power, and terms to the subject site, or that inclusion of the five allegedly comparable sites would support a different conclusion than that reached by the Bureau of Land Management.

Randy L. Power dba ProComm, 114 IBLA 205 (Apr. 24, 1990)

BLM properly cancels a communications site right-of-way where the holder fails to pay the annual rental charges for the first and second years of the grant following several 30-day notifications by BLM of the fair market rental amount due for those years, as determined by appraisal.

Roy L. Parrish, 114 IBLA 336 (May 22, 1990)

The Board will not overturn a BLM appraisal of a communication site right-of-way by the comparable lease method of appraisal where the appellant fails to establish by a preponderance of the evidence either that the appraisal method was erroneous or that the appraised value is excessive. Specifically, the appraisal will be affirmed where appellant does not establish that BLM improperly eliminated certain private and Government leases from comparison with the right-of-way, or that BLM improperly failed to adjust for differences both in the cost of obtaining access to the communication sites and between BLM rights-of-way and private leases.

MCI Telecommunications Corp., 115 IBLA 117 (June 27, 1990)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Southern Pacific Transportation Co., 115 IBLA 239 (July 18, 1990)

A Bureau of Land Management decision rejecting a right-of-way application for a water diversion and water pipeline in a wilderness study area, filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

C. B. Slabaugh, 116 IBLA 63 (Sept. 5, 1990)

Under FLPMA, the Secretary of the Interior has discretionary authority to grant rights-of-way. A BLM decision approving a trail right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be based upon a reasoned analysis of the factors involved; made with due regard for the public interest; and no reason for disturbing the decision is shown.

A FONSI will be affirmed if the record supports a conclusion that all relevent areas of environmental concern were identified and carefully reviewed, and that the final determination of no significant impact is reasonable in light of the environmental analysis. A party challenging a FONSI determination must show that it was premised on a clear error of law or demonstrable error of fact, or that analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be established by objective proof. Mere

expressions of a difference of opinion provide no basis for reversal.

Coy Brown, 115 IBLA 347 (Aug. 13, 1990)

A request for extension of a right-of-way for a culinary water well and related facilities within a wilderness study area is properly denied where the holder does not overcome BLM's determination that the extension will violate BLM's mandatory nonimpairment criteria.

The City of St. George, 116 IBLA 230 (Oct. 16, 1990)

A BLM appraisal of fair market rental value of a communication site lease will be upheld unless an appellant can show error in the appraisal methods used and demonstrate by convincing evidence that the rental charge is excessive. In the absence of a preponderance of evidence that the appraisal is erroneous, an appraisal generally may be rebutted only by another appraisal.

Gila Electronics, 117 IBLA 51 (Nov. 27, 1990)

Where BLM establishes the rental for an access road right-of-way granted under sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1988), in accordance with the schedule adopted pursuant to 43 CFR 2803.1-2(c)(1), and appellant fails to demonstrate error, BLM's rental determination will be affirmed.

Mr. & Mrs. Gerald H. Murray, 117 IBLA 138 (Dec. 6, 1990)

A BLM increase in the annual rental charge for a communications site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market value of the right-of-way by the comparable lease method of appraisal.

Questar Service Corp., 119 IBLA 65 (Mar. 29, 1991)

Where BLM granted appellant a communication site right-of-way under Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1988), subject to a future appraisal, application of 43 CFR 2803.1-2(c)(3)(ii), providing that BLM may establish an estimated rental fee, collect a deposit in advance, and adjust the advance deposit upon receipt of an approved fair market appraisal, was not a prohibited imposition of a retroactive rental.

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Oregon Broadcasting Co., 119 IBLA 241 (May 15, 1991)

A right-of-way grant for a water pipeline issued in 1990 pursuant to regulations published at 43 CFR Part 2800, implementing the Federal Land Policy and Management Act of 1976, was made subject to payment of rental under 43 CFR 2803.1-2(a).

Kevin C. Kehoe, 119 IBLA 257 (May 16, 1991)

RIGHTS-OF-WAY--Continued

Although 43 CFR 2801.1-2 authorizes BLM to require that a road right-of-way applicant grant a reciprocal right-of-way to the United States as a condition to receiving a right-of-way pursuant to sec. 501(a) of FLPMA, 43 U.S.C. 1761(a) (1988), the reciprocal grants must be equivalent, and a BLM decision denying an application for the assignment of a road right-of-way, based on the purported refusal of the assignee to grant public access across his private land, will be vacated because a FLPMA right-of-way does not grant public access.

Charles Ryden, 119 IBLA 277 (June 6, 1991)

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including rights-of-way for solar evaporation ponds and related facilities, is the comparable lease method of appraisal. An appraisal may be set aside and the case remanded where the record on appeal shows insufficient analysis of other leases considered in the appraisal to verify their comparability with the right-of-way appraised.

AMAX Magnesium, 119 IBLA 281 (June 6, 1991)

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

Where BLM is precluded by statutory proviso from expending funds in fiscal year 1991 to increase the fees charged for communication site rights-of-way, a decision reappraising the fair market rental value of the right-of-way may be vacated in part to reflect the lack of authority to collect the reappraised rental prior to Oct. 1, 1991.

Communications Enterprises, Inc., 120 IBLA 146 (July 16, 1991)

Uno Broadcasting Corp., 120 IBLA 380 (Sept. 23, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

The Board will affirm a BLM decision issuing a communication site right-of-way where on appeal the grantee complains that the rental for the right-of-way is too high, but the record shows that the rental was based on an appraisal of the fair market rental value utilizing the comparable lease method of appraisal and the appellant fails to show either that the appraisal method was erroneous or that the appraised value is excessive.

Idaho Wireless Corp., 120 IBLA 172 (July 23, 1991)

Where BLM has set the annual rental charge for a communication site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charge and remand for a reappraisal and any necessary recalculation of such charges.

First Broadcasting of Nevada, Inc., 120 IBLA 240 (Aug. 9, 1991)

Under the relevant regulation, the comparable lease method of appraisal is the preferred method for determining the fair market value of a nonlinear right-of-way such as a communication site. Under this method, the rentals charged for similar sites in the area are reviewed and adjustments are made for variations in the features of the sites and the rights obtained under the leases. An appraisal based simply on application of the consumer price index to a prior appraisal without any analysis of comparable leases is properly remanded as inconsistent with the regulatory standard.

KSEI, Inc., 120 IBLA 266 (Aug. 21, 1991)

BLM properly declines to condition a grant of a slurry pipeline right-of-way on a requirement that the pipeline be operated as a common carrier for the benefit of other producers of phosphate ore where no statute requires such operation and there is no demonstration

that such a condition is necessary to protect competition, future development of phosphate reserves, or the environment.

John D. Archer, 120 IBLA 290 (Sept. 6, 1991)

BLM's decision approving proposed temporary rights-of-way pending consummation of an exchange is properly vacated in part when it provides no term in the event the exchange is not consummated.

Sierra Club, Utah Chapter, 120 IBLA 347 (Sept. 13, 1991)

It is proper for BLM to cancel a reservoir right-of-way grant pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1766 (1988), when the grantee fails to obtain a performance bond required by the grant, after having been given notice and a reasonable time to comply.

Robert A. Erkins, 121 IBLA 61 (Oct. 25, 1991)

A decision rejecting a right-of-way application for an access road will be affirmed where granting the right-of-way would be inconsistent with applicable law and not in the public interest. Application for an access road right-of-way was properly rejected where the water well to which access was sought was neither the subject of an approved mining plan of operations nor authorized through issuance of a right-of-way grant or temporary use permit.

George Bernadot, 121 IBLA 138 (Oct. 28, 1991)

Where BLM has granted a power line right-of-way subject to future determination of rental, and BLM later determines a rental on the basis of an erroneous calculation of acreage within the grant, BLM is not precluded from revising the rental on the basis of the correct acreage, and requiring the holder of the right-of-way

to pay the revised rental from the date that the right-of-way was first granted.

Salt River Project, 121 IBLA 185 (Nov. 5, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)
98 I.D. 398

The holder of a right-of-way grant for a salt water disposal site is required to pay annually, in advance, the fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices. In accordance with 43 CFR 2803.1-2(c)(3)(i), rental for non-linear right-of-way grants must be based on a market survey of comparable rentals or on a value determination for specific parcels.

A BLM decision adjusting the rental for a salt water disposal site right-of-way from a per acre fee to a fee per barrel of disposed water will be affirmed where the adjusted rental is based on a market survey of comparable salt water disposal leases which indicates that a per barrel fee is utilized in the market place to determine rentals, and the appellant has neither demonstrated error in that methodology nor shown that the rental charges are excessive.

Laguna Gatuna, Inc., 121 IBLA 302 (Dec. 3, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

Absent a demonstration that BLM's method for appraising the value of the linear and site components of a right-of-way granted for a hydroelectric power facility is erroneous or the rental is clearly excessive, a BLM decision adjusting the rental is properly affirmed.

Bear Creek Hydro, 122 IBLA 200 (Feb. 10, 1992)

An appraisal of a right-of-way will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market rental value or the appellant shows that the resulting charges are excessive. Absent error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

KPVI Channel 6, 122 IBLA 263 (Mar. 3, 1992)

Where BLM issues a decision denying the assignment of a salt water disposal right-of-way and such decision is merely conclusory in nature, the record is barren of any supporting rationale, and other unaddressed issues are presented, the decision will be set aside and the case remanded for BLM to reassess assignment of the right-of-way and determine what steps are necessary for the protection of the Federal mineral interest in the land in question.

Burnett Oil Co., Inc., 122 IBLA 330 (Mar. 11, 1992)

An appraisal of the fair market rental value of a reservoir right-of-way will be upheld on appeal where no error is shown in the appraisal method used by BLM and the appellant fails to show by convincing evidence that the annual rental charge is excessive.

A decision initially advising the holder of a right-of-way of the fair market rental value of the grant and billing that amount more than 6 years after issuance of the right-of-way may be set aside and remanded for consideration of whether in the public interest the rental charge should be reduced on the

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

basis of undue hardship to the holder under the regulation at 43 CFR 2803.1-2(b)(2)(iv) where the reservoir authorized by the right-of-way was never constructed.

V. Irene Wallace, 122 IBLA 349 (Mar. 12, 1992)

Any use or occupancy of the public lands such as for radio broadcasting which requires a right-of-way or temporary use permit, which use has not been authorized, is prohibited and shall constitute a trespass for which the trespasser is liable for administrative costs, damages, and penalties under the regulations at 43 CFR 2801.3.

An assessment of damages for a willful trespass is properly affirmed where appellant's conduct constituted a voluntary or conscious trespass in that the evidence shows appellant knew of the lack of authority to use the public lands for communication site purposes.

High Desert Communications, Inc., 123 IBLA 20 (Apr. 24, 1992)

BLM properly increased the rental for an existing FLPMA linear right-of-way using the regulatory rental fee schedule for linear rights-of-way, when the regulation calling for rental adjustment at least once every 5 years was expressly incorporated into appellant's right-of-way grant, and the regulatory fee schedule was applicable during the course of a periodic adjustment necessary to reflect the then current fair market rental value.

Jack C. Gutte, 123 IBLA 295 (June 23, 1992)

A rental rate adjustment for a right-of-way for a hydroelectric power plant under 43 CFR 2803.1-2 will be set aside and remanded so that the BLM Manual may apply policies and procedures that are being developed for determining rentals for such rights-of-way.

Bear Creek Hydro (On Reconsideration), 124 IBLA 225 (Oct. 27, 1992)

BLM properly requires the holder of a communications site right-of-way to pay rental charges, in addition to those originally estimated at the time of issuance of the right-of-way grant, based upon an appraisal of the fair market rental value of the right-of-way.

Voice Ministries of Farmington, Inc., 124 IBLA 358 (Dec. 4, 1992)

A BLM decision to issue a right-of-way grant for an irrigation ditch and associated structures will be affirmed on appeal when based on a reasoned analysis of all relevant factors, including the threat to the human environment from potential breaches of the ditch and to the rights of downstream water users from the diversion of water, and provided the decision was made with due regard for the public interest and sufficient reasons for disturbing the decision have not been shown.

Daryl Richardson et al., 125 IBLA 132 (Jan. 15, 1993)

BLM is entitled (and required) to charge fair market rental for an existing water pipeline right-of-way issued pursuant to Title V of FLPMA, as amended, 43 U.S.C. §§ 1761-1771 (1988), even though no rental had been charged for a right-of-way or use authorization for the pipeline for a number of years prior to right-of-way issuance.

It does not matter that no surface uses of the land subject to an existing water pipeline right-of-way are or may be disrupted by the pipeline. The rental is charged for the right to use the land, and would accrue even if the right-of-way holder did not use the land.

The fair market value rental for a linear right-of-way is based upon the amount of land required to construct and maintain the pipeline. The mere fact that the pipeline is longer than it might be if the sole basis for choosing the route had been the per-acre rental charge is not a proper basis for concluding that the rental is too high.

The regulation at 43 CFR 2803.1-2 provides authority for reduction or waiver of rental for a right-of-way if requiring payment of the full rental will cause undue hardship on the holder and it is in the

public interest to reduce or waive the rental. BLM need not consider applying this regulation when assessing the rental amount if there is no evidence that charging the full rental amount would cause undue hardship.

Jacqueline Balander, 125 IBLA 262 (Feb. 17, 1993)

Denial of an application for a right-of-way on the grounds that the right-of-way would destroy plants of a Category 1 candidate species under the Endangered Species Act and its habitat will be affirmed when the decision is based on a reasoned analysis of the factors involved, made in due regard for the public interest, and no significant reason is shown to disturb the decision. A showing that there is a possible difference of scientific opinion on the issue of whether the candidate species is properly regarded as a subspecies is not sufficient to disturb BLM's decision.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

When the right-of-way grant specifically provided for periodic rental adjustments to bring the right-of-way rental in line with fair market rental values it is proper for BLM to increase the annual rental to conform the rental amount to the current fair market rental value of the right-of-way.

When the holder of a right-of-way is a nonprofit municipal utility or cooperative, BLM may consider whether the holder is entitled to a reduction of rental pursuant to 43 CFR 2803.1-2(b)(2)(i) or (ii).

Valley Pioneers Water Co., Inc., 125 IBLA 326 (Mar. 25, 1993)

A BLM increase in the rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that

cause undue hardship on the holder and it is in the

the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Quality Broadcasting Corp., Unicom Broadcasting, Inc., 126 IBLA 174 (May 11, 1993)

Use of a road on Oregon and California lands for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

Larry D. Olson, 126 IBLA 229 (May 24, 1993)

43 U.S.C. § 1766 (1988), and 43 CFR 2803.4(d) require written notice that cancellation of a right-of-way is contemplated for failure to comply with a condition of its granting and a reasonable opportunity to cure the noncompliance. A BLM decision cancelling a right-of-way without providing notice and a reasonable time to comply will be vacated.

John & Katherine Caton, 126 IBLA 335 (June 17, 1993)

Under 43 CFR 2802.4(a), a right-of-way application to use public lands may be denied if BLM determines, among other things, that (1) the proposed right-of-way would be inconsistent with the purposes for which the public lands are managed, or (2) the proposed right-of-way would not be in the public interest. An application for an amendment of an existing right-of-way that seeks authorization for use of a substantial new parcel of public lands is properly reviewed in light of that regulation. BLM's decision rejecting the right-of-way application is properly affirmed where the case record amply supports its conclusion that the amendment would be inconsistent with BLM's management plan for the area and would not be in the public interest, as it would permanently destroy riparian lands and decrease habitat for the bald eagle, and would likely increase erosion.

The burden is on appellant, as the party challenging BLM's decision denying an application for amendment of a right-of-way, both to show adequate

reason for appeal and, as appropriate, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively researched the question of potential damage to riparian lands and concluded that they would be permanently harmed by proposed action, it is not enough that appellant offers a contrary opinion, but it must demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusion. BLM's decision is properly affirmed where appellant fails to do so.

King's Meadow Ranches, 126 IBLA 339 (June 17, 1993)

A BLM increase in the annual rental charge for a communications site right-of-way will be vacated where the record fails to demonstrate any relationship between the right-of-way subject to appraisal and a BLM master appraisal determining the market value of a "typical" BLM right-of-way, and where there is no indication that the communications site at issue matched the comparable factors in BLM's appraisal for a "typical" right-of-way.

Confidential Communications Co., 126 IBLA 349 (June 25, 1993)

Where an existing FLPMA access road right-of-way grant provided that it was subject to the regulations in 43 CFR Part 2800, BLM properly established the rental for use thereof by utilizing the regulatory rental fee schedule for linear rights-of-way found at 43 CFR 2803.1-2(c) during the course of a periodic adjustment necessary to reflect the current fair market rental value. While the relevant statute and regulations provide for waiver or a reduction in the rental amount under certain circumstances, the right-of-way holder must prove eligibility for such consideration.

Ruth Tausta-White, 127 IBLA 101 (July 29, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

An increase in the annual rental charge for a communications site right-of-way will be set aside if the record fails to demonstrate any relationship between the right-of-way subject to appraisal and a BLM master appraisal determining the market value of a "typical" BLM right-of-way, and there is no indication that the comparable factors at the communications site at issue matched the comparable factors considered in BLM's appraisal of a "typical" right-of-way.

Western Tele-Communications, Inc., 127 IBLA 313 (Oct. 12, 1993)

The provisions of sec. 1323(b) of ANILCA, 16 U.S.C. § 3210(b) (1988), do not apply with respect to access to a Federal oil and gas lease since the leasehold estate does not constitute "nonfederally owned land" within the meaning of the statute.

Southern Utah Wilderness Alliance et al., 127 IBLA 331 (Oct. 19, 1993) 100 I.D. 370

Use of public lands for the purpose of a National Guard Maneuver Area is not properly authorized pursuant to the grant of a right-of-way under sec. 501 of FLPMA, 43 U.S.C. § 1761 (1988).

State of Alaska, Division of State Lands, 127 IBLA 375 (Oct. 21, 1993)

An application for a right-of-way for transportation of water across a WSA was properly rejected by BLM because it was inconsistent with purposes for which the land was managed. A right-of-way for water facilities was not shown to have existed prior to initiation of wilderness review by title documents that made no reference to facilities to transport water, nor did traces of an old pipeline at the proposed right-of-way location tend to show the existence of a continuing right-of-way for such facilities.

Roger G. Gervais, Patsy V. Gervais, 128 IBLA 43 (Dec. 1, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

The Federal grant for a pipeline right-of-way requires BLM to comply with sec. 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (1988), on both Federal and non-Federal lands involved in the project.

Central Valley Electric Cooperative, Inc., 128 IBLA 126 (Dec. 22, 1993)

The Interior Department and Related Agencies Appropriations Act of 1993, P.L. 102-381, 106 Stat. 1374, and the regulations in 43 CFR 3833 (58 FR 38186 (July 15, 1993)), require payment of a $100 per claim or site rental fee for assessment years 1992-93 and 1993-94. In the alternative, a claimant holding 10 or fewer claims and meeting the other requirements set out in the Act and regulations may file a certificate of exemption with BLM on or before Aug. 31, 1993. It is proper for BLM to deny exemption when BLM records indicate the claimant holds more than 10 claims. When there is evidence on appeal that 10 or fewer claims had actually been perfected, rendering the balance of the claims abandoned, it is proper to set BLM's decision aside and remand the case to BLM for a determination of whether the claimant has met the rental fee exemption requirements for the perfected claims.

Edna Jarvis, 128 IBLA 143 (Jan. 11, 1994)

The Board will not overturn a BLM determination of reimbursable costs expected to be incurred while administering a right-of-way application if the cost estimate is supported by the record and the applicant has failed to demonstrate otherwise.

Diablo Communications, Inc., 128 IBLA 377 (Mar. 11, 1994)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

A BLM decision to reject a right-of-way application calling for removal of vegetation and shaping the banks of a stream because the contemplated activity would conflict with BLM's riparian management policy will be affirmed when the record supports a finding that the decision was based upon a reasoned analysis of all relevant factors and made with due regard for the public interest.

Thomas L. Watson et al., 129 IBLA 18 (Mar. 15, 1994)

A right-of-way issued under FLPMA, 43 U.S.C. § 1761 (1988), for the development of a spring and pipeline is properly cancelled when the holder of the right-of-way abandons the project within the meaning of 43 U.S.C. § 1766 (1988), and 43 CFR 2803.4(c) by failing to use the right-of-way for a continuous 5-year period and submits nothing that demonstrates that the failure to use the right-of-way was due to circumstances not within the holder's control.

Theron E. Coon, 129 IBLA 30 (Mar. 21, 1994)

A BLM decision rejecting a right-of-way application for a water gathering and transportation system filed pursuant to sec. 501 of FLPMA will be affirmed where the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest. Where the record contains uncontroverted evidence, in the form of analysis by a BLM wildlife biologist and other environmental analysis, showing that granting the application would adversely affect public land values, including grazing activities, wildlife, and riparian vegetation and habitat, BLM's rejection of the application will be affirmed.

Kenneth Knight, 129 IBLA 182 (Apr. 28, 1994)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A BLM decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1988), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

J. E. Lepetich et al., 129 IBLA 255 (May 5, 1994)

BLM must charge fair market rental value for a right-of-way issued pursuant to Title V of FLPMA, as amended, 43 U.S.C. §§ 1761-1771 (1988).

BLM's fair market value determination will be affirmed if the appellant does not demonstrate error in the appraisal method or present convincing evidence that the fair market value determination is erroneous and the case file contains the facts or an analysis sufficiently complete to allow the Board to conclude that the fair market value determination is supported by the record.

Reduction or waiver of rental for a right-of-way is authorized by 43 CFR 2803.1-2 if payment of full rental would cause undue hardship. To qualify for reduction the holder of the right-of-way must formally request relief pursuant to that section and submit data and relevant information demonstrating the existence of a hardship.

Thousand Peaks Ranches, Inc., 129 IBLA 397 (June 30, 1994)

Where BLM granted a communication site right-of-way, subject to a future fair market value appraisal, application of 43 CFR 2803.1-2(c)(3)(ii), providing that BLM may establish an estimated rental fee, collect a deposit in advance, and adjust the advance deposit upon receipt of an approved fair market appraisal, was not a prohibited imposition of a retroactive rental.

Where a right-of-way holder charges that the fair market rental value determined by BLM is in error, but shows no error in BLM's appraisal method and provides no

evidence to establish that BLM's appraisal is excessive, the Board will affirm BLM's determination.

Alaskan M.D.S., Inc., 130 IBLA 13 (July 6, 1994)

The provisions of 43 CFR 4.21(a), 58 FR 4942-43 (Jan. 19, 1993), govern the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." The regulations governing the administration of rights-of-way, including communication sites rights-of-way, 43 CFR Part 2800, contain a "pertinent regulation" that meets the exception of 43 CFR 4.21(a). Under 43 CFR 2804.1(b), "[a]ll decisions of the authorized officer under this part shall remain effective pending appeal unless the Secretary rules otherwise."

Where a right-of-way holder charges that the fair market value determined by BLM is in error, but shows no error in BLM's appraisal method and provides no evidence to establish that BLM's appraisal is excessive, the Board will affirm BLM's determination.

London Bridge Broadcasting, Inc., 130 IBLA 73 (July 26, 1994)

Reimbursement of administrative costs incurred by BLM to investigate and reclaim a mining access road, water pipeline, and reservoir constructed without authorization on public land was properly required under right-of-way regulation 43 CFR 2801.3.

Wayne D. Klump, 130 IBLA 98 (Aug. 2, 1994)

In deciding whether to issue an EIS, BLM must consider indirect environmental effects of development of private lands if caused by its action. Where the record shows that such development (construction of housing in a subdivision) will likely occur even if BLM does not take the action in question (granting a right-of-way for an access road across Federal land to the subdivision),

it cannot be said that the effects of development were "caused by" the BLM action, and BLM need not consider those effects in an EA or EIS.

A BLM decision granting a right-of-way for an access across public land to a subdivision on private land will be affirmed where the record shows the decision to be based on a reasoned analysis of the facts involved, made with due regard for the public interest, and where appellants fail to show error in the decision. Where BLM identifies adverse environmental effects, but reasonably judges them to be similar to effects resulting from the no-action alternative, and where the action presents other benefits not provided by the no-action alternative, its decision will be affirmed.

James Shaw, S. Eric Krasa, 130 IBLA 105 (Aug. 2, 1994)

In adjudicating a protest against an application for communications right-of-way, BLM is required by 43 CFR 4.450-2 only to consider and decide matters which are proposed to be done. Where an application for right-of-way has already matured into a functioning use, a protest against the proposal upon which the use was initiated must be dismissed.

A BLM decision approving a reservation for a communication site right-of-way under FLPMA, 43 U.S.C. § 1767(a) (1988), is an exercise of discretion that will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason to disturb the decision is shown.

Confidential Communications Co., 131 IBLA 188 (Nov. 7, 1994)

RULES AND REGULATIONS

The provisions of 43 CFR 2920.1-2 concerning trespass do not apply to violations of 43 CFR 8372.0-7(a) governing special recreation permits. Rather, the appropriate penalties are provided by 43 CFR 8372.0-7(b).

Summit Quest, Inc., 120 IBLA 374 (Sept. 19, 1991)

RULES AND REGULATIONS--Continued

A $450 service charge paid for filing a mineral patent appliction pursuant to Departmental regulation 43 CFR 3862.1-2 could not be refunded after the claims for which patent was sought were declared abandoned and void under sec. 314 of FLPMA.

William R. Smith, 129 IBLA 384 (June 14, 1994)

SALES

BLM is required to fully adjudicate a protest against a proposed land sale where it raises reasonable doubt about the correctness of BLM's proposed action. BLM should specifically address the substantive questions in its decision ruling on the protest and, if it decides to reject them, should explain its reasons for doing so.

Under sec. 203(a)(3) of FLPMA and 43 CFR 2710.0-3(a)(2), BLM is authorized to sell a tract of public lands where, as a result of land-use planning, it determines that disposal of such tract will serve important public objectives, including but not limited to, expansion of communities and economic development, which cannot be achieved prudently or feasibly on land other than public land and which outweigh other public objectives and values. A decision to proceed with a sale to a county of public lands abutting its existing solid waste disposal facility will be set aside and the case remanded for further consideration where there is a comparably sized parcel of private land for sale that also abuts the existing facility, and where BLM has made no showing that the expansion of the county's facility could not be achieved prudently or feasibly by its acquiring the private land.

A tract of public land may be sold only where, as a result of land-use planning under 43 U.S.C. § 1712 (1988), the Secretary determines that the sale meets one of the criteria of 43 U.S.C. § 1713(a) (1988). When a tract is nominated to be offered for sale under 43 CFR 2710.0-6(b) but the proposed sale does not conform to the existing land-use planning document, the proposed sale must be considered in accordance with either plan amendment or planning analysis procedures.

Joyce & Tony Padilla, 119 IBLA 33 (Mar. 25, 1991)

SALES--Continued

It is proper for BLM to reject an application to amend an existing F&PP lease to permit substantial expansion of a solid-waste management station for collection of household refuse for transfer to a sanitary landfill because the intended expansion is contrary to existing BLM policy restricting authorization of sites for solid-waste disposal and related purposes to FLPMA sales and exchanges pending implementation of the R&PP Amendment Act of 1988, P.L. 100-648, 102 Stat. 3813.

Clark County, Nevada, 123 IBLA 150 (May 28, 1992)

When BLM finds that a tract of land has no significant mineral potential, approves conveyance of the Federal Government's mineral interest in the tract pursuant to sec. 209(b)(1) of FLPMA, 43 U.S.C. § 1716(b)(1) (1988), and calls for payment for the Government's mineral estate at its fair market value, the Government's fair market value determination must be supported by the record.

Todd L. Nicholson, 129 IBLA 213 (Apr. 28, 1994)

Under sec. 203(a) of FLPMA, 43 U.S.C. § 1713(a) (1988), in order to be eligible for public sale a tract of public land must be identified for disposal in the applicable land-use planning documents.

A BLM decision denying a request to purchase a tract of public land will be affirmed where disposal of the tract does not conform to the approved management framework plan and the record supports a finding that the request does not warrant further consideration.

Mr. & Mrs. Michael Bosch, Howard C. Bosch, 129 IBLA 373 (June 8, 1994)

SERVICE CHARGES

Regulation 43 CFR 3833.1-3(b), which increased the service charge to $10 for recording a notice of location with BLM, was effective Jan. 3, 1989. Notices of location mailed on Dec. 31, 1988, received by BLM on Jan. 4, 1989, and accompanied by a $5 service charge per claim are properly rejected by BLM upon expiration of a

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

SERVICE CHARGES--Continued

30-day compliance period authorized by 43 CFR 3833.1-4(a) without payment of a $5 balance per claim. At the conclusion of the 30-day compliance period, an appeals period of 30 days commences.

Instruction Memorandum No. 89-222 (Jan. 18, 1989) directs BLM to indicate, in its interlocutory decisions giving notice of deficient fees, that the agency will apply the submitted fees to process the claims in the order listed on the document submitted by the owner.

Herbert M. Cole et al., 115 IBLA 272 (July 26, 1990)

If a mining claimant files an affidavit of assessment work or notice of intention to hold without sufficient service charges as required by 43 CFR 3833.1-3, regulation 43 CFR 3833.1-4 provides for a 30-day compliance period during which this deficiency may be corrected prior to rejection. Because rejection of annual filings does not occur, if at all, until expiration of the compliance period pursuant to 43 CFR 3833.1-4, a decision notifying the claimant of the deficiency is interlocutory, i.e., not final for purposes of appeal. A notice of appeal filed by the claimant during the compliance period may be dismissed as premature and, in such case, the substance of the "appeal" should be treated as a protest.

Bennie Sinerius, 115 IBLA 312 (Aug. 7, 1990)

Departmental regulation 43 CFR 3833.1-3(c) requires that annual filings made pursuant to 43 CFR 3833.2 regarding evidence of assessment work and/or notice of intention to hold be accompanied by a nonrefundable service charge of $5 for each mining claim, millsite, or tunnel site. This requirement became effective on Jan. 3, 1989, the first business day of that year, and applies to any filing made on or after that date. The fact that a mining claimant may have performed his assessment work and executed the documents prior to that date does not relieve him of the obligation to comply with this requirement.

Amada Mineral Corp., 116 IBLA 257 (Oct. 17, 1990)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

SERVICE CHARGES--Continued

It is proper for BLM to reject location notices for placer mining claims submitted for recordation under 43 CFR 3833.1-4(a) because the claimants failed to tender the proper service charge within 30 days from the date claimants were deemed to have constructively received a deficiency notice requiring such payment. The record establishes that the deficiency notice was addressed to and the post office properly attempted delivery to the claimants' last address of record.

Gerhard W. Befeld, Marie D. Befeld, 123 IBLA 118 (May 19, 1992)

Under 43 CFR 3833.1-4(a), where a mining claimant submitted affidavits of assessment work and the accompanying check for service charges was not honored by his bank, it was improper for BLM to reject the affidavits without first providing him with a deficiency notice informing him that he had 30 days from receipt of the notice in which to submit the required service fee.

R. Keith Barrett, 123 IBLA 240 (June 12, 1992)

A $450 service charge paid for filing a mineral patent appliction pursuant to Departmental regulation 43 CFR 3862.1-2 could not be refunded after the claims for which patent was sought were declared abandoned and void under sec. 314 of FLPMA.

William R. Smith, 129 IBLA 384 (June 14, 1994)

SURFACE MANAGEMENT

Pursuant to 43 CFR 3809.3-2(d), a notice of noncompliance properly issues upon a determination that the mining claimants and the operators have failed to operate in such a manner as to prevent undue or unnecessary degradation or to complete reclamation of a millsite to the standards set forth in 43 CFR 3809.1-3.

B. K. Lowndes et al., 113 IBLA 321 (Mar. 14, 1990)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

SURFACE MANAGEMENT--Continued

Approval of a mining plan of operations providing for surface occupancy of mining claims by the claimant was inconsistent with a decision requiring that he remove structures and personal property from the claims by June 1989. To support a finding that surface occupancy of the claims exceeded the manner and degree of use to which the claims were put prior to Oct. 21, 1976, within the meaning of 43 U.S.C. § 1782(c) (1988), the record must indicate whether there was surface occupancy of the claims on or before that date.

Edmund Key, 117 IBLA 274 (Jan. 16, 1991)

A mining plan of operations limited in duration to operations on land in a wild and scenic river study area in 1989 was not shown to continue in effect after Dec. 31, 1989.

A mining plan of operations was properly required for dredging operations in a wild and scenic river study area pursuant to Departmental regulation 43 CFR 3809.1-4 when claimants failed to show that their operations were excepted from the general rule that mining in such a study area required submission of a plan of operations.

Pierre J. Ott, Jim D. Wills, 122 IBLA 371 (Apr. 2, 1992)

When an EA of a proposed mining plan of operations for exploration does not include the analysis of whether potential mining is sufficiently specific to adequately analyze it at the exploration stage and of the details of the exploration process, the mining process, and other allegedly connected activities in the area that is necessary for BLM's decision to withstand judicial review, BLM's decision will be set aside and the matter remanded so the EA may be supplemented.

Concerned Citizens for Responsible Mining et al., 124 IBLA 191 (Oct. 15, 1992)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

SURFACE MANAGEMENT--Continued

Occupancy of an unpatented mining claim is properly regulated to bar any unnecessary and undue degradation of the public lands as set forth in sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988). The accumulation of an excessive quantity of parts and materials stored in a disorganized manner on the surface of an unpatented mining claim causing a surface disturbance greater than would normally result when mining is performed by a prudent operator in usual, customary, and proficient operations of similar character gives rise to unnecessary and undue degradation of the public lands.

The raising of buffalo on the surface of an unpatented mining claim is barred where the record establishes that raising buffalo is not reasonably incidental to the mining operation.

United States v. Lee Jesse Peterson, 125 IBLA 72 (Jan. 6, 1993)

A determination by an authorized officer that dredging operations capable of moving over 2,400 yards of earth annually within the meaning of 43 CFR 3809.0-5 from the Merced River did not constitute "casual use" was not overcome by an allegation that less than 5 acres of land would be disturbed by such activity.

A reclamation bond was properly required for operations conducted within a wild and scenic river study area pursuant to a plan of operations. 43 CFR 3809.1-9(b).

Lloyd L. Jones, 125 IBLA 94 (Jan. 8, 1993)

BLM properly required the operator of a placer mining claim to conform suction dredging operations in a river designated for potential addition to the national wild and scenic rivers system and related occupancy to a modified plan of operations because such operations do not constitute casual use under 43 CFR 3809.0-5 (1991).

Pierre J. Ott, 125 IBLA 250 (Feb. 11, 1993)

SURFACE MANAGEMENT--Continued

A road constructed to provide motor vehicle access to a mining claim located in a WSA without first obtaining an approved plan of operations permitting such activity pursuant to provision of 43 CFR 3802.1-1(a) was properly required to be reclaimed.

Lloyd L. Jones, 127 IBLA 270 (Oct. 1, 1993)

BLM prepares an EA to evaluate both whether approval of a plan of operations would constitute a major Federal action significantly affecting the quality of the human environment and whether mitigation measures and reclamation procedures are adequate to prevent unnecessary and undue degradation of the public lands and their resources. A finding that a plan of operations would not cause unnecessary or undue degradation of public lands does not preclude the possibility that it would cause significant environmental effects requiring preparation of an EIS.

To determine whether approval of a plan of operations will cause unnecessary or undue degradation to public land, BLM is required to consider, in relation to operations of similar character, the extent of surface disturbance and the effects on resources and land use both within and outside the area of operations. Where an EA does not analyze whether there will be unnecessary or undue degradation, and other documentation does not show that BLM conducted the required review and came to a reasoned conclusion, the record does not support a decision that the plan of operations was adequate to prevent unnecessary and undue degradation of public lands.

Kendall's Concerned Area Residents, 129 IBLA 130 (Apr. 15, 1994)

The authority granted by FLPMA sec. 302(b), 43 U.S.C. § 1732(b) (1988), to prevent unnecessary or undue degradation of public lands authorizes BLM to order a cessation of mining operations if that action is necessary. BLM's authority entails not only acting to avert unnecessary or undue degradation before it occurs

SURFACE MANAGEMENT--Continued

but also acting to abate degradation if it develops after a plan has been approved.

Regulations promulgated under NEPA provide an exception when compliance would be inconsistent with other statutory requirements. NEPA does not apply when there is a clear and fundamental conflict of statutory duty. The time required to prepare an EA to review remedial measures to abate acid rock drainage prior to ordering them implemented would be fundamentally at odds with the need to abate damage to the environment and would be inconsistent with the duty to prevent unnecessary or undue degradation in 43 U.S.C. § 1732(b) (1988).

When the record supports the State Director's determination under 43 CFR 3809.1-7(c)(2) and (c)(3) that a proposed modification of a mine plan of operations must be submitted and his determination under 43 CFR 3809.1-7(c)(4) that measures are needed to avoid unnecessary or undue degradation, the decision will be affirmed on appeal.

Red Thunder, Inc., 129 IBLA 219 (Apr. 29, 1994)
101 I.D. 52

WILDERNESS

BLM's decision to allow use of off-road vehicles in wilderness study areas will be affirmed where appellant has failed to show that such use will impair wilderness suitability or cause undue or unnecessary degradation.

Uintah Mountain Club, 112 IBLA 287 (Jan. 5, 1990)

Construction of two guzzlers within a wilderness study area will be affirmed where the record establishes that the purpose of the guzzlers is to increase available water for wildlife and that the construction of the guzzlers will not impair the area's suitability for inclusion in the permanent wilderness system.

Oregon Natural Resources Council, 114 IBLA 163 (Apr. 19, 1990)

While Congress has prohibited the Secretary from issuing mineral leases for lands within a wilderness study area under 30 U.S.C. § 226-3(a) (Supp. V 1987), Congress also provided that nothing in this section shall affect any authority of the Secretary to issue permits for exploration by means not requiring construction of roads or improvement of existing roads if such activity is conducted in a manner compatible with the preservation of the wilderness environment. 30 U.S.C. § 226-3(b) (Supp. V 1987).

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)

A request for extension of a right-of-way for a culinary water well and related facilities within a wilderness study area is properly denied where the holder does not overcome BLM's determination that the extension will violate BLM's mandatory nonimpairment criteria.

The City of St. George, 116 IBLA 230 (Oct. 16, 1990)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1988), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of their suitability for inclusion in the wilderness system. However, operations that impair wilderness suitability may be allowed if they are conducted in the same manner

or degree as on Oct. 21, 1976, or if denial of exercise of valid existing rights will preclude the claimant's development of the claim.

BLM may properly reject a proposal in a mining plan of operations to construct a road within a wilderness study area if the record supports a conclusion that the road would impair the suitability of the area for preservation of wilderness. BLM's decision will be affirmed where BLM's judgment has not been shown to be in error.

A claimant may proceed, pursuant to 43 CFR 3802.1-5(e), with activities proposed in a plan of operations before agency approval is obtained. Nonetheless, BLM may later properly determine that the action taken impairs wilderness suitability of affected lands and take action to modify or terminate the offending activity.

Murray Perkins, Internat'l Silica Corp., 116 IBLA 288 (Oct. 23, 1990)

In order to demonstrate error in a BLM decision to eliminate an inventory unit from further consideration as a wilderness study area pursuant to secs. 201 and 603 of FLPMA, 43 U.S.C. §§ 1711 and 1782 (1988), an appellant must point out not only that BLM failed to follow proper procedures but also that the record does not support BLM's substantive conclusions and that a different determination might result from reassessment.

In assessing the presence or absence of wilderness characteristics in an inventory unit, BLM necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal and such judgments may not be overcome simply by expressions of disagreement.

Neither NEPA, 42 U.S.C. § 4332 (1988), nor the Endangered Species Act, 16 U.S.C. § 1536 (1988), contains directives which BLM must observe in evaluating the wilderness characteristics of an area. That evaluation is conducted pursuant to relevant provisions of FLPMA and the Wilderness Act.

The Wilderness Society et al., 119 IBLA 168 (May 1, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

A protest against sale of oil and gas leases that contends the sale should not proceed because the land to be leased has wilderness characteristics is properly dismissed because the final administrative determination that the land was not wilderness in character was made in 1985 when BLM and the Board decided not to include the land at issue in a WSA.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 17 (Jan. 2, 1992)

Where, in the absence of an approved plan of operations, a mining claimant cuts live trees in the course of road improvement activities on his mining claims, which are situated within a WSA, the impact of such activities exceeds in manner and degree the activities on the claims on Oct. 21, 1976, or temporarily suspended on that date, and impairs the suitability of the land for preservation as wilderness, BLM properly requires him to immediately rehabilitate the impact of those activities.

Richard C. Behnke, 122 IBLA 131 (Jan. 27, 1992)

Failure to appeal a decision designating an area as a WSA renders it final and precludes a party from later challenging it on appeal of a subsequent BLM decision approving a road restoration project within the WSA.

A BLM decision approving a road restoration project in a WSA will be sustained on appeal notwithstanding the fact that it may not be possible to restore all roads

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

within the WSA to a substantially unnoticeable condition, as to hold otherwise would defeat legislative intent demonstrated in FLPMA and the Wilderness Act.

San Juan County Commission, 123 IBLA 68 (May 11, 1992)

A mining claimant who constructs a road and clears land in a WSA in connection with a post-FLPMA mining claim violates 43 CFR 3802.1-1 by failing to file a plan of operations and receive approval prior to beginning work. Such unauthorized actions constitute a trespass under 43 CFR 2801.3.

A mining claimant who violates 43 CFR 3802.1 by constructing a road in a WSA in conjunction with a mining claim without filing and receiving approval of a plan of operations or who violates 43 CFR 3809.1-3(a) by contructing an access road across public lands to a mining claim without filing a notice of such action with BLM is liable for the costs of rehabilitating and stabilizing such lands and for costs incurred by the United States in the investigation and termination of such trespass.

Karry K. Klump, 123 IBLA 377 (July 23, 1992)

The Secretary of the Interior is required by sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), to manage lands under review for wilderness suitability so as to prevent impairment of their wilderness characteristics, subject to grandfathered uses and valid existing rights. Under this standard, a plan of operations for a mining claim located after 1976 is properly rejected if it entails impacts which cannot be reclaimed to the point of being substantially unnoticeable by the time the Secretary is to make his recommendation regarding wilderness designation.

Enactment of sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), had the effect of amending the Mining Law of 1872 to the extent of precluding mining-related activities on lands within a WSA which would impair the wilderness characteristics of the area except for valid

existing rights and the continuation of pre-FLPMA mining activities in the same manner and degree as conducted on Oct. 21, 1976.

Under the regulations at 43 CFR Subpart 3802 governing mining operations within a WSA, a failure of BLM to adjudicate the plan of operations within the time allowed does not constitute approval of the plan. Although a claimant may proceed, pursuant to 43 CFR 3802.1-5(e), with activities proposed in a plan of operations before agency approval is obtained, if BLM later determines that the action taken impairs wilderness suitability of affected lands it may properly take action to modify or terminate the offending activity.

A mineral entry final certificate is prepared by BLM for a mining claim after it has determined on the basis of the documents submitted that the claim is apparently valid in that: the land was available at the time of location; acts necessary to keep it in force including annual assessment work have been done; no adverse claim exists; and the applicant has paid the purchase price. However, a mineral examination to establish the discovery of a locatable valuable mineral deposit on the claim is still required to support a patent and, as long as title remains in the United States, mining activities are properly regulated pursuant to relevant statutes and regulations to protect the surface resources.

Internat'l Silica Corp., 124 IBLA 155 (Sept. 30, 1992)

In order to qualify under the "grandfathered uses" exception to the non-impairment standard applicable to lands within WSAs, the use in question must have been in existence either on Oct. 21, 1976, or temporarily suspended on that date, and must have continued thereafter following the logical pace and progression of development.

Southern Utah Wilderness Alliance et al., 125 IBLA 175 (Feb. 5, 1993) 100 I.D. 14

When a mining claim is located partially within a WSA, the regulations in 43 CFR Part 3802 apply, and BLM may properly issue a notice of noncompliance requiring a mining claimant to remove unauthorized structures for a WSA, reclaim disturbed lands, and submit a plan of operations and reclamation bond.

Paul M. Shock, 126 IBLA 232 (May 27, 1993)

A road constructed to provide motor vehicle access to a mining claim located in a WSA without first obtaining an approved plan of operations permitting such activity pursuant to provision of 43 CFR 3802.1-1(a) was properly required to be reclaimed.

Lloyd L. Jones, 127 IBLA 270 (Oct. 1, 1993)

A determination that approval of an application for a permit to drill an exploratory well and the grant of an associated right-of-way will not have a significant impact on the quality of the human environment will be affirmed on appeal where the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a FONSI has the burden of establishing by a preponderance of the evidence that the finding was based on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

While the authorized officer was clearly possessed of the authority under sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), to precondition approval of a unitization agreement involving a pre-FLPMA oil and gas lease upon acceptance of the application of the nonimpairment standard to lands within a WSA, where he failed to do so the Board will not retroactively impose this condition on leased lands within a WSA.

The Secretary of the Interior and those authorized to act on his behalf have the discretionary authority to suspend operations and production under any oil or gas

lease for conservation purposes, including the prevention of environmental damage. Where the record indicates that an EA prepared for drilling operations on an oil and gas lease located within both a ESA and an area of critical environmental concern failed to consider this option in evaluating the proposal to drill, the decision approving drilling operations will be set aside and the case will be remanded to permit consideration of whether, under this discretionary authority, operations under the lease should be suspended.

Issuance of a Federal oil and gas lease carries with it neither an express nor implied right of access to the leasehold. Thus, where a pre-FLPMA lease is surrounded by lands within a WSA, there is no valid existing right, within the meaning of sec. 701(h) of FLPMA, to obtain access to the lease boundaries across Federal land and, in the absence of grandfathered uses, access may not be granted if it would violate the nonimpairment standard mandated by sec. 603(c), 43 U.S.C. § 1782(c) (1988).

Since no express or implied rights of access arise upon issuance of a Federal oil and gas lease, the approval of the committal of a pre-FLPMA lease to a unit plan subsequent to the adoption of sec. 603(c) of FLPMA does not alter the application of the nonimpairment standard in determining whether access to the lease across other lands within the unit may be permitted.

Southern Utah Wilderness Alliance et al., 127 IBLA 331 (Oct. 19, 1993) 100 I.D. 370

An application for a right-of-way for transportation of water across a WSA was properly rejected by BLM because it was inconsistent with purposes for which the land was managed. A right-of-way for water facilities was not shown to have existed prior to initiation of wilderness review by title documents that made no reference to facilities to transport water, nor did traces of an old pipeline at the proposed right-of-way location tend to show the existence of a continuing right-of-way for such facilities.

Roger G. Gervais, Patsy V. Gervais, 128 IBLA 43 (Dec. 1, 1993)

FLPMA, 43 U.S.C. § 1782(c) (1988), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of the suitability of these areas for potential inclusion in the wilderness system. A claim located after enactment of FLPMA that includes both WSA lands and lands that contain pre-FLPMA mining operations situated outside the WSA does not qualify as a mining operation on WSA lands that may continue if its operations are occurring in the same manner and degree as on Oct. 21, 1976.

Although an operator is free under 43 CFR 3802.1-5(e) to regrade an existing access road if BLM does not notify the operator of any action on a plan of operations, the operator assumes the risk that BLM will later find the action impaired the suitability of the land for wilderness and require necessary changes. BLM is required under 43 CFR 3802.4-1(b) to issue a notice of noncompliance when it determines an operator is failing to comply with the provisions of the regulations in 43 CFR Subpart 3802 and the noncompliance is causing impairment of wilderness suitability.

When the boundary of a WSA excluding mining operations conducted before Oct. 21, 1976, is uncertain, it is appropriate to set aside the portion of a BLM decision requiring reclamation of slopes in the mined area and remand the matter for a delineation of the boundary.

Ceminex, Ltd., 129 IBLA 64 (Mar. 25, 1994)

A finding by BLM that a proposal in a mining plan of operations for construction of a road and other mechanized surface-disturbing activity on unpatented post-FLPMA mining claims located within a WSA would impair the area's suitability for inclusion in the wilderness system provided sufficient reason to deny approval of the proposed mining plan.

Dave Paquin, 129 IBLA 76 (Mar. 25, 1994)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

Under sec. 603(c) of FLPMA, lands within a WSA must be managed in a manner so as not to impair the suitability of such areas for preservation as wilderness. Impairment of suitability for inclusion in the Wilderness System is defined as causing such impacts that cannot be reclaimed to the point of being substantially unnoticeable. The Secretary is not charged with maintaining the existing wilderness character of every parcel and FLPMA did not prohibit mining activity within a WSA if it does not create an impairment.

Committee for Idaho's High Desert, 130 IBLA 327 (Sept. 12, 1994)

A BLM decision notifying a claimant that continued occupancy of mining claims is unauthorized, requiring reclamation of the site, and demanding the removal of a mobile home, generators, and other personal property from mining claims because the property is located within a WSA is properly affirmed where the IMP provides that any temporary impacts must be removed and reclaimed by June 30, 1989, the date the Secretary was scheduled to send his recommendation on that WSA to the President.

Virgil Schuette, 131 IBLA 332 (Dec. 22, 1994)

WITHDRAWALS

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Duane L. & Wyoma I. Pearson et al., 113 IBLA 393 (Mar. 28, 1990)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WITHDRAWALS--Continued

Congress has limited the exercise of the authority to make, modify, extend, or revoke withdrawals to the Secretary and individuals in the Office of the Secretary, appointed by the President by and with the advice and consent of the Senate, to whom he has delegated his authority. Unless the order making a withdrawal specifies when it terminates, lands remain withdrawn until the Secretary or his properly authorized delegate issues a formal order published in the Federal Register. A resource management plan is properly distinguished from an order revoking a withdrawal.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)

A mining claim located on land withdrawn under a first-form reclamation withdrawal pursuant to the Act of June 17, 1902, is null and void ab initio. A first-form reclamation withdrawal effective before Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the 1902 Act. The Mining Claims Rights Restoration Act of 1955 does not confer a right to enter and locate mining claims on lands withdrawn under a first-form reclamation withdrawal.

Glenn Freeman, Judith L. D. Freeman, 116 IBLA 105 (Sept. 17, 1990)

Where a statute withdrawing public lands expressly provides that the withdrawal and segregation of the public lands shall terminate on a date certain and, further, that the withdrawal may not be extended or renewed except by Act of Congress, a mining claim located on the lands after expiration of the withdrawal is not properly invalidated on the ground that the land was not opened by a public land order issued by the Secretary.

Richard Bargen, 117 IBLA 239 (Jan. 3, 1991)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

GENERALLY

A regulation should be sufficiently clear that there is no basis for an oil and gas lessee's non-compliance with the regulation before that regulation is interpreted to the detriment of a lessee. If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of its Oil and Gas Payor Handbook, because that Handbook lacks the force and effect of law enjoyed by a statute or regulation.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

The party choosing the means of delivery of a document must accept the responsibility for and bear the consequences of that choice, including the possibility of delay or nondelivery.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

In enacting sec. 102(a) of FOGRMA, 30 U.S.C. § 1712(a) (1988), Congress did not expand the Secretary's authority but allowed him to determine, under existing authority of law, which person is responsible for making royalty payments.

Sec. 102(a) of FOGRMA, 30 U.S.C. § 1712(a) (1988), requires a lessee to notify the Secretary of the assignment of the obligation to pay royalty. Sec. 3(7) of FOGRMA, 30 U.S.C. § 1702(7) (1988), defines lessee as including any person who has been assigned an obligation to make a royalty or other payment required by a lease. Under secs. 102(a) and 3(7) of FOGRMA, for a person who holds no interest in a lease to be liable for the lessee's royalty payments, the lessee and the person must have agreed to an assignment of the obligation to pay royalty, and notice of that assignment or either evidence of or notice of an assignment, and filing a PIF, without more, does not render the person filing it a lessee under sec. 3(7) of FOGRMA, 30 U.S.C. § 1702(7)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982 --Continued

GENERALLY--Continued

(1988). There must be a document assigning the obligation to make royalty payments or a contract or agreement stating this obligation.

The assignment of the obligation to make royalty payments is not related to an assignment of a lease or an interest in a lease that must be approved by BIA under 25 CFR 212.22.

The making of royalty payments and the filing of PIFs are not sufficient evidence to indicate an intent to be bound as an agent by lessees' obligation to pay royalty.

Mesa Operating Ltd Partnership, 125 IBLA 28 (Dec. 31, 1992) 99 I.D. 272

In the absence of a regulation and a PIF explicitly stating that filing the form constitutes the assumption of the lessee's obligation to pay royalty by the person filing it, a document evidencing the person's agreement to accept this responsibility is necessary.

A division order may constitute evidence that the obligation to pay royalty has been assigned.

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

ASSESSMENTS

A regulation should be sufficiently clear that there is no basis for an oil and gas lessee's non-compliance with the regulation before that regulation is interpreted to the detriment of a lessee. If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of its Oil and Gas Payor Handbook, because that Handbook lacks the force and effect of law enjoyed by a statute or regulation.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ASSESSMENTS--Continued

An exception to late payment charges for royalty payments filed after the end of the month following the month in which the oil and gas is produced and sold may be recognized where the payor has filed a sufficient estimated payment in accordance with the instructions in the Payor Handbook. An estimated payment is made on Form-2014 and requires identification of the payor, the lease number, and the product code and selling arrangement number. An estimated payment may only be established initially for the month immediately preceding the month in which the report and payment are filed and, thereafter, the estimated balance is rolled over monthly to cover production and sales in succeeding months.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)
97 I.D. 74

Pursuant to sec. 111 of the Federal Oil & Gas Royalty Management Act of 1982, 30 U.S.C. § 1721 (1982), MMS is authorized to assess a higher interest rate for late payment of oil and gas royalties than it had previously been authorized to assess; therefore, for time periods prior to passage of the Federal Oil and Gas Royalty Management Act of 1982, MMS may assess only the lower, previously authorized interest rate.

Shell Offshore Inc., 115 IBLA 205 (July 3, 1990)

MMS is required by law to assess interest charges on late royalty payments for oil and gas leasees which are not received by the due date. Where MMS seeks reconsideration of a Board decision reversing an order assessing late payment charges because of lack of evidence that the payments were untimely, and presents evidence conclusively showing that the lessee's payments were in fact untimely, the Board will vacate its earlier decision and affirm the MMS order assessing late payment charges.

Dugan Production Corp. (On Reconsideration), 117 IBLA 153 (Dec. 13, 1990)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ASSESSMENTS--Continued

Where royalty payments due on Federal oil and gas leases are not received by the Department on the date that such payments are due, or are less than the amount due, the Department is required by statute to charge interest on such late payments or underpayments. The MLA provides that interest charges collected on late payments under FOGRMA shall be paid into the Treasury of the United States, and that 50 percent thereof shall be paid by the Secretary of the Treasury to the State within the boundaries of which the leased land or deposits are located. The statute clearly contemplates that the lessee must pay all royalties, including those that will ultimately be paid to the State, into the U.S. Treasury. The Board of Land Appeals is bound to follow such statute and is not at liberty to consider whether interest may be forgiven based upon equitable considerations.

Wexpro Co., 122 IBLA 1 (Dec. 26, 1991)

CIVIL PENALTIES

The procedural safeguards applicable to civil penalties assessed pursuant to 30 U.S.C. § 1719 (1982), do not apply to late reporting assessments levied pursuant to 30 CFR 218.40.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

Assessments for late reporting of royalty on production pursuant to the regulation at 30 CFR 218.40 are properly distinguished from civil penalties assessed under sec. 109 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1719 (1982), and are not subject to the procedures required by that section.

Phillips Petroleum Co., 116 IBLA 152 (Sept. 24, 1990)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

CIVIL PENALTIES--Continued

Assessments for the nonreporting and late reporting of royalties pursuant to 30 CFR 218.40 are properly distinguished from civil penalties assessed under sec. 109 of FOGRMA, 30 U.S.C. § 1719 (1988), and are not subject to the procedures required by that section.

ANR Production Co., 118 IBLA 338 (Mar. 12, 1991)

Assessments for the late reporting of royalties pursuant to 30 CFR 218.40 are properly distinguished from penalties assessed under sec. 109 of FOGRMA, 30 U.S.C. § 1719 (1988), and do not effectively increase the royalty rate designated in an oil and gas lease.

By choosing the method of delivery of its report of sales and royalty remittance (Form MMS-2014), the payor must accept the responsibility for and bear the consequences of that choice, including the possibility of delay in delivery or nondelivery of the report.

Linmar Petroleum Co., 123 IBLA 45 (May 6, 1992)

ROYALTIES

A royalty payor who has been assigned the duty to make royalty payments for production from an oil and gas lease on behalf of co-lessees and who has notified MMS of acceptance of this responsibility by filing a payor information form may be held liable for royalties due under the terms of the lease.

A decision issued to the payor after audit regarding valuation of natural gas produced from certain leases asserting gas sold was not priced in accordance with the statutory ceiling price may be set aside and remanded where the record fails to indicate the affected lessees were apprised of the basis of the revised valuation and afforded an opportunity to respond as required by the lease terms.

In the context of an appeal from a decision of MMS after audit assessing additional royalty on production from an oil and gas lease the issue is what, if any, additional royalty is due and owing to the lessor. The Board adheres to its holding in Shell Oil Co., 52 IBLA 74 (1981), and Mobil Oil Corp., 65 IBLA 295 (1982),

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ROYALTIES--Continued

that where an audit is made of royalty payments for an oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease revealed within the period of the audit.

Forest Oil Corp., 113 IBLA 30 (Jan. 30, 1990)
97 I.D. 11

An exception to late payment charges for royalty payments filed after the end of the month following the month in which the oil and gas is produced and sold may be recognized where the payor has filed a sufficient estimated payment in accordance with the instructions in the Payor Handbook. An estimated payment is made on Form-2014 and requires identification of the payor, the lease number, and the product code and selling arrangement number. An estimated payment may only be established initially for the month immediately preceding the month in which the report and payment are filed and, thereafter, the estimated balance is rolled over monthly to cover production and sales in succeeding months.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)
97 I.D. 74

A Minerals Management Service decision dismissing an appeal of a royalty payment order as untimely will be reversed where it appears that the order was merely implementing a prior royalty valuation decision issued to the same lessee, covering the same production from the same leases, which was at the time the subject of a timely filed appeal.

Walter Van Norman, Jr., 114 IBLA 56 (Apr. 6, 1990)

The regulations found at 43 CFR 218.102(a) and 218.150(b) provide exceptions to the assessment of late payment charges when royalty payments are made after the end of the month following the month in which the oil and gas is produced and sold. The exception applies if the payor has filed a timely and sufficient estimated payment for the applicable lease account and each product type in accordance with the instructions

in the MMS Oil & Gas Payor Handbook. MMS properly assesses late payment charges when a payor has not submitted an estimated payment for a specific lease or product type, even if the total of the estimated payments attributable to the payor exceeds the total royalties due for production from all of the payor's leases.

Exxon Co., U.S.A., 115 IBLA 62 (June 14, 1990)

Pursuant to the lease terms and the applicable regulation, 30 CFR 218.50, royalty payments are required to be made by the last day of the month following production. Late payment charges will be assessed where payments are made after the due date. However, the regulations found at 43 CFR 218.102(a) and 218.150(b) establish exceptions to late payment charges for royalty payments made after the end of the month following the month in which the oil and gas is produced and sold where the payor has filed estimated payments in accordance with the instructions in the MMS Oil & Gas Payor Handbook. Where a payor fails to provide estimated payments at the lease level and fails to provide estimated payments by specific product codes on the MMS-2014 form, MMS properly assesses late payment charges. This charge is appropriate even though the total amount of all the estimated payments made by the payor for its leases exceeds the total amount of royalties due for all of the payor's leases, including those for which no estimated payment has been established.

Exxon Co., U.S.A., 115 IBLA 81 (June 19, 1990)

Ordinarily royalty is computed on the value of the gas removed or sold from the lease. Where gas must be transported from the field to the point of first sale, the deduction of reasonable transportation costs is allowed. The Secretary of the Interior's authority to determine the value of production upon which royalty payments are made extends to determining the factors used in computing transportation allowances for royalty purposes.

Operating leases are a proper component of a transportation allowance for a CO2 pipeline which is

required to transport production to market. A decision limiting operating costs to 10 percent of undepreciated investment when calculating the relevant transportation allowance may be set aside and remanded where the effect is to eliminate a substantial percentage of operating costs and no rational basis for such a limitation is given in the decision or contained in the record.

The allowance of a reasonable rate of return on depreciated assets has been upheld in computing a transportation allowance for production for which there is no market in the field or at the wellhead. Application of a rate of return based on the prime interest rate at the time of the initial period for which the transportation allowance is calculated will be upheld as reasonable.

Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164 (June 28, 1990)

Pursuant to sec. 111 of the Federal Oil & Gas Royalty Management Act of 1982, 30 U.S.C. § 1721 (1982), MMS is authorized to assess a higher interest rate for late payment of oil and gas royalties than it had previously been authorized to assess; therefore, for time periods prior to passage of the Federal Oil and Gas Royalty Management Act of 1982, MMS may assess only the lower, previously authorized interest rate.

Shell Offshore Inc., 115 IBLA 205 (July 3, 1990)

The regulated ceiling price of gas under the Natural Gas Policy Act (NGPA) is a relevant factor in determining the value of the gas for royalty purposes. Where an assessment of additional royalty after audit is based on a failure of the producer to file a timely application for classification of the gas under sec. 102 of the NGPA (allowing a higher ceiling price), and where the record discloses an issue of material fact concerning whether the producer knew or should have known the gas would qualify for a higher ceiling price at an earlier time, the case is properly referred for an evidentiary hearing.

Mobil Oil Corp., 115 IBLA 304 (Aug. 7, 1990)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ROYALTIES--Continued

Although royalty underpayments are improper by definition and may, under some circumstances, subject the payor to civil and/or criminal penalties, the issue in the context of a royalty audit is what, if any, additional royalty is due and owing to the lessor. Where an audit is made of royalty payments for an oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease revealed within the period of the audit regardless of the fact that the underpayments were intended to recoup the prior overpayments.

Forest Oil Corp. (On Reconsideration), 116 IBLA 176 (Sept. 26, 1990) 97 I.D. 239

MMS is required by law to assess interest charges on late royalty payments for oil and gas leasees which are not received by the due date. Where MMS seeks reconsideration of a Board decision reversing an order assessing late payment charges because of lack of evidence that the payments were untimely, and presents evidence conclusively showing that the lessee's payments were in fact untimely, the Board will vacate its earlier decision and affirm the MMS order assessing late payment charges.

Dugan Production Corp. (On Reconsideration), 117 IBLA 153 (Dec. 13, 1990)

Pursuant to the lease terms and the applicable regulation, 30 CFR 218.50, royalty payments are required to be made by the last day of the month following production. Late payment charges will be assessed where payments are made after the due date. However, the regulations found at 43 CFR 218.102(a) and 218.150(b) establish exceptions to late payment charges for royalty payments made after the end of the month following the month in which the oil and gas is produced and sold where the payor has filed estimated payments in accordance with the instructions in the MMS Oil & Gas Payor Handbook. Where a payor fails to provide estimated payments at the lease level, and fails to identify estimated payments by specific product codes on the MMS-2014 form, MMS properly assesses late payment charges. This charge is appropriate even though the total amount of all the estimated payments

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ROYALTIES--Continued

made by the payor for its leases exceeds the total amount of royalties due for all of the payor's leases, including those for which no estimated payment has been established.

Exxon Co., U.S.A., 117 IBLA 199 (Dec. 21, 1990)

MMS' Procedure Paper concerning valuation of NGLP for royalty purposes was not required to be promulgated as a regulation because it does not constitute a substantive rule of law, as it neither creates law nor changes established policy. Rather, it simply clarifies the methodology for applying the factors set forth in 30 CFR 206.150 (1985), providing internal guidance for how this authority should be exercised.

The interpretation announced by MMS in its Procedure Paper concerning valuation of NGLP did not constitute a sudden change in policy such that its application violated appellant's due process rights and was arbitrary and capricious.

When MMS adopts an agency-wide interpretation that is reasonable and consistent with the law, the Board will affirm application of that interpretation. MMS' Procedure Paper concerning valuation of NGLP comports with 30 CFR 206.150 (1985), and MMS' reliance on it does not render its actions arbitrary and capricious.

Where the Department's regulations gave fair notice that royalty was due on NGLP, and in the absence of any well-established practice at odds with that announced in a Procedure Paper concerning valuation of NGLP at the time a party paid the royalties on NGLP, there is no bar to retroactive application of the Procedure Paper.

Where a party fails to provide an offer of proof regarding arm's-length contracts for NGLP in effect during the period at issue comparing its contract with the characteristics of arm's-length contracts, the yardstick price is properly applied in lieu of the non-arm's-length contract price. The contract price, even if applied, is subject to correction to remove impermissible deductions for manufacturing costs and location differential.

In valuing NGLP for royalty computation purposes, where the NGLP was sold under a non-arm's-length contract

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ROYALTIES--Continued

not shown to be comparable to arm's-length contracts that represent market value, MMS may properly use published spot market prices to establish value. However, the Board will set aside an MMS decision instructing a lessee (where the reported price falls below the lowest spot market price) to use the average spot market price instead of the lowest spot market price.

Phillips Petroleum Co., 117 IBLA 255 (Jan. 10, 1991)

Where more than 6 years have passed between the payment of Federal oil and gas royalty (and the generation of relevant documentation concerning the royalty) and the institution of an audit concerning the timeliness of the royalty payments, the time for the lessee to maintain records concerning the royalty has expired under 30 U.S.C. § 1713(b) (1988).

Where a lessee's successor in interest asserts that a lessee's admitted late payment of royalty was excused because the lessee was unaware that royalty in kind was no longer being taken and that royalty in value payments were therefore due, but the Government is able to show by contemporary evidence that the lessee did receive timely notice of the termination of the royalty in kind contract, MMS' decision imposing late payment charges for the lessee's failure to pay royalty timely is properly affirmed.

Marathon Oil Co., 119 IBLA 345 (June 18, 1991)

An assessment of late payment charges for months in which a royalty payor underpaid royalties for natural gas produced and sold from an offshore oil and gas lease will be reversed where MMS approved a refund request for overpayment made during a specific time period including those months; the lease royalty account had a net surplus each month during the period; and the payments all occurred for a single lease.

Pogo Producing Co., 121 IBLA 270 (Nov. 18, 1991)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ROYALTIES--Continued

When the record does not confirm that a lessee has been assigned or assumed legal responsibility for making royalty payments on behalf of co-lessees, an MMS decision directing the lessee to recalculate the royalties for all co-lessees will be set aside and the case remanded for recalculation by the appropriate party or parties.

Phillips Petroleum Co., Phillips 66 Natural Gas Co., 121 IBLA 278 (Nov. 19, 1991)

"Marketable condition rule." A Federal oil and gas lessee is under an obligation to assume the expenses of placing any gas produced and sold into "marketable condition." No deduction from royalty is allowed for the expenses of compressing gas required to place it in marketable condition regardless of whether these costs are paid directly by the lessee or by a third party. The price of gas sold at the wellhead which has been reduced from the price of gas in marketable condition by the costs of compressing it as required for marketing to a pipeline purchaser does not establish the value of the gas in marketable condition.

Beartooth Oil & Gas Co., 122 IBLA 267 (Mar. 3, 1992)

MMS may properly require a Federal gas lessee to furnish a report derived from information in corporate records concerning royalty payments, even if some of the documents needed to produce the report are over 6 years old.

Discovery of an anomaly in royalty reporting arising during refund proceedings on a Federal lease provided a reasonable foundation for an investigation into the possibility that other similar errors had also occurred.

MMS may properly require a Federal gas lessee to furnish a report concerning identified payment errors to be prepared from corporate royalty payment records. If regulations currently in effect do not require a payor

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ROYALTIES--Continued

to research and analyze payment records and report specified reporting errors, special orders providing adequate guidance for reporting will provide a foundation that permits the required report to be completed.

Amoco Production Co., 123 IBLA 278 (June 18, 1992)

Under 30 U.S.C. § 1714 (1988), the Department of the Interior lacks authority to escrow oil and gas royalties derived from production on Indian lands, or allocated thereto, beyond the last business day of the month in which they were received.

Cherokee Nation of Oklahoma, Chickasaw Nation, & Choctaw Nation of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 22 IBIA 240 (Aug. 24, 1992)

FERC Order No. 94 reimbursements paid to a lessee by a pipeline purchaser of gas from OCS oil and gas leases for certain production-related expenses, not included in the ceiling price for delivered gas, may be considered part of the lessee's gross proceeds for purposes of calculation of royalties. A request for a refund of royalties paid on such reimbursements may be properly denied.

Pogo Producing Co., 124 IBLA 76 (Sept. 9, 1992)

MMS properly required a Federal and Indian oil and gas lessee to review royalty accounts in order to determine whether royalty underpayment was caused by exclusion of state tax reimbursements from gross proceeds of sales of oil and gas.

The Federal and Indian lessee was properly required to compute and pay additional royalties where there was evidence of systematic exclusion of tax reimbursements in reporting production proceeds for royalty purposes.

BHP Petroleum (Americas) Inc., 124 IBLA 185 (Oct. 14, 1992)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ROYALTIES--Continued

In enacting sec. 102(a) of FOGRMA, 30 U.S.C. § 1712(a) (1988), Congress did not expand the Secretary's authority but allowed him to determine, under existing authority of law, which person is responsible for making royalty payments.

Sec. 102(a) of FOGRMA, 30 U.S.C. § 1712(a) (1988), requires a lessee to notify the Secretary of the assignment of the obligation to pay royalty. Sec. 3(7) of FOGRMA, 30 U.S.C. § 1702(7) (1988), defines lessee as including any person who has been assigned an obligation to make a royalty or other payment required by a lease. Under secs. 102(a) and 3(7) of FOGRMA, for a person who holds no interest in a lease to be liable for the lessee's royalty payments, the lessee and the person must have agreed to an assignment of the obligation to pay royalty, and notice of that assignment or either evidence of or notice of an assignment, and filing a PIF, without more, does not render the person filing it a lessee under sec. 3(7) of FOGRMA, 30 U.S.C. § 1702(7) (1988). There must be a document assigning the obligation to make royalty payments or a contract or agreement stating this obligation.

The assignment of the obligation to make royalty payments is not related to an assignment of a lease or an interest in a lease that must be approved by BIA under 25 CFR 212.22.

The making of royalty payments and the filing of PIFs are not sufficient evidence to indicate an intent to be bound as an agent by lessees' obligation to pay royalty.

Mesa Operating Ltd Partnership, 125 IBLA 28 (Dec. 31, 1992) 99 I.D. 272

Acting under authority provided by sec. 103 of FOGRMA, MMS properly required production of sales contracts and exchange agreements needed to ascertain whether gross proceeds from sales of Federal crude oil exceeded the value reported by the Federal lessee from a transfer between affiliated corporations that was not an arms-length transaction.

Santa Fe Energy Products Co., 127 IBLA 265 (Sept. 28, 1993)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ROYALTIES--Continued

In the absence of a regulation and a PIF explicitly stating that filing the form constitutes the assumption of the lessee's obligation to pay royalty by the person filing it, a document evidencing the person's agreement to accept this responsibility is necessary.

A division order may constitute evidence that the obligation to pay royalty has been assigned.

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

MMS' demands for additional royalty on Federal offshore oil and gas leases are administrative actions that are not covered by 28 U.S.C. § 2415(a) (1988). Further, a lessee has a duty to compile and voluntarily chose to retain beyond 6 years, so that, notwithstanding the 6-year limit on recordkeeping imposed by 30 U.S.C. § 1713(b) (1988), MMS is not barred from making demands for payment of additional royalty where the lessee has retained relevant documents. The provisions of 30 U.S.C. § 1755 (1988), bar actions to recover penalties and, thus, do not relate to MMS demands for collection of additional royalty.

Chevron U.S.A., Inc., 129 IBLA 151 (Apr. 19, 1994)

FERC Order No. 94 reimbursements paid to a lessee by a pipeline purchaser for gas for certain production-related expenses, not included in the ceiling price for delivered gas, are properly considered part of the gross proceeds for purposes of calculation of royalties.

Even where a lessee obtains FERC Order No. 94 reimbursements for transportation of gas, the amount of the allowance properly granted is limited to the actual cost of the transportation of the gas which may not be coincidental with the reimbursement received.

OXY USA Inc., 129 IBLA 285 (May 20, 1994)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ROYALTIES--Continued

Valuation standards established for crude oil not transferred by a Federal lessee under an arm's-length contract were governed by Departmental regulation 30 CFR 206.102(c), which required a producer who did not have arm's-length sales or post prices to use an arithmetic average of third-party posted prices for like quality oil in the same field to calculate royalty.

Shell Oil Co., 130 IBLA 93 (Aug. 1, 1994)

FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT

GENERALLY

Under the provisions of 43 CFR 3101.7-3. a third-party objecting to issuance of an oil and gas lease on land within the National Forest System, pursuant to the consent of the FS, has standing to appeal to the Interior Board of Land Appeals. However, to the extent that the third-party raises objections to the conformity of actions undertaken by the FS with respect to its own internal operating procedures or with laws solely applicable to the FS, the Board will not review such contentions where the FS has provided its own appeal system for the resolution of such issues.

Where the record establishes that oil and gas leasing recommendations contained in an applicable land and RMP adopted by the FS were subject to revision upon site-specific examination and the FS, pursuant to such an examination, consents to leasing lands formerly designated as unavailable or as available for leasing with NSO restrictions, objections to a decision by BLM to issue leases in reliance on the FS recommendations will be rejected where the party objecting fails to show that the FS site-specific analysis was, in any way, flawed.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

FEES
(See also Accounts)

A party seeking a waiver of fees due for a special recreation permit is not barred from receiving the waiver simply because it is engaged in "commercial use" as that term is defined in the regulations. Rather, the party may receive the waiver if it meets the criteria set out in 43 CFR 8372.4(c)(1) and (2).

Pacific Crest Outward Bound School, 117 IBLA 309 (Jan. 23, 1991)

It is proper for BLM to reject location notices for placer mining claims submitted for recordation under 43 CFR 3833.1-4(a) because the claimants failed to tender the proper service charge within 30 days from the date claimants were deemed to have constructively received a deficiency notice requiring such payment. The record establishes that the deficiency notice was addressed to and the post office properly attempted delivery to the claimants' last address of record.

Gerhard W. Befeld, Marie D. Befeld, 123 IBLA 118 (May 19, 1992)

FISH AND WILDLIFE SERVICE

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

GEOPHYSICAL EXPLORATION

GENERALLY

The interim final rule amending 43 CFR Subpart 3150 to make decisions and approvals of the authorized officer in onshore oil and gas geophysical exploration matters effective pending appeal has the effect of making such BLM determinations final agency action immediately subject to judicial review under the provisions of 5 U.S.C. § 704 (1988). While the interim final rule provides that a petition for stay may be filed with the Board of Land Appeals, a person would not be required to exhaust that procedure before proceeding to District Court.

Southern Utah Wilderness Alliance, 123 IBLA 13 (Apr. 22, 1992)

Where BLM has prepared an EA and FONSI specific to a proposal to drill two exploratory geothermal observation/flow test wells and deepen an existing exploratory test well, and its analysis of possible full-field development is limited by the absence of any development proposal, that assessment is sufficient in scope and a site-specific EIS is not necessary.

Where the FWS has already issued a formal consultation document on issuance of geothermal leases near a lake which harbors an endangered species of fish, and the FWS has continued to consult with BLM to help devise mitigating measures for geothermal lease issuance and exploratory drilling, BLM may correctly decline to request a second formal consultation for the geothermal test drilling.

Sierra Club, Inc., et al., 126 IBLA 142 (May 6, 1993)

NOTICE OF INTENT

The general regulations governing proceedings before OHA contain a rule, 43 CFR 4.21(a), providing that a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and that the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. The rule specifically provides, however, that it is effective "[e]xcept as otherwise provided by law or other pertinent regulation." An interim final rule, published in the Federal

GEOPHYSICAL EXPLORATION--Continued

NOTICE OF INTENT--Continued

Register on Mar. 13, 1992 (57 FR 9010), 43 CFR 3150.2, provides otherwise by making decisions approving notices of intent to conduct geophysical exploration effective pending appeal.

Southern Utah Wilderness Alliance, 123 IBLA 13 (Apr. 22, 1992)

GEOTHERMAL LEASES
(See also Hearings, Mineral Leasing Act)

GENERALLY

A decision to approve an application for permit to drill a geothermal well will not be disturbed on appeal where it is shown that there is a connection between water wells alleged to be affected by such drilling and the geothermal resource. Where the record establishes that other factors unrelated to the geothermal drilling may be the cause of damage to the water wells, the Secretary is entitled to rely on his experts in the field who are of the opinion that the drilling will not result in contamination of groundwater supplies or otherwise harm the environment.

Dorothy A. Towne et al., 115 IBLA 31 (June 8, 1990)

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

GEOTHERMAL LEASES--Continued

GENERALLY--Continued

Where BLM has prepared an EA and FONSI specific to a proposal to drill two exploratory geothermal observation/flow test wells and deepen an existing exploratory test well, and its analysis of possible full-field development is limited by the absence of any development proposal, that assessment is sufficient in scope and a site-specific EIS is not necessary.

Where the FWS has already issued a formal consultation document on issuance of geothermal leases near a lake which harbors an endangered species of fish, and the FWS has continued to consult with BLM to help devise mitigating measures for geothermal lease issuance and exploratory drilling, BLM may correctly decline to request a second formal consultation for the geothermal test drilling.

Sierra Club, Inc., et al., 126 IBLA 142 (May 6, 1993)

APPLICATIONS

Generally

An application for a noncompetitive lease of geothermal resources that was filed in the name of two applicants may be rejected where one of the applicants fails to respond to a demand by BLM that she confirm that she intends to take the lease and that she provide her current address.

Fidelity Trust Building, Inc., 129 IBLA 57 (Mar. 25, 1994)

ASSIGNMENTS OR TRANSFERS

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

GEOTHERMAL LEASES--Continued

CANCELLATION

A geothermal resources lease was properly cancelled where the lessee failed, as required by 43 CFR 3203.5, to notify BLM of performance of required exploration at any time prior to the end of the sixth lease year or within 60 days thereafter. Because the lessee was not given 30 days to correct the violation prior to cancellation, the decision cancelling the lease is reversed and the lessee is allowed 30 days in which to correct the violation, as provided by 43 CFR 3203.5, in order to retain the lease.

George M. Wilkinson, Fidelity Trust Building, Inc., 124 IBLA 171 (Oct. 2, 1992)

DRILLING

A decision to approve an application for permit to drill a geothermal well will not be disturbed on appeal where it is shown that there is a connection between water wells alleged to be affected by such drilling and the geothermal resource. Where the record establishes that other factors unrelated to the geothermal drilling may be the cause of damage to the water wells, the Secretary is entitled to rely on his experts in the field who are of the opinion that the drilling will not result in contamination of groundwater supplies or otherwise harm the environment.

Dorothy A. Towne et al., 115 IBLA 31 (June 8, 1990)

ENVIRONMENTAL PROTECTION

Water Quality and Other Environmental Qualities

A decision to approve an application for permit to drill a geothermal well will not be disturbed on appeal where it is shown that there is a connection between water wells alleged to be affected by such drilling and the geothermal resource. Where the record establishes that other factors unrelated to the geothermal drilling may be the cause of damage to the water wells, the Secretary is entitled to rely on his experts in the field who are of the opinion that the drilling will not

GEOTHERMAL LEASES--Continued

ENVIRONMENTAL PROTECTION--Continued

Water Quality and Other Environmental Qualities --Continued

result in contamination of groundwater supplies or otherwise harm the environment.

Dorothy A. Towne et al., 115 IBLA 31 (June 8, 1990)

LANDS SUBJECT TO

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

PATENTED OR ENTERED LANDS

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

REINSTATEMENT

A late rental payment by a geothermal lessee was not entitled to the benefit of a grace period provided by 43 CFR 3244.2-2(b)(1) because the payment bore a private postal meter mark. Bankruptcy administration was not shown to justify the late payment under provision of 43 CFR 3244.2-2(b) because there was no showing that the late payment was caused by the

GEOTHERMAL LEASES--Continued

REINSTATEMENT--Continued

bankruptcy or any other agency beyond the control of the geothermal lessee.

GRI Exploration Corp., 127 IBLA 389 (Oct. 27, 1993)

When a lessee failed to timely pay annual rental due on a geothermal lease on which there was no well capable of producing geothermal resources in commercial quantities, the lease terminated by operation of law, and BLM properly limited the right of the lessee to seek reinstatement to a 30-day period following notice of termination.

George M. Wilkinson, 130 IBLA 79 (July 26, 1994)

RENTALS

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Because BLM had no authority to accept rental payment for land within a geothermal lease over which it had no jurisdiction, it was obliged to refund to the lessee any excess payment.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

When a lessee failed to timely pay annual rental due on a geothermal lease on which there was no well capable of producing geothermal resources in commercial quantities, the lease terminated by operation of law, and BLM properly limited the right of the lessee to seek reinstatement to a 30-day period following notice of termination.

George M. Wilkinson, 130 IBLA 79 (July 26, 1994)

GEOTHERMAL LEASES--Continued

TERMINATION

A late rental payment by a geothermal lessee was not entitled to the benefit of a grace period provided by 43 CFR 3244.2-2(b)(1) because the payment bore a private postal meter mark. Bankruptcy administration was not shown to justify the late payment under provision of 43 CFR 3244.2-2(b) because there was no showing that the late payment was caused by the bankruptcy or any other agency beyond the control of the geothermal lessee.

GRI Exploration Corp., 127 IBLA 389 (Oct. 27, 1993)

When a lessee failed to timely pay annual rental due on a geothermal lease on which there was no well capable of producing geothermal resources in commercial quantities, the lease terminated by operation of law, and BLM properly limited the right of the lessee to seek reinstatement to a 30-day period following notice of termination.

George M. Wilkinson, 130 IBLA 79 (July 26, 1994)

GEOTHERMAL RESOURCES

A decision to approve an application for permit to drill a geothermal well will not be disturbed on appeal where it is shown that there is a connection between water wells alleged to be affected by such drilling and the geothermal resource. Where the record establishes that other factors unrelated to the geothermal drilling may be the cause of damage to the water wells, the Secretary is entitled to rely on his experts in the field who are of the opinion that the drilling will not result in contamination of groundwater supplies or otherwise harm the environment.

Dorothy A. Towne et al., 115 IBLA 31 (June 8, 1990)

GRAZING AND GRAZING LANDS

Where a Federal land exchange results in the diminution of a grazing allotment, provisions of 43 CFR 4110.4-2 require that affected permits be modified to reflect the changed area of use. When such a diminution of a permit takes place, the grazier is entitled to prior notice of 2 years duration, and compensation for any improvements authorized to be placed on the land.

John S. Peck, Owen K. Speirs, Claire T. Speirs, 114 IBLA 393 (May 30, 1990)

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Forgey Ranch Co. v. Bureau of Land Management, 116 IBLA 32 (Aug. 27, 1990)

Under 43 CFR 2201.1(c) the publication of a notice of realty action constitutes the notice to grazing permittees and lessees required by 43 CFR 4110.4-2(b).

A grazing permittee received the regulatory 2-year notice when, subsequent to receipt of an allegedly defective notice, the permittee was served with a copy of the notice of realty action.

City of Santa Fe et al. (On Judicial Remand), 120 IBLA 308 (Sept. 11, 1991)

Implementation of the Act of Sept. 1, 1937 (the Reindeer Industry Act) is committed to the discretion of the Secretary of the Interior. When BLM rejects an application for a reindeer grazing permit after consulting with the Alaska Dept. of Fish and Game, which opposes approval, and the applicant fails to show error in BLM's findings or an abuse of discretion, BLM's decision is properly affirmed on appeal.

Thomas L. Gray, 121 IBLA 295 (Dec. 3, 1991)

GRAZING AND GRAZING LANDS--Continued

An ALJ's decision adjudicating grazing privileges will not be set aside on appeal if it correctly determines that a BLM decision reducing grazing is reasonable and substantially complies with the provisions of the Federal grazing regulations fround at 43 CFR Part 4100.

Glanville Farms, Inc. v. Bureau of Land Management, 122 IBLA 77 (Jan. 14, 1992)

Absent an analysis of the possible consequences should proposed range-land improvement projects not be fully successful and lacking an anlysis of the immediate consequences of undertaking the projects, the Board cannot conclude that BLM has identified the relevant areas of environmental concern and has taken a hard look at the environmental consequences of the projects.

Southern Utah Wilderness Alliance, The Wilderness Society, Utah Chapter Sierra Club, 123 IBLA 302 (June 25, 1992)

BLM enjoys broad discretion in determining how to adjudicate and manage grazing privileges, and a BLM decision concerning grazing privileges will not be set aside if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100. BLM's decision may be regarded as arbitrary, capricious, or inequitable only where it is not supported by any rational basis, and the burden is on the objecting party to show that a decision is improper.

Wayne D. Klump v. Bureau of Land Management, 124 IBLA 176 (Oct. 13, 1992)

Wayne D. Klump v. Bureau of Land Management, 124 IBLA 200 (Oct. 21, 1992)

BLM properly rejected an application for use in a grazing allotment where all of such use had been granted to a grazier who had control of water base available and accessible for stock watering purposes and was used under a color of right, absent a determination under

GRAZING AND GRAZING LANDS--Continued

state law that the grazier did not have valid water rights.

Silvino Ortiz v. Bureau of Land Management, 126 IBLA 8 (Apr. 1, 1993)

Where BLM denies an application to change livestock use from cattle to cattle and sheep based on the potential conflict with desert bighorn sheep, that decision is correctly affirmed by an ALJ when the record shows a rational basis for BLM's decision and appellant has failed to show the decision was improper.

Joe Iriart v. Bureau of Land Management, Utah Wilderness Ass'n (Intervenor), 126 IBLA 111 (Apr. 27, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

GRAZING AND GRAZING LANDS--Continued

The provisions of revised 43 CFR 4.21(a) govern the effect of a decision pending appeal, "[e]cept as otherwise provided by law or pertinent regulation." The regulations governing grazing procedures contain a "pertinent regulation" that meets the exception of 43 CFR 4.21(a). Under 43 CFR 4.477(a), an appeal shall suspend the effect of the decision from which it is taken pending final action on the appeal unless the decision appealed from is made immediately effective.

A decision by an authorized officer of BLM, an ALJ, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. For purposes of making that determination, the word "resource" is considered to include all rangeland values that might be subject to degradation.

Nat'l Wildlife Federation, Southern Utah Wilderness Alliance, & Joseph M. Feller (Appellants/Appellees) v. Bureau of Land Management (Respondent/Appellant), American Farm Bureau Federation, Utah Farm Bureau Federation, & Ute Mtn. Ute Indian Tribe (Intervenors/Appellants), 128 IBLA 231 (Mar. 1, 1994)

Where the standing of an organization is challenged in an appeal to the Board of Land Appeals of an ALJ's decision in a grazing case on the basis that the organization is not adversely affected, the Board will find adverse effect where the organization presents colorable allegations of injury through production of the affidavits of three of its members holding grazing authorizations in adjacent or nearby allotments within the same resource area, whose ability to continue grazing livestock is threatened by the legal rulings being challenged.

Nat'l Wildlife Federation, Southern Utah Wilderness Alliance, & Joseph M. Feller (Appellants/Appellees) v. Bureau of Land Management (Respondent/Appellant), American Farm Bureau Federation, Utah Farm Bureau Federation, & Ute Mtn. Ute Indian Tribe (Intervenors/Appellants), 129 IBLA 124 (Apr. 13, 1994)

Where an entity was not named as an "affected interest" under 43 CFR 4100.0-5 concerning a BLM decision to grant a grazing permit and where there is no indication that the entity participated in any other way in any of BLM's dealings with the granting of the permit, it lacks standing to appeal the decision to the Board of Land Appeals, as it was not a "party to the case" under 43 CFR 4.410(a).

An entity that applies for and receives status as an "affected interest" under 43 CFR 4100.0-5 prior to BLM's granting of an application for a grazing permit was a "party to the case" under 43 CFR 4.410(a). Where that entity has alleged and filed supporting evidence showing that its members frequently use and enjoy areas of the grazing allotment affected by the permit for diverse recreational, educational, scientific, and aesthetic pursuits, it has made an adequately specific, colorable allegation that it is "adversely affected" by the appealed decision, completing the showing required for standing under 43 CFR 4.410(a), so that a motion to dismiss for lack of standing is properly denied.

An order by an ALJ denying an appeal as frivolous will be vacated where appellant's SOR set out numerous specific objections to the propriety of BLM's decision granting a grazing permit, along with citations to Departmental regulations and the BLM Manual, presenting legitimate issues of fact and law requiring resolution.

An application for a grazing permit following transfer of ownership of base lands is an "application for permit" within the meaning of 43 CFR 4160.1-1, governing proposed decisions on permits or leases. Further, a BLM decision effectively extending the term of a grazing permit and recognizing a new entity as permittee is a "proposed action relating to terms and conditions of permits" under that provision.

Under 43 CFR 4160.1-1, BLM must do two discrete things: (1) it must serve a copy of a proposed decision concerning an application for permit on any applicant unless BLM and the permittee have reached a "documented agreement"; and (2) it must also send a copy of such proposed decision to any entity named as an "affected interest" pursuant to 43 CFR 4100.0-5. The regulation is mandatory, and where BLM fails to comply, its decision approving the permit application is properly set aside and remanded with instructions to readjudicate

the application in light of the objections of the "affected interest."

Oregon Natural Resources Council, Oregon Natural Desert Ass'n v. Bureau of Land Management, MC Beaty Butte Grazing Ass'n, 129 IBLA 269 (May 17, 1994)

GRAZING LEASES
(See also Taylor Grazing Act)

GENERALLY

The holder of the expiring permit must accept the terms and conditions to be included in the new permit in order to receive first priority for receipt of the new permit. When a BLM notice seeking applications for a grazing permit sets out conditions for issuance of the permit which are within the scope of BLM's authority, the conditions are not arbitrary and capricious, and when it is clear that an applicant who may otherwise qualify for first priority has no desire to meet those terms and conditions, it is proper for BLM to reject the application because the applicant does not intend to meet the terms and conditions precedent to issuance of the permit.

Pete Stamatakis v. Bureau of Land Management, 115 IBLA 69 (June 15, 1990)

A decision that denied grazing lessees increased preferences because adequate data was not available to support the increases sought was not shown to be irrational so as to require reversal because the decision-maker chose to reject data gathered by a preliminary study using discredited sampling methods.

Robert E. Miller, Jr., & Donald E. Rowlett v. Bureau of Land Management, 118 IBLA 354 (Mar. 14, 1991)

GRAZING LEASES--Continued

GENERALLY--Continued

Economic injury to a grazer, even if severe, does not invalidate BLM's decision adjudicating and managing grazing preference, but is only one consideration bearing on the reasonableness of that determination. If BLM's decision has a reasonable basis, it must be affirmed. Although the record demonstrates that BLM's decision to divide an allotment into use areas and to assign users to specific use areas works some inconvenience on one grazer and provokes general dissatisfaction among all users assigned to one area, BLM's decision is properly affirmed where the record does not show economic injury so severe as to overcome BLM's valid reasons for imposing that grazing system.

Calvin Yardley et al., L. Wayne Ross v. Bureau of Land Management, 123 IBLA 80 (May 11, 1992)

APPORTIONMENT OF LAND

A decision that denied grazing lessees increased preferences because adequate data was not available to support the increases sought was not shown to be irrational so as to require reversal because the decision-maker chose to reject data gathered by a preliminary study using discredited sampling methods.

Holders of existing permanent grazing perference rights who seek increased grazing preferences must show that sufficient forage exists to support the requested increases. Generally, to be allowed, such increases must be supported by continuing rangeland studies.

Robert E. Miller, Jr., & Donald E. Rowlett v. Bureau of Land Management, 118 IBLA 354 (Mar. 14, 1991)

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GRAZING LEASES--Continued

APPORTIONMENT OF LAND--Continued

show economic injury so severe as to overcome BLM's valid reasons for imposing that grazing system.

Calvin Yardley et al., L. Wayne Ross v. Bureau of Land Management, 123 IBLA 80 (May 11, 1992)

CANCELLATION OR REDUCTION

A decision that denied grazing lessees increased preferences because adequate data was not available to support the increases sought was not shown to be irrational so as to require reversal because the decision-maker chose to reject data gathered by a preliminary study using discredited sampling methods.

Robert E. Miller, Jr., & Donald E. Rowlett v. Bureau of Land Management, 118 IBLA 354 (Mar. 14, 1991)

A decision to redraw the boundary of a grazing allotment to inhibit the transmission of disease from cattle to bighorn sheep will be affirmed if the decision rests upon a rational basis, reflects consideration of all relevant factors, is supported by the record, and the appellant fails to show the decision was improper.

Jerry W. Blair, Howard P. Blair v. Bureau of Land Management, 126 IBLA 296 (June 14, 1993)

PREFERENCE RIGHT APPLICANTS

A decision that denied grazing lessees increased preferences because adequate data was not available to support the increases sought was not shown to be irrational so as to require reversal because the decision-maker chose to reject data gathered by a preliminary study using discredited sampling methods.

Holders of existing permanent grazing perference rights who seek increased grazing preferences must show that sufficient forage exists to support the requested

GRAZING LEASES--Continued

PREFERENCE RIGHT APPLICANTS--Continued

increases. Generally, to be allowed, such increases must be supported by continuing rangeland studies.

Robert E. Miller, Jr., & Donald E. Rowlett v. Bureau of Land Management, 118 IBLA 354 (Mar. 14, 1991)

GRAZING PERMITS AND LICENSES
(See also Appeals, Hearings, Taylor Grazing Act)

GENERALLY

The holder of the expiring permit must accept the terms and conditions to be included in the new permit in order to receive first priority for receipt of the new permit. When a BLM notice seeking applications for a grazing permit sets out conditions for issuance of the permit which are within the scope of BLM's authority, the conditions are not arbitrary and capricious, and when it is clear that an applicant who may otherwise qualify for first priority has no desire to meet those terms and conditions, it is proper for BLM to reject the application because the applicant does not intend to meet the terms and conditions precedent to issuance of the permit.

Pete Stamatakis v. Bureau of Land Management, 115 IBLA 69 (June 15, 1990)

Pursuant to the regulations at 43 CFR Part 4100, if an applicant for a grazing preference owns land in a grazing district but that land does not serve as a base for livestock operations which utilize public lands, his application is properly denied.

If an applicant for a grazing preference does not timely file a completed application and moreover offers a preference right which had previously terminated, a decision denying the application will not be overturned on appeal.

Pursuant to 43 CFR 1610.5-3(a) all resource management authorizations and actions, as well as budget or other action proposals and subsequent more detailed or specific planning, shall conform to the approved resource management plan. A BLM decision to deny a grazing permit application based on incompatibility

GRAZING PERMITS AND LICENSES--Continued

GENERALLY--Continued

between the applicable resource management plan and the application shall be affirmed.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

A decision by BLM to grant a sheep grazing application subject to restrictions in order to facilitate multiple-use management objectives by keeping a portion of an allotment off limits to domestic sheep so that it might be available for the introduction of bighorn sheep, will not be disturbed absent substantial evidence showing that the decision is improper.

Joe Saval Co. v. Bureau of Land Management, State of Nevada, Department of Wildlife (Intervenor), 119 IBLA 202 (May 7, 1991)

Implementation of the Act of Sept. 1, 1937 (the Reindeer Industry Act) is committed to the discretion of the Secretary of the Interior. When BLM rejects an application for a reindeer grazing permit after consulting with the Alaska Dept. of Fish and Game, which opposes approval, and the applicant fails to show error in BLM's findings or an abuse of discretion, BLM's decision is properly affirmed on appeal.

Thomas L. Gray, 121 IBLA 295 (Dec. 3, 1991)

It is within the authorized officer's discretionary authority to grant "affected interest" status pursuant to 43 CFR 4100.0-5, for purposes of being involved in grazing management pursuant to the applicable regulations in 43 CFR Part 4100, to a person who has used grazing allotment lands for recreation and filed a written request for affected interest status.

Donald K. Majors, 123 IBLA 142 (May 28, 1992)

GRAZING PERMITS AND LICENSES--Continued

GENERALLY--Continued

A decision adjusting user boundaries within a Federal grazing allotment was properly affirmed upon a showing that BLM had consulted, cooperated, and coordinated the determination concerning areas of allotted use by the grazers concerned in conformity to Departmental regulation 43 CFR 4110.2-4.

M. L. Investment Co. v. Bureau of Land Management, 130 IBLA 376 (Sept. 15, 1994)

A decision by BLM denying an organization "affected interest status" in grazing matters is properly set aside where BLM did not state therein why it felt the organization did not meet relevant criteria. That failure violated not only the terms of a governing BLM State Office IM, but also the more general requirement, imposed by well-established precedent, that its decision must contain a reasoned and factual explanation providing a basis for understanding and accepting the decision, or alternatively, for appealing and disputing it before this Board.

Southern Utah Wilderness Alliance, 131 IBLA 293 (Nov. 30, 1994)

ADJUDICATION

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Forgey Ranch Co. v. Bureau of Land Management, 116 IBLA 32 (Aug. 27, 1990)

An ALJ's decision adjudicating grazing privileges will not be set aside on appeal if it correctly determines that a BLM decision reducing grazing is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Glanville Farms, Inc. v. Bureau of Land Management, 122 IBLA 77 (Jan. 14, 1992)

GRAZING PERMITS AND LICENSES--Continued

ADJUDICATION--Continued

Where, in the course of analysis and adjudication, a proposal is changed so much that those potentially adversely affected do not have fair notice of its contents, the decision of the ALJ on the proposal will be set aside and the matter remanded so that BLM may issue a new proposed decision based on analysis of the redefined proposal.

Glenn Grenke v. Bureau of Land Management, 122 IBLA 123 (Jan. 24, 1992)

BLM enjoys broad discretion in determining how to adjudicate and manage grazing preference. Under 43 CFR 4.478(b), BLM's decision concerning grazing preference may not properly be set aside by an ALJ if it appears that it is reasonable and that it represents a substantial compliance with the provisions of 43 CFR Part 4100. BLM's decision may be regarded as arbitrary, capricious, or inequitable only where it is not supportable "on any rational basis." The burden is on the objecting party to show that a decision is improper.

BLM's decision dividing a grazing allotment into use areas is properly affirmed where (1) range improvement had been found to be necessary after study, (2) the previous system of rest/rotation grazing had failed, (3) it was necessary to restrict use to specific areas to another, and (4) it was necessary to make users accountable for the condition of the range that they were grazing. BLM's decision assigning permittees to specific use areas is properly affirmed where (1) the boundaries were drawn and assignments were made to equalize use of the range, and (2) the boundaries as drawn will equalize the availability of "high country," which provides better feed in late summer.

A determination by BLM of the carrying capacity of a unit of range will not be disturbed in the absence of positive evidence in error. Where appellants presented only testimony expressing their opinion that one area of range has had better feed than another and present no contrary range data assembled by approved methods challenging BLM's methodology such as a range survey, and where their experience on range conditions is not based on BLM's new plan but on existing uncontrolled

GRAZING PERMITS AND LICENSES--Continued

ADJUDICATION--Continued

grazing practices, BLM's determination is properly adopted.

Economic injury to a grazer, even if severe, does not invalidate BLM's decision adjudicating and managing grazing preference, but is only one consideration bearing on the reasonableness of that determination. If BLM's decision has a reasonable basis, it must be affirmed. Although the record demonstrates that BLM's decision to divide an allotment into use areas and to assign users to specific use areas works some inconvenience on one grazer and provokes general dissatisfaction among all users assigned to one area, BLM's decision is properly affirmed where the record does not show economic injury so severe as to overcome BLM's valid reasons for imposing that grazing system.

BLM's attempt to structure a grazing system so that the greatest number of grazers are satisfied does not justify reversal of that decision where it is otherwise supportable.

Calvin Yardley et al., L. Wayne Ross v. Bureau of Land Management, 123 IBLA 80 (May 11, 1992)

BLM enjoys broad discretion in determining how to adjudicate and manage grazing privileges, and a BLM decision concerning grazing privileges will not be set aside if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100. BLM's decision may be regarded as arbitrary, capricious, or inequitable only where it is not supported by any rational basis, and the burden is on the objecting party to show that a decision is improper.

Wayne D. Klump v. Bureau of Land Management, 124 IBLA 176 (Oct. 13, 1992)

Wayne D. Klump v. Bureau of Land Management, 124 IBLA 200 (Oct. 21, 1992)

GRAZING PERMITS AND LICENSES--Continued

ADJUDICATION--Continued

BLM properly rejected an application for use in a grazing allotment where all of such use had been granted to a grazier who had control of water base available and accessible for stock watering purposes and was used under a color of right, absent a determination under state law that the grazier did not have valid water rights.

Silvino Ortiz v. Bureau of Land Management, 126 IBLA 8 (Apr. 1, 1993)

Where BLM denies an application to change livestock use from cattle to cattle and sheep based on the potential conflict with desert bighorn sheep, that decision is correctly affirmed by an ALJ when the record shows a rational basis for BLM's decision and appellant has failed to show the decision was improper.

Joe Iriart v. Bureau of Land Management, Utah Wilderness Ass'n (Intervenor), 126 IBLA 111 (Apr. 27, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C.

GRAZING PERMITS AND LICENSES--Continued

ADJUDICATION--Continued

§ 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

By regulation, 43 CFR 4.478(b), the Department has provided that an adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 CFR Part 4100. 43 CFR 4.478(b). In this manner, the Department has considerably narrowed the scope of review of BLM grazing decision by an ALJ and by this Board.

The standard of proof to be applied in weighing the evidence presented at a hearing held pursuant to an appeal of a grazing decision issued by BLM is the preponderance of evidence test. Where a decision determining grazing privileges has been reached in the exercise of administrative discretion, the appellant seeking relief therefrom bears the burden of showing by a preponderance of the evidence that the decision is unreasonable or improper.

In an appeal of a BLM decision adjudicating grazing privileges, neither an ALJ nor the Board of Land Appeals has authority to entertain a claim by one grazing applicant of breach of the terms of a contract between the United States, acting through the Department of the Navy, and one of the other applicants.

Jerry Kelly (Appellee) v. Bureau of Land Management (Appellant), Sheldon W. Lamb (Intervenor/Appellant), 131 IBLA 146 (Oct. 31, 1994)

ADMINISTRATIVE LAW JUDGE

It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure

GRAZING PERMITS AND LICENSES--Continued

ADMINISTRATIVE LAW JUDGE--Continued

to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

Reed B. Robison, RO Livestock v. Bureau of Land Management, 120 IBLA 181 (July 26, 1991)

BLM enjoys broad discretion in determining how to adjudicate and manage grazing preference. Under 43 CFR 4.478(b), BLM's decision concerning grazing preference may not properly be set aside by an ALJ if it appears that it is reasonable and that it represents a substantial compliance with the provisions of 43 CFR Part 4100. BLM's decision may be regarded as arbitrary, capricious, or inequitable only where it is not supportable "on any rational basis." The burden is on the objecting party to show that a decision is improper.

BLM's decision dividing a grazing allotment into use areas is properly affirmed where (1) range improvement had been found to be necessary after study, (2) the previous system of rest/rotation grazing had failed, (3) it was necessary to restrict use to specific areas to another, and (4) it was necessary to make users accountable for the condition of the range that they were grazing. BLM's decision assigning permittees to specific use areas is properly affirmed where (1) the boundaries were drawn and assignments were made to equalize use of the range, and (2) the boundaries as drawn will equalize the availability of "high country," which provides better feed in late summer.

A determination by BLM of the carrying capacity of a unit of range will not be disturbed in the absence of positive evidence in error. Where appellants presented only testimony expressing their opinion that one area of range has had better feed than another and present no contrary range data assembled by approved methods challenging BLM's methodology such as a range survey, and where their experience on range conditions is not based on BLM's new plan but on existing uncontrolled

GRAZING PERMITS AND LICENSES--Continued

ADMINISTRATIVE LAW JUDGE--Continued

grazing practices, BLM's determination is properly adopted.

Economic injury to a grazer, even if severe, does not invalidate BLM's decision adjudicating and managing grazing preference, but is only one consideration bearing on the reasonableness of that determination. If BLM's decision has a reasonable basis, it must be affirmed. Although the record demonstrates that BLM's decision to divide an allotment into use areas and to assign users to specific use areas works some inconvenience on one grazer and provokes general dissatisfaction among all users assigned to one area, BLM's decision is properly affirmed where the record does not show economic injury so severe as to overcome BLM's valid reasons for imposing that grazing system.

BLM's attempt to structure a grazing system so that the greatest number of grazers are satisfied does not justify reversal of that decision where it is otherwise supportable.

Calvin Yardley et al., L. Wayne Ross v. Bureau of Land Management, 123 IBLA 80 (May 11, 1992)

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the

GRAZING PERMITS AND LICENSES--Continued

ADMINISTRATIVE LAW JUDGE--Continued

extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

APPEALS

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Forgey Ranch Co. v. Bureau of Land Management, 116 IBLA 32 (Aug. 27, 1990)

Pursuant to 43 CFR Subpart 4160, a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

Pursuant to the regulations at 43 CFR Part 4100, if an applicant for a grazing preference owns land in a grazing district but that land does not serve as a base for livestock operations which utilize public lands, his application is properly denied.

If an applicant for a grazing preference does not timely file a completed application and moreover offers

GRAZING PERMITS AND LICENSES--Continued

APPEALS--Continued

a preference right which had previously terminated, a decision denying the application will not be overturned on appeal.

An appeal from a decision denying an application for a grazing permit will not be dismissed as moot even though the relevant grazing season has passed, where issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

Pursuant to 43 CFR 1610.5-3(a) all resource management authorizations and actions, as well as budget or other action proposals and subsequent more detailed or specific planning, shall conform to the approved resource management plan. A BLM decision to deny a grazing permit application based on incompatibility between the applicable resource management plan and the application shall be affirmed.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

Reed B. Robison, RO Livestock v. Bureau of Land Management, 120 IBLA 181 (July 26, 1991)

GRAZING PERMITS AND LICENSES--Continued

APPEALS--Continued

A decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. When the record is not adequate for the Board to determine whether such a situation exists, it may refer the question for hearing, findings of fact, and conclusions of law.

William J. Thoman v. Bureau of Land Management, Roberts Ranch et al. (Intervenors), 120 IBLA 302 (Sept. 9, 1991)

An ALJ's decision adjudicating grazing privileges will not be set aside on appeal if it correctly determines that a BLM decision reducing grazing is reasonable and substantially complies with the provisions of the Federal grazing regulations fround at 43 CFR Part 4100.

Glanville Farms, Inc. v. Bureau of Land Management, 122 IBLA 77 (Jan. 14, 1992)

In order to establish standing to appeal under 43 CFR 4.410, an individual or organization must show that he or she is a party to a case and that a legally cognizable interest has been adversely affected by the appealed decision.

Glenn Grenke v. Bureau of Land Management, 122 IBLA 123 (Jan. 24, 1992)

BLM enjoys broad discretion in determining how to adjudicate and manage grazing preference. Under 43 CFR 4.478(b), BLM's decision concerning grazing preference may not properly be set aside by an ALJ if it appears that it is reasonable and that it represents a substantial compliance with the provisions of 43 CFR Part 4100. BLM's decision may be regarded as arbitrary, capricious, or inequitable only where it is not supportable "on any rational basis." The burden is on the objecting party to show that a decision is improper.

GRAZING PERMITS AND LICENSES--Continued

APPEALS--Continued

BLM's decision dividing a grazing allotment into use areas is properly affirmed where (1) range improvement had been found to be necessary after study, (2) the previous system of rest/rotation grazing had failed, (3) it was necessary to restrict use to specific areas to another, and (4) it was necessary to make users accountable for the condition of the range that they were grazing. BLM's decision assigning permittees to specific use areas is properly affirmed where (1) the boundaries were drawn and assignments were made to equalize use of the range, and (2) the boundaries as drawn will equalize the availability of "high country," which provides better feed in late summer.

A determination by BLM of the carrying capacity of a unit of range will not be disturbed in the absence of positive evidence in error. Where appellants presented only testimony expressing their opinion that one area of range has had better feed than another and present no contrary range data assembled by approved methods challenging BLM's methodology such as a range survey, and where their experience on range conditions is not based on BLM's new plan but on existing uncontrolled grazing practices, BLM's determination is properly adopted.

Economic injury to a grazer, even if severe, does not invalidate BLM's decision adjudicating and managing grazing preference, but is only one consideration bearing on the reasonableness of that determination. If BLM's decision has a reasonable basis, it must be affirmed. Although the record demonstrates that BLM's decision to divide an allotment into use areas and to assign users to specific use areas works some inconvenience on one grazer and provokes general dissatisfaction among all users assigned to one area, BLM's decision is properly affirmed where the record does not show economic injury so severe as to overcome BLM's valid reasons for imposing that grazing system.

BLM's attempt to structure a grazing system so that the greatest number of grazers are satisfied does not justify reversal of that decision where it is otherwise supportable.

Calvin Yardley et al., L. Wayne Ross v. Bureau of Land Management, 123 IBLA 80 (May 11, 1992)

GRAZING PERMITS AND LICENSES--Continued

APPEALS--Continued

BLM enjoys broad discretion in determining how to adjudicate and manage grazing privileges, and a BLM decision concerning grazing privileges will not be set aside if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100. BLM's decision may be regarded as arbitrary, capricious, or inequitable only where it is not supported by any rational basis, and the burden is on the objecting party to show that a decision is improper.

Wayne D. Klump v. Bureau of Land Management, 124 IBLA 176 (Oct. 13, 1992)

Wayne D. Klump v. Bureau of Land Management, 124 IBLA 200 (Oct. 21, 1992)

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

Where BLM denies an application to change livestock use from cattle to cattle and sheep based on the potential conflict with desert bighorn sheep, that decision is correctly affirmed by an ALJ when the record shows a rational basis for BLM's decision and appellant has failed to show the decision was improper.

Joe Iriart v. Bureau of Land Management, Utah Wilderness Ass'n (Intervenor), 126 IBLA 111 (Apr. 27, 1993)

GRAZING PERMITS AND LICENSES--Continued

APPEALS--Continued

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

A decision by an authorized officer of BLM, an ALJ, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. For purposes of making that determination, the word "resource" is considered to include all rangeland values that might be subject to degradation.

Nat'l Wildlife Federation, Southern Utah Wilderness Alliance, & Joseph M. Feller (Appellants/Appellees) v. Bureau of Land Management (Respondent/Appellant), American Farm Bureau Federation, Utah Farm Bureau Federation, & Ute Mtn. Ute Indian Tribe (Intervenors/Appellants), 128 IBLA 231 (Mar. 1, 1994)

GRAZING PERMITS AND LICENSES--Continued

APPEALS--Continued

By regulation, 43 CFR 4.478(b), the Department has provided that an adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 CFR Part 4100. 43 CFR 4.478(b). In this manner, the Department has considerably narrowed the scope of review of BLM grazing decision by an ALJ and by this Board.

The standard of proof to be applied in weighing the evidence presented at a hearing held pursuant to an appeal of a grazing decision issued by BLM is the preponderance of evidence test. Where a decision determining grazing privileges has been reached in the exercise of administrative discretion, the appellant seeking relief therefrom bears the burden of showing by a preponderance of the evidence that the decision is unreasonable or improper.

In an appeal of a BLM decision adjudicating grazing privileges, neither an ALJ nor the Board of Land Appeals has authority to entertain a claim by one grazing applicant of breach of the terms of a contract between the United States, acting through the Department of the Navy, and one of the other applicants.

Jerry Kelly (Appellee) v. Bureau of Land Management (Appellant), Sheldon W. Lamb (Intervenor/Appellant), 131 IBLA 146 (Oct. 31, 1994)

APPORTIONMENT OF FEDERAL RANGE

A determination by BLM of the carrying capacity of a unit of range will not be disturbed in the absence of positive evidence in error. Where appellants presented only testimony expressing their opinion that one area of range has had better feed than another and present no contrary range data assembled by approved methods challenging BLM's methodology such as a range survey, and where their experience on range conditions is not based on BLM's new plan but on existing uncontrolled grazing practices, BLM's determination is properly adopted.

Economic injury to a grazer, even if severe, does not invalidate BLM's decision adjudicating and managing grazing preference, but is only one consideration bearing on the reasonableness of that determination. If BLM's decision has a reasonable basis, it must be

GRAZING PERMITS AND LICENSES--Continued

APPORTIONMENT OF FEDERAL RANGE--Continued

affirmed. Although the record demonstrates that BLM's decision to divide an allotment into use areas and to assign users to specific use areas works some inconvenience on one grazer and provokes general dissatisfaction among all users assigned to one area, BLM's decision is properly affirmed where the record does not show economic injury so severe as to overcome BLM's valid reasons for imposing that grazing system.

BLM's attempt to structure a grazing system so that the greatest number of grazers are satisfied does not justify reversal of that decision where it is otherwise supportable.

Calvin Yardley et al., L. Wayne Ross v. Bureau of Land Management, 123 IBLA 80 (May 11, 1992)

A decision adjusting user boundaries within a Federal grazing allotment was properly affirmed upon a showing that BLM had consulted, cooperated, and coordinated the determination concerning areas of allotted use by the grazers concerned in conformity to Departmental regulation 43 CFR 4110.2-4.

M. L. Investment Co. v. Bureau of Land Management, 130 IBLA 376 (Sept. 15, 1994)

ASSIGNMENT

Where application is made to BLM for transfer of grazing preference, transfer applications shall evidence assignment of interest and obligation in range improvements. The terms and conditions of the cooperative agreements and range improvement permits are binding on the transferee. 43 CFR 4110.2-3(a)(2).

Glanville Farms, Inc. v. Bureau of Land Management, 122 IBLA 77 (Jan. 14, 1992)

GRAZING PERMITS AND LICENSES--Continued

BASE PROPERTY (WATER)

BLM properly rejected an application for use in a grazing allotment where all of such use had been granted to a grazier who had control of water base available and accessible for stock watering purposes and was used under a color of right, absent a determination under state law that the grazier did not have valid water rights.

Silvino Ortiz v. Bureau of Land Management, 126 IBLA 8 (Apr. 1, 1993)

The BLM may properly cancel a grazing permit and preference where the record shows that the operator transferred deeded land and the base property water rights for an allotment; that the deeded land and water rights were pledged as security for a loan issued by the FmHA; and that upon foreclosure of that loan, ownership of the base property was transferred to the FmHA.

Dale D. Smith v. Bureau of Land Management, 129 IBLA 304 (May 25, 1994)

CANCELLATION OR REDUCTION

Where a Federal land exchange results in the diminution of a grazing allotment, provisions of 43 CFR 4110.4-2 require that affected permits be modified to reflect the changed area of use. When such a diminution of a permit takes place, the grazier is entitled to prior notice of 2 years duration, and compensation for any improvements authorized to be placed on the land.

John S. Peck, Owen K. Speirs, Claire T. Speirs, 114 IBLA 393 (May 30, 1990)

It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay

GRAZING PERMITS AND LICENSES--Continued

CANCELLATION OR REDUCTION--Continued

or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

Reed B. Robison, RO Livestock v. Bureau of Land Management, 120 IBLA 181 (July 26, 1991)

Under 43 CFR 2201.1(c) the publication of a notice of realty action constitutes the notice to grazing permittees and lessees required by 43 CFR 4110.4-2(b).

A grazing permittee received the regulatory 2-year notice when, subsequent to receipt of an allegedly defective notice, the permittee was served with a copy of the notice of realty action.

City of Santa Fe et al. (On Judicial Remand), 120 IBLA 308 (Sept. 11, 1991)

A grazing permit does not create any right, title, interest, or estate in or to lands. The privileges granted by a permit are entitled to procedural protections, but continued ownership of the permit is dependent upon compliance with its terms and conditions.

Luther Wallace Klump v. Bureau of Land Management, 125 IBLA 170 (Feb. 5, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the

GRAZING PERMITS AND LICENSES--Continued

CANCELLATION OR REDUCTION--Continued

extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

Prohibited acts of unauthorized grazing in violation of 43 CFR 4140.1(b) are subject to civil penalties. The regulation at 43 CFR 4170.1-1(b) requires BLM to suspend or cancel, in whole or in part, grazing use authorized under a grazing permit and grazing preference for repeated willful violations of 43 CFR 4140.1(b)(1) including grazing without a permit or in violation of the terms of a permit.

In assessing the propriety of cancelling a grazing permit and preference in whole or in part, a "severe reduction" in grazing privileges (i.e., a permanent loss of privileges or a temporary loss of significant privileges for a period of years) may be imposed where the trespasses were both repeated and willful; involved fairly large numbers of animals; occurred over a fairly long period of time; and often involved a failure to take prompt remedial action upon notification of the trespass. Any mitigating circumstances are also properly considered.

Wayne D. Klump v. Bureau of Land Management, 130 IBLA 119 (Aug. 4, 1994)

GRAZING PERMITS AND LICENSES--Continued

HEARINGS

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

GRAZING PERMITS AND LICENSES--Continued

HEARINGS--Continued

The hearing before an ALJ provided by 43 CFR 4.470 for grazing appeals is authorized by sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988). This hearing is deemed to be a hearing "on the record" as provided by 5 U.S.C. § 554(a) (1988). The standard of proof at such a hearing is a preponderance of the evidence.

Ralph & Beverly Eason v. Bureau of Land Management, 127 IBLA 259 (Sept. 28, 1993)

A finding of a grazing trespass will be affirmed where it is supported by a preponderance of the evidence introduced at a hearing.

Hearsay evidence is admissible in a grazing trespass hearing if it is relevant and material.

The procedures at 43 CFR Subpart 4150 for giving notice to the owner of livestock grazing without authorization in violation of 43 CFR 4140.1(b)(1), ordering removal, and for impounding unauthorized livestock are properly distinguished from the procedures for adjudicating an alleged trespass and the amount of damages under 43 CFR Subpart 4160 and for assessing penalties under 43 CFR Subpart 4170. Although proposed and final decisions subject to appeal for a hearing before an ALJ are required to adjudicate an alleged trespass and assess damages or penalties, these are not a prerequisite to notice and impoundment of livestock grazing without authorization.

Prohibited acts of unauthorized grazing in violation of 43 CFR 4140.1(b) are subject to civil penalties. The regulation at 43 CFR 4170.1-1(b) requires BLM to suspend or cancel, in whole or in part, grazing use authorized under a grazing permit and grazing preference for repeated willful violations of 43 CFR 4140.1(b)(1) including grazing without a permit or in violation of the terms of a permit.

Wayne D. Klump v. Bureau of Land Management, 130 IBLA 119 (Aug. 4, 1994)

GRAZING PERMITS AND LICENSES--Continued

HEARINGS--Continued

By regulation, 43 CFR 4.478(b), the Department has provided that an adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 CFR Part 4100. 43 CFR 4.478(b). In this manner, the Department has considerably narrowed the scope of review of BLM grazing decision by an ALJ and by this Board.

The standard of proof to be applied in weighing the evidence presented at a hearing held pursuant to an appeal of a grazing decision issued by BLM is the preponderance of evidence test. Where a decision determining grazing privileges has been reached in the exercise of administrative discretion, the appellant seeking relief therefrom bears the burden of showing by a preponderance of the evidence that the decision is unreasonable or improper.

Jerry Kelly (Appellee) v. Bureau of Land Management (Appellant), Sheldon W. Lamb (Intervenor/Appellant), 131 IBLA 146 (Oct. 31, 1994)

RANGE SURVEYS

A determination by BLM of the carrying capacity of a unit of range will not be disturbed in the absence of positive evidence in error. Where appellants presented only testimony expressing their opinion that one area of range has had better feed than another and present no contrary range data assembled by approved methods challenging BLM's methodology such as a range survey, and where their experience on range conditions is not based on BLM's new plan but on existing uncontrolled grazing practices, BLM's determination is properly adopted.

Calvin Yardley et al., L. Wayne Ross v. Bureau of Land Management, 123 IBLA 80 (May 11, 1992)

GRAZING PERMITS AND LICENSES--Continued

TRESPASS

BLM enjoys broad discretion in determining how to adjudicate and manage grazing privileges, and a BLM decision concerning grazing privileges will not be set aside if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100. BLM's decision may be regarded as arbitrary, capricious, or inequitable only where it is not supported by any rational basis, and the burden is on the objecting party to show that a decision is improper.

Wayne D. Klump v. Bureau of Land Management, 124 IBLA 200 (Oct. 21, 1992)

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

A grazing trespass appealed by the livestock owner will be upheld where the livestock were grazed on a permit issued to a third party without filing with BLM a document transferring control of the livestock to the permittee and specifying the brand, numbers of livestock, and anticipated periods of use as required by BLM.

A finding of trespass against a livestock owner grazing his cattle on an allotment permitted to a third party will be upheld where the grazing permit is applied for on an annual basis, the permit for the current season authorizes grazing of cattle bearing the brand of the permittee, and no control document for the current season transferring control from the livestock owner to the permittee specifying the brand, numbers of livestock, and anticipated periods of use has been filed with BLM.

GRAZING PERMITS AND LICENSES--Continued

TRESPASS--Continued

A finding of a grazing trespass will be affirmed where it is supported by a preponderance of the evidence introduced at a hearing.

Hearsay evidence is admissible in a grazing trespass hearing if it is relevant and material.

A trespass will be considered willful where the evidence objectively shows that the circumstances did not comport with a finding that the trespasser acted in good faith or innocent mistake.

The procedures at 43 CFR Subpart 4150 for giving notice to the owner of livestock grazing without authorization in violation of 43 CFR 4140.1(b)(1), ordering removal, and for impounding unauthorized livestock are properly distinguished from the procedures for adjudicating an alleged trespass and the amount of damages under 43 CFR Subpart 4160 and for assessing penalties under 43 CFR Subpart 4170. Although proposed and final decisions subject to appeal for a hearing before an ALJ are required to adjudicate an alleged trespass and assess damages or penalties, these are not a prerequisite to notice and impoundment of livestock grazing without authorization.

Prohibited acts of unauthorized grazing in violation of 43 CFR 4140.1(b) are subject to civil penalties. The regulation at 43 CFR 4170.1-1(b) requires BLM to suspend or cancel, in whole or in part, grazing use authorized under a grazing permit and grazing preference for repeated willful violations of 43 CFR 4140.1(b)(1) including grazing without a permit or in violation of the terms of a permit.

Wayne D. Klump v. Bureau of Land Management, 130 IBLA 119 (Aug. 4, 1994)

HEARINGS
(See also Administrative Procedure, Federal Land Policy & Management Act of 1976, Geothermal Leases, Grazing Permits & Licenses, Indian Probate, Mining Claims, Multiple Mineral Development Act, Rules of Practice, Surface Mining Control & Reclamation Act of 1977, Surface Resources Act, Water Pollution Control)

A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude further consideration of the character of the land based on subsequent exploration and development.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

Withdrawal of patent applications prior to adjudication of a protest against issuance of patent requires dismissal without prejudice of the protest proceedings.

Sunshine Mining Co. v. State of Idaho, 114 IBLA 317 (May 14, 1990)

HEARINGS--Continued

Where an appellant seeks to rebut the presumption of regularity attending the official acts of public officers upon an offer of proof that her Native allotment application was filed, and that procedures operative in the Bureau of Indian Affairs during the mid-to-latter part of 1970 resulted in the absence of her Native allotment application from the file, a fact-finding hearing is warranted.

June I. Degnan (On Reconsideration), 114 IBLA 373 (May 24, 1990)

Where an application for review of a permit is pending before an Administrative Law Judge and the permittee and OSMRE agree to the nature of the issue remaining after settlement by them of the other issues raised by the application, such agreement will not preclude consideration of any of the settled issues at the behest of an intervenor in the proceeding, whether intervention occurred before or after the settlement.

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of that statute, if that question was not addressed by the Judge.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

Where the record on appeal presents unresolved questions of fact or undecided, significant legal issues, under 43 CFR 4.415 the Board of Land Appeals has discretionary authority to refer the matter for a hearing.

Jerome P. McHugh & Associates (On Reconsideration), 117 IBLA 303 (Jan. 17, 1991)

HEARINGS--Continued

A second hearing will not be afforded if an appellant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result.

Roy E. Mehaffey v. Office of Surface Mining Reclamation & Enforcement, 117 IBLA 350 (Jan. 31, 1991)

The Board of Indian Appeals will not refer a case for an evidentiary hearing pursuant to 43 CFR 4.337(a) when the resolution of the factual disputes is not necessary for disposition of the case.

Jimmie L. Sanders v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 213 (Feb. 12, 1991)

A decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. When the record is not adequate for the Board to determine whether such a situation exists, it may refer the question for hearing, findings of fact, and conclusions of law.

William J. Thoman v. Bureau of Land Management, Roberts Ranch et al. (Intervenors), 120 IBLA 302 (Sept. 9, 1991)

In referring a case for a hearing, the Board will normally identify the subject matter and one or more issues. Such instructions do not preclude an ALJ from receiving evidence on and considering all relevant matters. The fact the Board does not comment on or rule upon all aspects of a case when referring it for a hearing does not mean that they are accepted as correct or made the law of the case.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

HEARINGS--Continued

Although the Board has discretionary authority to order a hearing before an ALJ pursuant to 43 CFR 4.415, a hearing is necessary only when there is a material issue of fact requiring resolution through the introduction of testimony and other evidence.

Vanderbilt Gold Corp., 126 IBLA 72 (Apr. 19, 1993)

Although authorized under 43 CFR 4.415, a fact-finding hearing will be ordered only when the record before the Board presents conflicting issues of fact that cannot be resolved on the basis of that record. Where appellant fails to submit all available evidence to the Board, it is not possible to conclude that the evidence is irreconcilable, and the request for hearing is properly denied.

Pine Grove Farms, 126 IBLA 269 (June 3, 1993)

The hearing before an ALJ provided by 43 CFR 4.470 for grazing appeals is authorized by sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988). This hearing is deemed to be a hearing "on the record" as provided by 5 U.S.C. § 554(a) (1988). The standard of proof at such a hearing is a preponderance of the evidence.

Ralph & Beverly Eason v. Bureau of Land Management, 127 IBLA 259 (Sept. 28, 1993)

Although the Board has discretionary authority to order a hearing before an ALJ pursuant to 43 CFR 4.415, it normally orders a hearing only when an appellant presents a material issue of fact requiring resolution through the introduction of testimony and other evidence not readily obtainable through the ordinary appeal procedure. If no oral testimony is required and an appeal can be resolved relying on documentary submissions, a request for a hearing is properly denied.

Felix F. Vigil, 129 IBLA 345 (June 2, 1994)

HEARINGS--Continued

BLM decisions denying applications for permits to drill oil and gas wells within the Potash Area established by the Secretary of the Interior will be set aside and the matters referred for a hearing where the record contains significant, unresolved factual issues concerning BLM's designation of the areas sought to be drilled as potash enclaves and BLM's determination that drilling the wells would make potash mining unsafe and ultimately uneconomic, thereby constituting an undue waste of the potash resource.

Yates Petroleum Corp., et al., 131 IBLA 230 (Nov. 18, 1994)

Where, on appeal from a decision declaring mining claims abandoned and void ab initio on the basis that they were located on school lands, the claimant tenders persuasive evidence in support of its contention that the lands in question were known mineral in character on the date of acceptance of the survey, but there is no evidence in the record regarding the position of the state and/or its successors-in-interest on the issue, we will decline to make a definitive determination on that issue and set aside BLM's decision and refer the case to the Hearings Division.

Butte Lode Mining Co., 131 IBLA 284 (Nov. 30, 1994)

INDIAN PROBATE
(See also Appeals, Bureau of Indian Affairs, Hearings, Indians, Rules of Practice)

ADMINISTRATIVE LAW JUDGE

Authority

Duly promulgated Departmental regulations provide parties to an Indian probate proceeding with a right to appeal to the Board of Indian Appeals. An Indian probate Administrative Law Judge lacks authority to restrict or cut off that right of appeal by saying that his or her orders are final.

Estate of Henry Houle, 19 IBIA 222 (Feb. 12, 1991)

INDIAN PROBATE--Continued

ADMINISTRATIVE LAW JUDGE--Continued

Authority--Continued

When a claim for "finder's fees" arises within the context of a probate proceeding, seeks recovery from the IIM account of an heir or devisee, and is based on a contract that requires Departmental approval but has not been approved, the ALJ is an "authorized representative" of the Secretary of the Interior within the meaning of 25 CFR 115.9 for the purpose of considering whether the contract should be approved.

Estate of John Charlie, 24 IBIA 253 (Oct. 20, 1993)

APPEAL (See also PLEADING, RECONSIDERATION)

Generally

The burden of proving error in an initial Departmental Indian probate decision is on the party challenging the decision.

Estate of Donald Paul Lafferty, 19 IBIA 90 (Nov 27, 1990)

Estate of Charles Running Bird, 24 IBIA 136 (July 30, 1993)

The appellant bears the burden of proving the error of the decision from which the appeal is taken.

Estate of Warren Lewis Lincoln, 19 IBIA 118 (Dec. 20, 1990)

Estate of Jerry Elmer Coppock, 20 IBIA 212 (Aug. 22, 1991)

Duly promulgated Departmental regulations provide parties to an Indian probate proceeding with a right to appeal to the Board of Indian Appeals. An Indian probate Administrative Law Judge lacks authority to restrict or cut off that right of appeal by saying that his or her orders are final.

Estate of Henry Houle, 19 IBIA 222 (Feb. 12, 1991)

INDIAN PROBATE--Continued

APPEAL (See also PLEADING, RECONSIDERATION)--Continued

Generally--Continued

The appellant bears the burden of proving the error in the decision from which the appeal is taken.

Estate of Frank (Tate) Nevaquaya Tooahimpah, 21 IBIA 222 (Mar. 4, 1992)

Matters Considered on Appeal

The Board of Indian Appeals is not required to consider evidence raised for the first time on appeal.

Estate of Warren Lewis Lincoln, 19 IBIA 118 (Dec. 20, 1990)

The Board of Indian Appeals is not required to consider evidence presented for the first time on appeal.

Estates of Evan Gillette, Sr., & Lizzie Gillette/Yellow Bird/Bellanger/Paint/Bedell, aka Elizabeth Burdell, 22 IBIA 133 (June 18, 1992)

Standing to Appeal

An Agency Superintendent has standing to seek reopening of an estate, the decision in which conflicts with the decision in another estate. A Superintendent also has standing to appeal from a decision of an ALJ which creates a conflict in the law by being contrary to a decision issued in another estate.

Estate of Walter A. Abraham, 24 IBIA 86 (July 8, 1993)

INDIAN PROBATE--Continued

ATTORNEYS AT LAW

Fees

43 CFR 4.281 does not authorize the award of attorneys fees against an opposing party in an Indian probate proceeding, but only against the party represented or against the estate.

Estates of Evan Gillette, Sr., & Lizzie Gillette/Yellow Bird/Bellanger/Paint/Bedell, aka Elizabeth Burdell, 22 IBIA 133 (June 18, 1992)

BUREAU OF INDIAN AFFAIRS

Generally

The Secretary of the Interior is authorized to waive use of funds in Individual Indian Money accounts to satisfy indebtedness of Indians to the United States resulting from errors in recording Indian probate distributions.

Ardis Robinson v. Acting Billings Area Director, Bureau of Indian Affairs, 20 IBIA 168 (Aug. 13, 1991)

CHILDREN, ADOPTED (See also ADOPTION, INHERITING)

Right to Inherit

Generally

Under Oklahoma law, use of the phrase "issue of" or "heirs of the body" evidences an intent to exclude adopted children from a class gift.

Estate of Frank (Tate) Nevaquaya Tooahimpah, 21 IBIA 222 (Mar. 4, 1992)

INDIAN PROBATE--Continued

CHILDREN, ILLEGITIMATE (See also INHERITING)

Generally

Written acknowledgments of paternity, especially those signed at a time reasonably contemporaneous with the child's birth, are persuasive evidence of paternity and are generally to be given greater weight than the recollections of witnesses.

Estate of Charles Running Bird, 24 IBIA 136 (July 30, 1993)

Right to Inherit

Generally

Under 25 U.S.C. § 371 (1988), an illegitimate Indian child is entitled to inherit trust property through the person shown to be the father.

Estate of Abbie (Effie) Little Eagle Osbourne, 22 IBIA 142 (June 18, 1992)

ESCHEAT

Under 25 U.S.C. § 2206(b) (1988 and Supps.), an Indian testator may devise an interest in trust or restricted property that would otherwise escheat under 25 U.S.C. § 226(a) (1988 and Supps.), to any person who owns an interest in that property.

Estate of Clarence Wilson, 22 IBIA 33 (Apr. 23, 1992)

EVIDENCE

Weight of Evidence

Written acknowledgments of paternity, especially those signed at a time reasonably contemporaneous with the child's birth, are persuasive evidence of paternity and are generally to be given greater weight than the recollections of witnesses.

Estate of Charles Running Bird, 24 IBIA 136 (July 30, 1993)

INDIAN PROBATE--Continued

HEARING (See also ADMINISTRATIVE PROCEDURE, REHEARING)

Notice

Although there is a presumption that notice sent to a party at his or her last known address and not returned has been received, when the party shows that the address used was not his or her correct current address and specifically contests receiving notice, the presumption cannot operate to prove receipt of notice.

Estate of Rose Hyson Hardick Sparlin, 19 IBIA 153 (Jan. 11, 1991)

INDIAN LAND CONSOLIDATION ACT

Escheat

Where Congress, in amending an existing statutory provision, indicates an intent to clarify that provision, the amendment and its legislative history may be used in construing the original enactment.

Interests subject to the escheat provision in 25 U.S.C. § 2206(a) (1988), escheat only to the tribe with governmental jurisdiction over the reservation or off-reservation area in which the interests are located.

Estate of Peter Alvin Ward, 19 IBIA 196 (Feb. 5, 1991) 98 I.D. 14

Under sec. 207 of ILCA, 25 U.S.C. § 2206 (1988 and Supps.), the test for whether a small fractional interest in trust or restricted land escheats to the governing Indian tribe is based on the earnings produced by that interest. The Board of Indian Appeals lacks authority to substitute a different test for the one set out in the statute.

Under sec. 207 of ILCA, 25 U.S.C. § 2206 (1988 and Supps.), an interest in trust or restricted land is presumed to escheat to the governing Indian tribe if it represents 2 per centum or less of the total acreage in the land and has earned to its owner less than $100 in any one of the 5 years before the owner's death. However, the presumption favoring escheat may be rebutted by a showing that the interest is capable of earning

INDIAN PROBATE--Continued

INDIAN LAND CONSOLIDATION ACT--Continued

Escheat--Continued

$100 or more in any one of the 5 years following the owner's death.

With respect to any Indian estate in which interests are presumed to escheat under sec. 207 of ILCA, 25 U.S.C. § 2206 (1988 and Supps.), evidence must appear in the probate record showing that (1) the ALJ informed individuals who would otherwise inherit the interests that they have the right to attempt a rebuttal of the presumption, and (2) such individuals were provided with an opportunity to exercise their right of rebuttal.

Estate of Guadalupe Almanza Conger, 21 IBIA 244 (Mar. 17, 1992)

With respect to any Indian estate in which interests are presumed to escheat under sec. 207 of ILCA, 25 U.S.C. § 2206 (1988 and Supps.), evidence must appear in the probate record showing that (1) the Administrative Law Judge informed individuals who would otherwise inherit the interests that they have the right to attempt a rebuttal of the presumption and (2) such individuals were provided with an opportunity to exercise their right of rebuttal.

Under 25 U.S.C. § 2206(b) (1988 and Supps.), an Indian testator may devise an interest in trust or restricted property that would otherwise escheat under 25 U.S.C. § 226(a) (1988 and Supps.), to any person who owns an interest in that property.

Estate of Clarence Wilson, 22 IBIA 33 (Apr. 23, 1992)

INHERITING (See also CHILDREN, ADOPTED; CHILDREN, ILLEGITIMATE; WILLS)

Generally

Under 25 U.S.C. § 348 (1988), those persons who may inherit trust property from a deceased Indian are determined in accordance with the appropriate state law. Whether a person may inherit is not affected by whether

INDIAN PROBATE--Continued

INHERITING (See also CHILDREN, ADOPTED; CHILDREN, ILLEGITMATE; WILLS)--Continued

Generally--Continued

the property will remain in trust in the hands of the heir.

Estate of Walter A. Abraham, 24 IBIA 86 (July 8, 1993)

INVENTORY (See also MODIFICATION OF INVENTORY)

Property Erroneously Excluded or Included

Corrections to inventories in Indian estates may not be pursued through administrative appeals of unrelated BIA decisions.

Georgianna L. Danks v. Aberdeen Area Director, Bureau of Indian Affairs, 20 IBIA 79 (June 12, 1991)

Departmental regulations in 43 CFR Part 4, Subpart D, suffice to allow consideration of alleged legal errors in BIA's inventory of Indian trust assets during an Indian probate proceeding.

Estates of Evan Gillette, Sr., & Lizzie Gillette/Yellow Bird/Bellanger/Paint/Bedell, aka Elizabeth Burdell, 22 IBIA 133 (June 18, 1992)

Indian probate regulations of DOI establish a procedure by which property which was improperly included in an estate inventory may be eliminated from the inventory, even though probate proceedings have been concluded. 43 CFR 4.273.

Severo Leon et al. v. Albuquerque Area Director, Bureau of Indian Affairs, 23 IBIA 248 (Mar. 23, 1993)

INDIAN PROBATE--Continued

LIFE ESTATES

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law. However, when an Indian testator devises a life estate to a named individual with the remainder interest in the heirs of that individual's body, the remaindermen are determined with reference to state laws of intestate succession.

Estate of Frank (Tate) Nevaquaya Tooahimpah, 21 IBIA 222 (Mar. 4, 1992)

MODIFICATION OF INVENTORY (See also INVENTORY)

Generally

It is ultimately a decision within the informed discretion of BIA as to whether any conveyance of trust property, including one presented after the death of the grantor, should be approved.

Estate of George Levi, 26 IBIA 50 (June 17, 1994)

NOTICE OF HEARING

Generally

Although there is a presumption that notice sent to a party at his or her last known address and not returned has been received, when the party shows that the address used was not his or her correct current address and specifically contests receiving notice, the presumption cannot operate to prove receipt of notice.

Estate of Rose Hyson Hardick Sparlin, 19 IBIA 153 (Jan. 11, 1991)

Under 43 CFR 4.211(a), constructive notice of an Indian probate hearing can be given through posting in the vicinity of the hearing. In order to find that a person received constructive notice through posting, and thus lacks standing to petition for reopening under 43 CFR 4.242(h), the probate record must show that the

INDIAN PROBATE--Continued

NOTICE OF HEARING--Continued

Generally--Continued

notices were properly posted in accordance with the regulation.

Estate of Jack Kenworthy, 21 IBIA 4 (Oct. 4, 1991)

REHEARING (See also ADMINISTRATIVE PROCEDURE, HEARING)

Generally

Rehearings in Indian probate proceedings are intended to allow consideration of alleged errors made by the Administrative Law Judge and to permit the introduction of evidence that could not, with diligent effort, have been discovered prior to the original hearing. They are not a means for presenting evidence and arguments that were known at the time of the original hearing but not introduced.

Estate of Howard Little Charley, 18 IBIA 335 (July 3, 1990)

Under 43 CFR 4.241(b), an Administrative Law Judge must deny a petition for rehearing that is not properly filed with the Superintendent.

Estate of Peter Joseph Chalwain, 20 IBIA 128 (July 21, 1991)

A person seeking reopening of an Indian estate closed for more than 3 years should set forth all of the issues he/she intends to raise in the petition for reopening.

Estate of Teresa Mitchell, 25 IBIA 88 (Dec. 17, 1993)

INDIAN PROBATE--Continued

REHEARING (See also ADMINISTRATIVE PROCEDURE, HEARING)--Continued

Renunciation

Under 43 CFR 4.208, a devisee or heir cannot renounce an interest in trust or restricted property in favor of a particular person or persons. Rather, the interest renounced passes as if the person renouncing predeceased the decedent.

Estate of Gus Four Eyes, Jr., aka Gilford Fireshaker, 20 IBIA 22 (May 6, 1991)

REOPENING

Generally

Petitions to reopen Indian probates closed for more than 3 years require compelling proof that the petitioner has acted with due dilligence.

Estate of Little Snake (John Smith), 24 IBIA 121 (July 27, 1993)

Standing to Petition for Reopening

Under 43 CFR 4.211(a), constructive notice of an Indian probate hearing can be given through posting in the vicinity of the hearing. In order to find that a person received constructive notice through posting, and thus lacks standing to petition for reopening under 43 CFR 4.242(h), the probate record must show that the notices were properly posted in accordance with the regulation.

Estate of Jack Kenworthy, 21 IBIA 4 (Oct. 4, 1991)

An Agency Superintendent has standing to seek reopening of an estate, the decision in which conflicts with the decision in another estate. A Superintendent also has standing to appeal from a decision of an ALJ which creates a conflict in the law by being contrary to a decision issued in another estate.

Estate of Walter A. Abraham, 24 IBIA 86 (July 8, 1993)

INDIAN PROBATE--Continued

REOPENING--Continued

Standing to Petition for Reopening--Continued

An adult who participated in the original probate hearing into a deceased Indian's estate lacks standing to petition for reopening.

Where a petition to reopen a closed Indian estate is based on a claimed interest which derives entirely from the petitioner's predecessor in interest, the petitioner has only the standing that his/her predecessor would have had.

Estate of Little Snake (John Smith), 24 IBIA 121 (July 27, 1993)

REPRESENTATION

An individual participating in a Departmental Indian probate proceeding without an attorney is still required to raise all issues and arguments at the hearing.

Estate of Gus Four Eyes, Jr., aka Gilford Fireshaker, 20 IBIA 22 (May 6, 1991)

SECRETARY'S AUTHORITY

Generally

DOI is not bound by tribal court decisions in determining the heirs of a deceased Indian, but rather has the authority and responsibility to make an independent determination of the decedent's heirs. A tribal court decision may be accepted as evidence of heirship.

Estate of Matthew Pumpkinseed, 25 IBIA 98 (Jan. 4, 1994)

INDIAN PROBATE--Continued

STATE LAW

Applicability to Indian Probate, Intestate Estates

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law. However, when an Indian testator devises a life estate to a named individual with the remainder interest in the heirs of that individual's body, the remaindermen are determined with reference to state laws of intestate succession.

Estate of Frank (Tate) Nevaquaya Tooahimpah, 21 IBIA 222 (Mar. 4, 1992)

Applicability to Indian Probate, Testate

The execution and construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law.

Estate of Pearl Big Bow Aungkotoye Nahno Kerchee, 18 IBIA 153 (Feb. 15, 1990)

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law. However, when an Indian testator devises a life estate to a named individual with the remainder interest in the heirs of that individual's body, the remaindermen are determined with reference to state laws of intestate succession.

Estate of Frank (Tate) Nevaquaya Tooahimpah, 21 IBIA 222 (Mar. 4, 1992)

Whether an Indian decedent has executed a will passing trust property is a question of Federal, not state, law.

Estate of Teresa Mitchell, 25 IBIA 88 (Dec. 17, 1993)

INDIAN PROBATE--Continued

STATE LAW--Continued

Pretermitted Heir

In the absence of substantive law or regulations on the issue of pretermitted heirs, the Department of the Interior should give effect to the stated wishes of an Indian testator, as expressed in a valid will, rather than create substantive rules governing pretermission within the limited context of individual probate cases.

Estate of Lois Marie (Francis) Pete (Sanchez), 22 IBIA 249 (Aug. 28, 1992) 99 I.D. 186

TRIBAL COURTS

DOI is not bound by tribal court decisions in determining the heirs of a deceased Indian, but rather has the authority and responsibility to make an independent determination of the decedent's heirs. A tribal court decision may be accepted as evidence of heirship.

Estate of Matthew Pumpkinseed, 25 IBIA 98 (Jan. 4, 1994)

WILLS (See also CONTRACT TO MAKE WILL, INHERITING)

Anti-lapse Policy

43 CFR 4.261 should be applied to the lapse of a devise under the residuary clause of an Indian will.

Estate of Frank (Tate) Nevaquaya Tooahimpah, 21 IBIA 222 (Mar. 4, 1992)

Applicability of State Law

The execution and construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law.

Estate of Pearl Big Bow Aungkotoye Nahno Kerchee, 18 IBIA 153 (Feb. 15, 1990)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING) --Continued

Applicability of State Law--Continued

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law. However, when an Indian testator devises a life estate to a named individual with the remainder interest in the heirs of that individual's body, the remaindermen are determined with reference to state laws of intestate succession.

Estate of Frank (Tate) Nevaquaya Tooahimpah, 21 IBIA 222 (Mar. 4, 1992)

Children, Disinheritance of

Under Tooahnippah v. Hickel, 397 U.S. 598 (1970), in the absence of substantive probate regulations, the Department of the Interior lacks the authority to disapprove an Indian will because it does not provide for pretermitted heirs.

Estate of Howard Little Charley, 18 IBIA 335 (July 3, 1990)

Construction of

The Secretary of the Interior, as trustee under a testamentary trust including an Osage headright interest, is bound to carry out the testamentary restrictions imposed by the testator.

Scott W. Bradshaw et al. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 339 (July 3, 1990)

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law. However, when an Indian testator devises a life estate to a named individual with the remainder interest in the heirs of that

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING) --Continued

Construction of--Continued

individual's body, the remaindermen are determined with reference to state laws of intestate succession.

Estate of Frank (Tate) Nevaquaya Tooahimpah, 21 IBIA 222 (Mar. 4, 1992)

Contest

In Indian probate cases an anti-contest clause should not be enforced against an heir or beneficiary who had probable cause to believe that there was a legal deficiency in the will.

Estate of George Levi, 26 IBIA 50 (June 17, 1994)

Disapproval of Will

Under Tooahnippah v. Hickel, 397 U.S. 598 (1970), in the absence of substantive probate regulations, the Department of the Interior lacks the authority to disapprove an Indian will because it does not provide for pretermitted heirs.

Estate of Howard Little Charley, 18 IBIA 335 (July 3, 1990)

Execution

Whether an Indian decedent has executed a will passing trust property is a question of Federal, not state, law.

Estate of Teresa Mitchell, 25 IBIA 88 (Dec. 17, 1993)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING) --Continued

Failure to Mention Child

In the absence of substantive law or regulations on the issue of pretermitted heirs, the Department of the Interior should give effect to the stated wishes of an Indian testator, as expressed in a valid will, rather than create substantive rules governing pretermission within the limited context of individual probate cases.

Estate of Lois Marie (Francis) Pete (Sanchez), 22 IBIA 249 (Aug. 28, 1992) 99 I.D. 186

Failure to Mention Spouse

In the absence of substantive law or regulations on the issue of pretermitted heirs, the Department of the Interior should give effect to the stated wishes of an Indian testator, as expressed in a valid will, rather than create substantive rules governing pretermission within the limited context of individual probate cases.

Estate of Lois Marie (Francis) Pete (Sanchez), 22 IBIA 249 (Aug. 28, 1992) 99 I.D. 186

Residuary Clause

43 CFR 4.261 should be applied to the lapse of a devise under the residuary clause of an Indian will.

Estate of Frank (Tate) Nevaquaya Tooahimpah, 21 IBIA 222 (Mar. 4, 1992)

Revocation by Subsequent Marriage

In the absence of substantive law or regulations on the issue of pretermitted heirs, the Department of the Interior should give effect to the stated wishes of an Indian testator, as expressed in a valid will, rather than create substantive rules governing pretermission within the limited context of individual probate cases.

Estate of Lois Marie (Francis) Pete (Sanchez), 22 IBIA 249 (Aug. 28, 1992) 99 I.D. 186

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING) --Continued

Testamentary Capacity

Generally

To invalidate an Indian will for lack of testamentary capacity, it must be shown that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property. Furthermore, it must be shown that this condition existed at the time the will was executed.

Estate of Pearl Big Bow Aungkotoye Nahno Kerchee, 18 IBIA 153 (Feb. 15, 1990)

An Indian testator may be deemed competent to make a will even though he is unable to manage his own business affairs, has had a guardian appointed for him, is illiterate, and/or is unable to speak or understand the English language.

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property. Further, the evidence must show that this condition existed at the time of execution of the will.

Estate of Joseph Poolaw, 18 IBIA 358 (July 9, 1990)

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of her bounty, the extent of her property, or the desired distribution of that property. Further, the evidence must show that this condition existed at the time of execution of the will.

Evidence that an Indian decedent has been a patient at a mental hospital or has taken medication for a mental condition is insufficient to establish that the decedent

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING) --Continued

Testamentary Capacity--Continued

Generally--Continued

lacked the requisite testamentary capacity at the time she executed her will.

Estate of Johanna Small Rib (Standing Twenty), 19 IBIA 236 (Feb. 20, 1991)

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of her bounty, the extent of her property, or the desired distribution of that property. Further, the evidence must show that this condition existed at the time of execution of the will.

Estate of Leona Ketcheshawno Waterman Ely, 20 IBIA 205 (Aug. 21, 1991)

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

Estates of Evan Gillette, Sr., & Lizzie Gillette/Yellow Bird/Bellanger/Paint/Bedell, aka Elizabeth Burdell, 22 IBIA 133 (June 18, 1992)

Undue Influence

To invalidate an Indian will on the grounds of undue influence, it must be shown that (1) the decedent was susceptible of being dominated by another; (2) the person allegedly influencing the decedent in the execution of the will was capable of controlling his mind and actions; (3) such a person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) the will is contrary to the decedent's own desires.

Estate of Joseph Poolaw, 18 IBIA 358 (July 9, 1990)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING) --Continued

Undue Influence--Continued

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will on the grounds of undue influence, it must be shown: (1) that the decedent was susceptible of being dominated by another; (2) that the person allegedly influencing the decedent in the execution of the will was capable of controlling her mind and actions; (3) that such a person did exert influence upon the decedent of a nature calculated to induce or coerce her to make a will contrary to her own desires; and (4) that the will is contrary to the decedent's own desires.

Estate of Johanna Small Rib (Standing Twenty), 19 IBIA 236 (Feb. 20, 1991)

To invalidate an Indian will on the grounds of undue influence, it must be shown that (1) the decedent was susceptible of being dominated by another; (2) the person allegedly influencing the decedent in the execution of her will was capable of controlling her mind and actions; (3) such a person did exert influence upon the decedent of a nature calculated to induce or coerce her to make a will contrary to her own desires; and (4) the will is contrary to the decedent's own desires.

When the evidence shows that the principal beneficiary under an Indian will was in a confidential relationship with the testator and actively participated in the preparation of the will, a rebuttable presumption of undue influence is raised, and the burden of rebutting the presumption is on the will proponent.

Estate of Leona Ketcheshawno Waterman Ely, 20 IBIA 205 (Aug. 21, 1991)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING) --Continued

Undue Influence--Continued

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

Estates of Evan Gillette, Sr., & Lizzie Gillette/Yellow Bird/Bellanger/Paint/Bedell, aka Elizabeth Burdell, 22 IBIA 133 (June 18, 1992)

WITNESSES

Observation by Administrative Law Judge

Where evidence is conflicting, the Board of Indian Appeals normally will not disturb a decision based upon findings of credibility when the ALJ had an opportunity to hear the witnesses and to observe their demeanor.

Estate of Donald Paul Lafferty, 19 IBIA 90 (Nov 27, 1990)

Estate of Charles Running Bird, 24 IBIA 136 (July 30, 1993)

INDIANS
(See also Board of Indian Appeals, Bureau of Indian Affairs, Indian Probate)

GENERALLY

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Little Shell Tribe of Chippewa Indians of Montana v. Aberdeen Area Director, Bureau of Indian Affairs, 18 IBIA 282 (May 8, 1990)

INDIANS--Continued

GENERALLY--Continued

In order to estop the Government, the party seeking estoppel must show, at least, that the traditional elements of estoppel are present. Thus, the party seeking estoppel must show that: (1) the party to be estopped knew the facts; (2) he intended that his conduct should be acted on or so acted that the party asserting the estoppel had a right to believe it was so intended; (3) the latter was ignorant of the true facts; and (4) he relied on the former's conduct to his injury. Additionally, the party seeking estoppel must show that the Government engaged in affirmative misconduct and that the allegedly estopping statements were made in writing by an official at a policymaking level.

The Federal Government is not bound by a State court decision to which the Federal Government was not a party.

Scott W. Bradshaw et al. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 339 (July 3, 1990)

A non-Indian lacks standing to raise an alleged violation of the Federal trust responsibility.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

Sec. 2 of the AIRFA does not prohibit BLM from adopting a land use that conflicts with traditional Indian religious beliefs or practices. BLM complies with AIRFA if, in the decisionmaking process, it obtains and considers the views of the Indians, and if, in project implementation, it avoids unnecessary interference with Indian religious practices.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)
97 I.D. 263

INDIANS--Continued

GENERALLY--Continued

The Board of Indian Appeals is not required to consider issues and arguments that are raised for the first time on appeal.

Bernell Kombol, dba Grass Mountain Logging Co. v. Acting Ass't Portland Area Director (Economic Development), Bureau of Indian Affairs, 19 IBIA 123 (Dec. 26, 1990)

Bob Begay v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 248 (Sept. 20, 1991)

All Materials of Montana, Inc. v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 202 (Feb. 27, 1992)

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Acting Portland Area Director, Bureau of Indian Appeals, 22 IBIA 22 (Apr. 13, 1992)

The Board of Indian Appeals will not refer a case for an evidentiary hearing pursuant to 43 CFR 4.337(a) when the resolution of the factual disputes is not necessary for disposition of the case.

Jimmie L. Sanders v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 213 (Feb. 12, 1991)

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Winlock Veneer Co. v. Acting Juneau Area Director, Bureau of Indian Affairs, 20 IBIA 3 (May 2, 1991)

Doubtful or ambiguous expressions in statutes enacted for the benefit of Indians must be interpreted in favor of the Indians.

INDIANS--Continued

GENERALLY--Continued

In interpreting a statute that attempts to address two conflicting Federal policies, the BIA must be cognizant of the inherent tension within the statute.

Dahlstrom Lumber Co. v. Portland Area Director, Bureau of Indian Affairs & Mayr Brothers Logging Co., Inc., et al., Portland Area Director, Bureau of Indian Affairs, 20 IBIA 143 (July 17, 1991)

In exercising the authority of the Secretary of the Interior to review decisions issued by officials of the BIA, the Board of Indian Appeals is not limited by the standards of review set forth in the APA, 5 U.S.C. § 706 (1988), for review of agency decisionmaking by the Federal courts.

Ute Indian Tribe of the Uintah & Ouray Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 24 (Oct. 22, 1991)

In a case where the interests of an Indian tribe are arguably in conflict with the interests of some members of the tribe, the Board of Indian Appeals declines to invoke the canon regarding construction of statutory ambiguities in favor of Indians.

Where a statute concerning Indians manifests two competing purposes, an expansive reading of the statute should be avoided if that reading would disserve one of the two purposes.

State of Utah, Board of Indian Affairs & Division of Indian Affairs v. Navajo Area Director, Bureau of Indian Affairs, 21 IBIA 282 (Mar. 31, 1992) 99 I.D. 39

In order to correct prior error, an official of the BIA may change an administrative interpretation of a statute as long as the reason for the change is clearly set forth to show that the departure from the prior administrative position is not arbitrary or capricious.

Hopi Indian Tribe v. Director, Office of Trust & Economic Development, Bureau of Indian Affairs, 22 IBIA 10 (Apr. 7, 1992)

INDIANS--Continued

GENERALLY--Continued

Unless otherwise specified, a decision of the Board of Indian Appeals remanding a matter to an official of the BIA restores that official's full authority to consider the matter.

Stone Trucking v. Portland Area Director, Bureau of Indian Affairs, 22 IBIA 52 (May 5, 1992)

A Federal agency has a responsibility to explain the rationale and factual basis for decisions affecting persons dealing with the agency. Failure to provide such information is a violation of due process.

Quileute Tribe v. Portland Area Director, Bureau of Indian Affairs, 23 IBIA 20 (Oct. 29, 1992)

Where the Montana State Historic Preservation Office is aware that an area may possess traditional cultural values, owing to the presence of Native American fasting and vision questing sites there, but nevertheless concludes that no properties eligible for inclusion on the National Register of Historic Places were identified in the area, BLM is not required to comply with sec. 106 of the National Historic Preservation Act. Rather, it is adequate for BLM to address effects of gold mining on cultural values through its compliance with the American Indian Religious Freedom Act. BLM complies with the latter Act where it actively solicits the opinions of Native Americans, both individually and in tribal groups, and considers reasonable mitigating measures.

Red Thunder, Inc., et al., 124 IBLA 267 (Nov. 3, 1992)

Regulations are interpreted in accordance with traditional principles of statutory construction. Words used in regulations are given their plain and ordinary meaning unless they are technical terms or terms of art, in which case they are given their technical meaning.

Okie Crude Co., et al. v. Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 174 (Feb. 5, 1993)

INDIANS--Continued

GENERALLY--Continued

Self-executing legislation contains the standards necessary for its enforcement without the need for implementing regulations.

White Earth Band of Chippewa Indians v. Minneapolis Area Director, Bureau of Indian Affairs, 23 IBIA 216 (Mar. 3, 1993)

In cases arising under 25 CFR 2.8, challenging the failure of a BIA official to issue a decision, the burden is on the Bureau either to show that the failure was justified or to present and support a position that the official could have taken.

United Auburn Indian Community v. Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 33 (May 28, 1993)

Courts commonly give deference to the construction of a statute by the agency charged with its administration, particularly one which was contemporaneous with the statute and has been consistently followed by the agency.

Hopi Tribe v. Director, Office of Trust Responsibilities, Bureau of Indian Affairs, 24 IBIA 65 (June 22, 1993)

Inclusion of a copy of 25 CFR Part 2 with a decision issued by a BIA Superintendent, although an excellent practice, does not replace the written statement of appeal rights that is required under 25 CFR 2.7(c).

Nevaco, Inc. & Pyramid Lake Paiute Tribe of Indians v. Acting Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 157 (Aug. 31, 1993)

INDIANS--Continued

GENERALLY--Continued

In order to correct prior error, an official of the BIA may change an administrative interpretation of a statute as long as the reason for the change is clearly set forth to show that the departure from the prior administrative position is not arbitrary or capricious.

In order to estop the Government, the party seeking estoppel must show, at least, that the traditional elements of estoppel are present. Thus, the party seeking estoppel must show that: (1) the party to be estopped knew the facts; (2) he intended that his conduct should be acted on or so acted that the party asserting the estoppel had a right to believe it was so intended; (3) the latter was ignorant of the true facts; and (4) he relied on the former's conduct to his injury.

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

The *qui tam* provision of 25 U.S.C. § 81 (1988), authorizes Federal courts to hear suits brought under that section by third parties in the name of the U.S. and, under appropriate circumstances, to order the recovery of money paid by or on behalf of an Indian tribe. The Board of Indian Appeals is not a Federal court, and the *qui tam* provision does not grant standing in an administrative proceeding before the Board.

Robert & Krista Johnson v. Acting Phoenix Area Director, Bureau of Indian Affairs, 25 IBIA 18 (Nov. 12, 1993)

When determining whether to grant a trader's license or peddler's permit, it is a denial of due process for BIA to rely on adverse allegations relating to the character of the applicant without giving the applicant an opportunity to respond to those allegations.

Jane Rush v. Acting Navajo Area Director, Bureau of Indian Affairs, 25 IBIA 198 (Mar. 4, 1994)

INDIANS--Continued

GENERALLY--Continued

A tribal member lacks standing to bring an administrative appeal for the tribe based on a personal assessment of what is or is not in the best interest of the tribe.

Thomas Swab, Jr., Eric Swab, Louise Zucco, Linda Wenzel, Sandra Jefferson Yonge, & Corina Archuleta v. Sacramento Area Director, Bureau of Indian Affairs, 25 IBIA 205 (Mar. 4, 1994)

The allocation of funds from a lump-sum appropriation is committed to agency discretion.

Fort Peck Waterusers Ass'n, Dwight A. & Carol J. Sibley v. Billings Area Director, Bureau of Indian Affairs, 26 IBIA 90 (July 6, 1994)

DOI lacks authority under 25 CFR 1.2 to waive a statutory restriction in the guise of waiving regulations in 25 CFR Chapter I.

Clifton W. Skye v. Aberdeen Area Director, Bureau of Indian Affairs, 26 IBIA 169 (Aug. 9, 1994)

DOI lacks authority to waive the government-to-government relationship between the Federal Government and the Indian tribes, which was reaffirmed by Congress in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n (1988 and Supps.).

Mark H. Perrault v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 26 IBIA 214 (Sept. 9, 1994)

A specific provision in BIA program regulations will normally supersede a general regulation dealing with the same subject.

A specific reference in duly promulgated regulations to the applicability of a section of the BIA Manual allows that section to be relied on, used, and

INDIANS--Continued

GENERALLY--Continued

cited as precedent by the agency in cases arising under those regulations.

Friends of the Wild Swan v. Portland Area Director, Bureau of Indian Affairs, 27 IBIA 8 (Nov. 14, 1994)

ALASKA NATIVES

Reindeer

The Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), was not repealed by the Alaska Statehood Act, 72 Stat. 339.

The legislative history of the Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), makes it clear that Congress intended to reserve the reindeer industry in Alaska for the exclusive benefit of Alaska Natives.

Courts commonly give deference to the construction of a statute by the agency charged with its administration, particularly one which was contemporaneous with the statute and has been consistently followed by the agency.

Ambiguities in the Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), must be construed in favor of the Alaska Natives who are the intended beneficiaries of the Act.

In a case where the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters, the intention of the drafters, rather than the strict language, controls.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992)
99 I.D. 219

INDIANS--Continued

ARCHAEOLOGICAL RESOURCES

Hearings and appeals concerning civil penalties assessed by BIA under the Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm (1988), are governed by the procedures established in 43 CFR Part 7.

Arizona Silica Sand Co. v. Acting Navajo Area Director, Bureau of Indian Affairs, 26 IBIA 249 (Sept. 28, 1994)

ATTORNEYS

Contracts

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract for one of the Five Civilized Tribes is final for the Department and is not subject to appeal within the Department.

Principal Chief, Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 105 (Jan. 17, 1990)

The Board of Indian Appeals has jurisdiction to review a decision of a Bureau of Indian Affairs official declining to approve or disapprove an Indian group's attorney contract on the basis that the group is not a Federally recognized Indian tribe.

Edwards, McCoy & Kennedy & Western Shoshone Business Council of the Duck Valley Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 454 (Sept. 24, 1990)

Fees

An application for attorney fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (West Supp. 1989), for services rendered in obtaining BLM approval of an allotment under the General Allotment Act of 1887, 25 U.S.C. § 334 (1982), is properly denied when no adversary adjudication has occurred or

INDIANS--Continued

ATTORNEYS--Continued

Fees--Continued

when the Office of Hearings and Appeals has not conducted an adjudication.

Ann Marie Sayers, 115 IBLA 40 (June 8, 1990)

Courts commonly give deference to the construction of a statute by the agency charged with its administration, particularly one which was contemporaneous with the statute and has been consistently followed by the agency.

25 U.S.C. §§ 640d-7(e) and 640d-27(a) (1988), both mandate the payment of "appropriate" or "reasonable" litigation costs incurred by the Navajo Nation, the Hopi Tribe, and the San Juan Southern Paiute Tribe under the Navajo-Hopi Settlement Act, 25 U.S.C. §§ 640d-640d-28 (1988).

Hopi Tribe v. Director, Office of Trust Responsibilities, Bureau of Indian Affairs, 24 IBIA 65 (June 22, 1993)

BLOOD QUANTUM

Land may be acquired in trust status under the Indian Reorganization Act, 25 U.S.C. § 465 (1988), or the Oklahoma Indian Welfare Act, 25 U.S.C. § 501 (1988), for members of the Five Civilized Tribes who possess less than 1/2 Indian blood.

Jack & Shirley Baker v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 164 (Jan. 25, 1991) 98 I.D. 5

CIVIL RIGHTS

Indian Civil Rights Act of 1968

In discharging its government-to-government relationship with an Indian tribe, BIA has the authority

INDIANS--Continued

CIVIL RIGHTS--Continued

Indian Civil Rights Act of 1968--Continued

and the responsibility to decline to recognize the results of a tribal election when it finds that a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988), has tainted the election results.

Because of the possibility of abuse of power by a group of individuals temporarily in office, tribal legislation disenrolling certain tribal members must meet the standards established by the tribe's constitution or other governing documents. Since the passage of the Indian Civil Rights Act, 15 U.S.C. § 1302 (1988), these standards have included the matters covered by the Act.

United Keetoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, & Joe Grayson, Jr., & Pam Thurman Jumper, Muskogee Area Director, Bureau of Indian Affairs, 22 IBIA 75 (June 4, 1992)

A tribal action which deprives an individual of procedural rights set out in the tribal constitution violates the due process requirement of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988).

In discharging its government-to-government relationship with an Indian tribe, BIA has the authority and the responsibility to decline to recognize a removal of tribal officials when the removal action was tainted by a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988).

James C. Greendeer v. Minneapolis Area Director, Bureau of Indian Affairs, 22 IBIA 91 (June 10, 1992)

In discharging its government-to-government relationship with an Indian tribe, the BIA has the authority and the responsibility to decline to recognize the results of a tribal election when it finds that a

INDIANS--Continued

CIVIL RIGHTS--Continued

Indian Civil Rights Act of 1968--Continued

violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988), has tainted the election results.

Neddeen Naylor, Mary L. Wuester, Irene Button, & Noreen E. Sellberg v. Sacramento Area Director, Bureau of Indian Affairs, 23 IBIA 76 (Nov. 13, 1992)

The Indian Civil Rights Act, 25 U.S.C. § 1302 (1988), is not an independent grant of jurisdiction to DOI to scrutinize tribal actions when those actions do not otherwise require Departmental approval or other involvement.

Arthur J. Welmas & Linda Streeter Dukic, Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 264 (Oct. 20, 1993)

"Ex post facto law." The term "ex post facto law" in the Indian Civil Rights Act of 1968, 26 U.S.C. § 1302(9) (1988), should not be given a broader interpretation than the same term in the Constitution of the U.S., Art. I, sec. 9, cl. 3, and sec. 10, cl. 1.

Janie Jovita Flores et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12, 1993)

CONTRACTING OF FEDERAL SERVICES

Under the circumstances of this case, the Board of Indian Appeals finds no reason why self-governance decisions signed by the Deputy Commissioner of Indian Affairs should be immune from the general right of review by the Board. If these decisions are actually decisions of the Assistant Secretary--Indian Affairs, they should be signed by the Assistant Secretary, not by the Deputy Commissioner or any other subordinate official.

Mille Lacs Band of Ojibwe v. Acting Deputy Commissioner of Indian Affairs, 27 IBIA 94 (Dec. 21, 1994)

INDIANS--Continued

CONTRACTS

Generally

A person doing business with an Indian tribe lacks standing to raise a violation of the requirements of 25 U.S.C. § 81 (1988).

Bernell Kombol, dba Grass Mountain Logging Co. v. Acting Ass't Portland Area Director (Economic Development), Bureau of Indian Affairs, 19 IBIA 123 (Dec. 26, 1990)

Robert & Krista Johnson v. Acting Phoenix Area Director, Bureau of Indian Affairs, 25 IBIA 18 (Nov. 12, 1993)

An ambiguity in a written contract can be overcome by the contemporaneous actions and understandings of the parties to the contract.

The creation of a third-party beneficiary under a lease does not constitute an assignment or sublease and does not otherwise render the lease invalid.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

The Uniform Commercial Code and state statutory and decisional law can be examined in determining the principles of general contract law in interpreting a contract for the logging and sale of Indian timber.

Based upon the general law of contracts, Indian contracts contain an implied requirement that they be carried out in good faith and in accordance with standards of commercial reasonableness.

Winlock Veneer Co. v. Acting Juneau Area Director, Bureau of Indian Affairs, 20 IBIA 3 (May 2, 1991)

INDIANS--Continued

CONTRACTS--Continued

Generally--Continued

Under the terms of the timber contract at issue, the conditions of sale could only be modified in writing and with the approval of the BIA Agency Superintendent.

John P. Taylor, dba Taylor Logging v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 101 (July 5, 1991)

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

In general, the measure of damages for the breach of a contract relating to Indian trust or restricted lands is that amount of money which will place the owner in as good a position as he would have been in had the contract been fully performed.

Under the doctrine of avoidable consequences, damages for breach of contract are normally not awarded to the nonbreaching party for those expenses which could have been avoided through the exercise of reasonable care. The doctrine does not, however, create enforceable rights in the breaching party.

Absent a specific provision in a contract entered into after a prior contract was breached, the BIA has no duty to obtain the consent of the party that breached the original contract before approving modifications to the resale contract.

Bernell Kombol, dba Grass Mountain Logging Co. v. Ass't Portland Area Director, Bureau of Indian Affairs, 21 IBIA 116 (Dec. 19, 1991)

In an appeal alleging an agreement with the contracting officer settling a dispute under contracts issued pursuant to the Indian Self-Determination and Education Assistance Act, which provides that the CDA shall apply, the contracting officer's proclaimed final decision denying Busby's properly certified claim imbued

INDIANS--Continued

CONTRACTS--Continued

Generally--Continued

the Board with jurisdiction under the CDA to determine whether the claim had been settled.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

The starting point for understanding a contract is the language of the document.

Nevaco, Inc. & Pyramid Lake Paiute Tribe of Indians v. Acting Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 157 (Aug. 31, 1993)

The determination of the nature of an agreement relating to the use of Indian trust land is a question of Federal law. It is appropriate to apply state contract law to this determination only when there are no Federal cases on point, and then only so far as state law does not conflict with the Federal interest in protecting the use of Indian resources. The decisions of the Board of Indian Appeals are part of the Federal law relating to contracts involving the use of trust land.

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

When a claim for "finder's fees" arises within the context of a probate proceeding, seeks recovery from the IIM account of an heir or devisee, and is based on a contract that requires Departmental approval but has not been approved, the ALJ is an "authorized representative" of the Secretary of the Interior within the meaning of 25 CFR 115.9 for the purpose of considering whether the contract should be approved.

Estate of John Charlie, 24 IBIA 253 (Oct. 20, 1993)

INDIANS--Continued

CONTRACTS--Continued

Generally--Continued

When an oil and gas development agreement entered into under the Indian Mineral Development Act, 25 U.S.C. §§ 2101-2108 (1988), provides that it remains in effect after its initial term as long as oil and/or gas is produced in paying quantities, it expires by its own terms when production in paying quantities ceases.

Jay Magness v. Albuquerque Area Director, Bureau of Indian Affairs, 25 IBIA 65 (Dec. 6, 1993)

Upon default by the purchaser under a deferred sale contract for trust or restricted land, all previous payments, including interest, are forfeited to the Indian owner. 25 U.S.C. § 372 (1988); 25 CFR 152.35.

BIA is bound by the terms of contracts it has approved, when the contracts are not in conflict with governing regulations.

Rose Stuart v. Acting Billings Area Director, Bureau of Indian Affairs, 25 IBIA 282 (Apr. 19, 1994)

In discerning the intent of the parties to a contract, one must start with the language of the contract.

An ambiguity in a written contract can be overcome by the contemporaneous actions and understandings of the parties to the contract.

Pinoleville Indian Community v. Acting Sacramento Area Director, Bureau of Indian Affairs, 26 IBIA 292 (Oct. 25, 1994)

Formation and Validity

Generally

The principle that tribal bingo management agreements are invalid absent approval under 25 U.S.C. § 81

INDIANS--Continued

CONTRACTS--Continued

Formation and Validity--Continued

Generally--Continued

(1988), applies to tribal agreements for bingo enterprises on tribal land within the St. Regis Mohawk Reservation.

Donald S. Jacobs v. Eastern Area Director, Bureau of Indian Affairs, 20 IBIA 69 (June 10, 1991)

ECONOMIC ENTERPRISES

Generally

Under the circumstances of this case, in which, inter alia, a grant application under the Indian Business Development Program was disapproved on grounds not communicated to the applicant in the disapproval notification, the disapproval will be vacated and the matter referred to the Assistant Secretary--Indian Affairs for the exercise of discretion committed to the Bureau of Indian Affairs and the issuance of a new decision.

Sherry Wilson Price v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 272 (May 1, 1990)

EDUCATION AND TRAINING

Tribally Controlled Schools

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Choctaw Nation of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 243 (Feb. 26, 1991)

INDIANS--Continued

EDUCATION AND TRAINING--Continued

Vocational Training

Under the Bureau of Indian Affairs' adult vocational training program, 25 CFR Part 27, institutional training must be attended on a full-time basis.

Where funds available under the Bureau of Indian Affairs' adult vocational training program are limited, it is a reasonable exercise of discretion for the Bureau to deny funding to an applicant who would simultaneously receive financial assistance under the Bureau's higher education program.

Diana Zarr v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 290 (May 11, 1990)

BIA Manual provisions restricting second requests for adult vocational training services are without the force of law when sought to be applied against parties outside the Bureau.

Alfonso Robles v. Sacramento Area Director, Bureau of Indian Affairs, 23 IBIA 276 (Mar. 29, 1993)

ENROLLMENT/TRIBAL MEMBERSHIP

Because of the possibility of abuse of power by a group of individuals temporarily in office, tribal legislation disenrolling certain tribal members must meet the standards established by the tribe's constitution or other governing documents. Since the passage of the Indian Civil Rights Act, 15 U.S.C. § 1302 (1988), these standards have included the matters covered by the Act.

United Keetoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, & Joe Grayson, Jr., & Pam Thurman Jumper, Muskogee Area Director, Bureau of Indian Affairs, 22 IBIA 75 (June 4, 1992)

INDIANS--Continued

ENROLLMENT/TRIBAL MEMBERSHIP--Continued

DOI generally lacks authority to review sanctions imposed by a tribe against a tribal member. Under limited circumstances set forth in 25 CFR 62.4(a)(3), the Department may review tribal disenrollment decisions. However, the Board of Indian Appeals declines to adopt a theory of "constructive disenrollment" in order to invoke sec. 62.4(a)(3), when the tribal governing documents authorize sanctions less than disenrollment under the disenrollment provisions.

Arthur J. Welmas & Linda Streeter Dukic, Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 264 (Oct. 20, 1993)

Respect for tribal self-government requires that tribal remedies be exhausted before a Federal forum may entertain a challenge to tribal actions or authority. This is particularly true where the matter at issue involves tribal membership.

Janie Jovita Flores et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12, 1993)

FEDERAL RECOGNITION OF INDIAN TRIBES

Generally

In determining whether an Indian group is an "Indian tribe" under statutes and regulations which do not define "Indian tribe," Department of the Interior officials are bound by the regulations in 25 CFR Part 83.

Where the Secretary of the Interior has approved the constitution of an Indian tribe, no Department of the Interior official has authority to "recognize" a portion of the tribe as a separate tribal entity.

Edwards, McCoy & Kennedy & Western Shoshone Business Council of the Duck Valley Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 454 (Sept. 24, 1990)

INDIANS--Continued

FEDERAL RECOGNITION OF INDIAN TRIBES--Continued

Generally--Continued

In determining whether an Indian entity is an Indian tribe for purposes of a particular BIA program, the Bureau must first look to the definition of "Indian tribe" in the statute or regulation governing the program. If the relevant statute or regulation does not define the term, the regulations in 25 CFR Part 83 control the determination.

Central Council of Tlingit & Haida Indian Tribes v. Chief, Branch of Judicial Services, Bureau of Indian Affairs, 26 IBIA 159 (Aug. 3, 1994)

Acknowledgment

Under the terms of a referral to the Board of Indian Appeals by the Secretary of the Interior, where the party requesting reconsideration of a final determination to acknowledge an Indian tribe failed to establish one or more of the grounds for reconsideration at 25 CFR 83(c)(1)-(3), the Board affirms the final determination.

In re Federal Acknowledgment of the San Juan Southern Paiute Tribe, 18 IBIA 213 (Mar. 27, 1990)

Resumption of Trust Relationship

The DOI lacks authority to administratively restore recognition of an Indian tribe that was lawfully terminated pursuant to legislation.

United Auburn Indian Community v. Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 33 (May 28, 1993)

INDIANS--Continued

FINANCIAL MATTERS

Financial Assistance

Decisions concerning whether to approve an application for a grant under the Indian Business Development Program are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

25 CFR 286.3 requires that, in order to be eligible for a grant under the Indian Business Development Program, an economic enterprise must be controlled by the management decisions of its Indian owners.

Honaghaahnii Marketing & Public Relations, Inc. v. Navajo Area Director, Bureau of Indian Affairs, 18 IBIA 144 (Feb. 14, 1990)

The regulations in 25 CFR 278.25 concerning the Core Management grant program, do not set forth a timeframe within which the Bureau of Indian Affairs Area Director must complete the process of reviewing applications.

Washoe Tribe of Nevada & California v. Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 192 (Mar. 15, 1990)

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Death Valley Timbi-Sha Shoshone Tribe v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 196 (Mar. 16, 1990)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Yomba Tribal Council, Yomba Shoshone Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 243 (Apr. 16, 1990)

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

McCoy Industries, Inc. v. Eastern Area Director, Bureau of Indian Affairs, 18 IBIA 234 (Apr. 11, 1990)

Core Management grants are made available to small tribes to assist them in establishing and maintaining sound management practices and fiscal control systems.

Lovelock Paiute Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 249 (Apr. 16, 1990)

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

The Core Management grant program is administered under authority of the Snyder Act, 25 U.S.C. § 13 (1982), rather than the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1982 and Supps.).

La Jolla Band of Mission Indians v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 263 (Apr. 26, 1990)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Under the Bureau of Indian Affairs' adult vocational training program, 25 CFR Part 27, institutional training must be attended on a full-time basis.

Where funds available under the Bureau of Indian Affairs' adult vocational training program are limited, it is a reasonable exercise of discretion for the Bureau to deny funding to an applicant who would simultaneously receive financial assistance under the Bureau's higher education program.

Diana Zarr v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 290 (May 11, 1990)

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

In determining whether or not to approve a loan guaranty, the Bureau of Indian Affairs should consider evidence that an Indian applicant has been denied a loan by one or more lending institutions. The mere fact that an application has been denied, however, is not, in and of itself, proof that a loan guaranty should have been granted.

Home Respiratory Services, Inc. & The Will Rogers Bank & Trust Co. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 299 (May 24, 1990)

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Because it is improper to base a decision on the lack of information that was never requested from the applicant, if the Bureau of Indian Affairs issues a decision denying an application for assistance under the Indian Financing Act of 1974 and the record shows that the decision was based on the lack of information that was not requested either on the standard application form or as a supplemental submission, the decision is not supported by the record.

Robert Gauthier v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 303 (May 24, 1990)

Aubertin Logging & Lumber Enterprises v. Acting Portland Area Director, Bureau of Indian Affairs, 18 IBIA 307 (May 31, 1990)

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Leonard & Ellen Pueblo v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 350 (July 6, 1990)

Decisions concerning whether a loan application under the Indian Loan Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, the Board of Indian Appeals does not substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Linda C. McDonald v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 399 (Aug. 21, 1990)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

When the reason for denial of an application to modify a loan under the Indian Revolving Loan Program is not given in the denial decision, the decision will be vacated and the matter remanded for further proceedings.

Lyle Cochran v. Acting Billings Area Director, Bureau of Indian Affairs, 18 IBIA 406 (Aug. 21, 1990)

In general, decisions concerning whether a request for a loan guaranty or grant under one of the business development programs operated by the Bureau of Indian Affairs are committed to the discretion of the Bureau. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Lyle D. & Donna J. Griffith v. Acting Portland Area Director, Bureau of Indian Affairs, 19 IBIA 14 (Oct. 19, 1990)

Where a Bureau of Indian Affairs Area Director denies an application for a loan under the Indian Revolving Loan Fund on the grounds that the financial condition of the applicant is inadequate to provide a reasonable prospect of repayment, the administrative record should show how the Area Director reached his conclusions concerning the applicant's financial condition.

S&H Concrete Construction, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 19 IBIA 69 (Nov. 15, 1990)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Yavapai-Prescott Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 19 IBIA 107 (Dec. 3, 1990)

Under 25 CFR 2.7(a), it is the responsibility of a Bureau of Indian Affairs' deciding official to give notice of the decision to all interested parties known to the official.

Edward Parisian v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 109 (Dec. 3, 1990)

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Bureau of Indian Affairs technical assistance provides applicants for Core Management grants with an opportunity to receive an advance indication of potential problems with their applications and with guidance in correcting those problems but does not guarantee that applicants who receive assistance will be funded.

In reviewing applications for Core Management grants, the Bureau of Indian Affairs should strive to

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

minimize the effect of the personal judgments of individual reviewers.

Washoe Tribe of Nevada & California v. Acting Phoenix Area Director, Bureau of Indian Affairs, 19 IBIA 190 (Feb. 5, 1991)

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure proper consideration was given to all legal prerequisites to the exercise of discretion.

When a BIA Area Director denies an application for a loan guaranty on the grounds that he or she lacks confidence in the ability of a new business to repay the loan out of its profits, the administrative record should show how the Area Director reached this conclusion.

Fred A. Reed v. Minneapolis Area Director, Bureau of Indian Affairs, 19 IBIA 249 (Mar. 5, 1991)

Decisions concerning whether a request for a U.S. Direct Loan should be approved are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Because it is improper to base a decision on the lack of information that was never requested from the applicant, if the BIA issues a decision denying an application for assistance under the Indian Financing Act of 1974 and the record shows that the decision was based on the lack of information that was not requested either on

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

the standard application form or as a supplemental submission, the decision is not supported by the record.

David Pourier v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 266 (Mar. 21, 1991)

Under 25 CFR 286.17(a), if review of an application for a grant under the Indian Business Development Program by the Bureau of Indian Affairs suggests that the applicant may be able to obtain financing through other sources, the Bureau is required to ask the applicant to submit letters from two customary lenders in the area that are making loans for similar purposes, before it disapproves the grant application on the grounds that such financing should be available.

Under 25 CFR 286.17(g)(5), an application for a second grant for an Indian enterprise that has previously received a grant under the Indian Business Development Program must show that the additional grant will increase the enterprise's net profits, increase Indian employment, or both.

Stone Trucking v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 312 (Apr. 18, 1991)

A Bureau of Indian Affairs decision concerning the eligibility of a tribe for a Core Management grant under 25 CFR 278.22(a)(1) is a decision based on a legal conclusion and is subject to review by the Board of Indian Appeals.

For purposes of eligibility for a Core Management grant under 25 CFR 278.22(a)(1), a tribe's population includes members of the tribe who reside on or near the tribe's reservation, and may include as well non-member Indians who receive services from the tribe or who are socially or culturally affiliated with the tribe, but does not include non-member Indians who have no affiliation with the tribe.

Pawnee Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs, 20 IBIA 39 (May 21, 1991)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

In order to be eligible for general assistance under 25 CFR Part 20, an applicant must reside within an Indian reservation or within the "near-reservation" area designated for the applicant's tribe.

After issuing a decision concerning general assistance benefits, a Bureau of Indian Affairs official may reverse that decision within the time for filing an appeal, provided no appeal has been filed.

Linda Stark, Edward Stark, & Frederick Stark v. Acting Portland Area Director, Bureau of Indian Affairs, 20 IBIA 121 (July 11, 1991)

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure proper consideration was given to all legal prerequisites to the exercise of discretion.

Benefits under the Indian Financing Act are available to economic enterprises which are at least 51 percent owned by members of Federally recognized Indian tribes.

Helen Polzer et al. v. Minneapolis Area Director, Bureau of Indian Affairs, 20 IBIA 158 (Aug. 5, 1991)

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Decisions concerning whether an application for a loan under the Indian Revolving Loan Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

S&H Concrete Construction, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 176 (Aug. 13, 1991)

To be eligible for a grant under the Indian Business Development Program, an Indian-owned economic enterprise must be located on or near an Indian reservation.

Robert J. Harrison v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 20 IBIA 183 (Aug. 13, 1991)

A BIA decision denying a loan application under Title I of the Indian Financing Act, 25 U.S.C. §§ 1461-1469 (1988), will be summarily affirmed when it adequately explains the reason for denial and is supported by the administrative record, and when the appellant fails to show that the Bureau's discretion was not properly exercised.

Power Fuel Producers, Inc. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 20 IBIA 190 (Aug. 16, 1991)

Under 25 CFR Part 20, general assistance provided by the BIA is intended to be a secondary or residual source of financial assistance and may not duplicate assistance received from other sources.

BIA Manual provisions concerning general assistance are without the force of law when sought to be applied against parties outside the Bureau. However, those provisions may be enforced against the Bureau where not to do so might result in a deprivation of benefits to an applicant for general assistance.

Lloyd Carter v. Acting Billings Area Director, Bureau of Indian Affairs, 20 IBIA 195 (Aug. 20, 1991)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Under 25 U.S.C. § 1453 (1988), loans from the Indian Revolving Loan Fund may be made only to applicants who in the opinion of the Secretary are unable to obtain financing from other sources on reasonable terms and conditions.

When a challenge is raised to a discretionary decision issued by a BIA official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

Raymond E. Patchen v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 219 (Aug. 27, 1991)

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Core Management grants are made available to small tribes to assist them in establishing and maintaining sound management practices and fiscal control systems.

Sauk-Suiattle Indian Tribe v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 238 (Sept. 6, 1991)

The BIA must determine whether an applicant for an Indian Business Development Program grant is eligible for a grant prior to approving or disapproving the application.

Vanassa Douchette, dba Douchette Landscaping, Masonry & Paving v. Eastern Area Director, Bureau of Indian Affairs, 21 IBIA 7 (Oct. 8, 1991)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Decisions concerning whether an application for a loan under the Indian Revolving Loan Program should be approved are committed to the discretion of the BIA. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Russell R. Kirn v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 53 (Nov. 13, 1991)

Lease income from trust lands is not specifically excluded by Federal statute from consideration as a resource available to meet an individual Indian's need within the meaning of 25 CFR 20.21, which governs the general assistance program of the BIA.

Diedre Wilson v. Acting Portland Area Director, Bureau of Indian Affairs, 21 IBIA 188 (Feb. 14, 1992)

Decisions concerning whether a tribe's application for a Technical Assistance grant should be funded are committed to the discretion of the BIA. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

The Board of Indian Appeals has jurisdiction to review an allegation that raises questions as to whether the BIA followed its own guidelines for a financial assistance program.

It is improper for the BIA to deny an application for financial assistance for reasons that are in conflict with the guidelines for the program under which assistance was sought.

Oneida Indian Nation v. Deputy Comm'r of Indian Affairs, 21 IBIA 215 (Feb. 28, 1992)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

When the BIA denies an application for a U.S. Direct Loan, the administrative record and the decision, when read together, must show how the Bureau reached its conclusions.

Charles McCloud v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 21 IBIA 254 (Mar. 18, 1992)

When an official of BIA determines that an application for financial assistance under the Indian Financing Act should be disapproved, the issuance of a preliminary determination to that effect, allowing the applicant an opportunity to respond, could significantly expedite final resolution of the matter by allowing the applicant to address the official's concerns before initiation of the appeal process.

Nockey Construction, Inc. v. Portland Area Director, Bureau of Indian Affairs, 22 IBIA 38 (May 1, 1992)

It is improper for BIA to deny an application for financial assistance for reasons that were not set forth in the announcement of the program under which assistance was sought.

Tunica-Biloxi Tribe v. Deputy Comm'r of Indian Affairs, 22 IBIA 43 (May 4, 1992)

25 CFR Part 286, dealing with the Indian Business Development Program, does not require that a customary lender be a lending institution qualified under the guaranteed loan program in 25 CFR Part 103.

Even if a grant application under the Indian Business Development Program is found to be eligible for funding, it is a proper exercise of the discretion granted to the BIA to find that other applications have higher priority under 25 CFR 286.8. Support for this

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

conclusion must, however, appear in the administrative record.

Stone Trucking v. Portland Area Director, Bureau of Indian Affairs, 22 IBIA 52 (May 5, 1992)

Under 25 CFR 20.21(e)(1), the payment standard for general assistance from BIA is based on the payment standard for the Aid to Families with Dependent Children program in the state where the applicant or recipient resides.

Under 25 CFR 20.23, BIA is not required to provide miscellaneous financial assistance to applicants who have other resources available to meet current living costs.

Pat Hayes v. Acting Anadarko Area Director, BIA, 22 IBIA 65 (June 3, 1992)

Where subsequent legislation renders questionable the continued validity of a BIA regulation, the Board of Indian Appeals will not apply the regulation to the detriment of a party dealing with the Bureau.

Under 25 U.S.C. § 1493 (1988), BIA may not decline to honor an already-approved loan guaranty on the grounds of lender imprudence. However, under 25 U.S.C. § 1491 (1988), the Bureau may raise certain defenses against a claim under the guaranty.

Under BIA's loan guaranty program, the failure of a lender to maintain effective liens will diminish the amount of the guaranty to the extent of any loss caused by the lender's failure. 25 CFR 103.28(b).

Arguable BIA imprudence in approving a loan guaranty does not relieve the lender of its obligations under the loan guaranty regulations and agreement.

The Guardian Life Insurance Co. of America & Public Leasing Corp. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 22 IBIA 104 (June 11, 1992)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

Although regulations in 25 CFR Part 103, governing the Indian Loan Guaranty and Insurance Program, require that an economic enterprise be at least 51 percent Indian-owned in order to be eligible for a loan guaranty, they do not specifically require that the economic enterprise be Indian-controlled.

The regulations in 25 CFR Part 103, governing the Indian Loan Guaranty and Insurance Program, require that an economic enterprise seeking a loan guaranty must contribute beneficially to the economy of an Indian reservation.

Navajo Precision Built Systems, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 22 IBIA 153 (June 26, 1992)

A Federal agency has a responsibility to explain the rationale and factual basis for decisions affecting persons dealing with the agency. Failure to provide such information is a violation of due process.

Quileute Tribe v. Portland Area Director, Bureau of Indian Affairs, 23 IBIA 20 (Oct. 29, 1992)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

In determining which applications will be funded, it is improper for the BIA to combine applications for funding under one grant program with applications under another grant program when the criteria and purposes of the two grant programs are different.

Three Affiliated Tribes of the Fort Berthold Reservation v. Aberdeen Area Director, Bureau of Indian Affairs, 23 IBIA 160 (Jan. 14, 1993)

BIA Manual provisions restricting second requests for adult vocational training services are without the force of law when sought to be applied against parties outside the Bureau.

Alfonso Robles v. Sacramento Area Director, Bureau of Indian Affairs, 23 IBIA 276 (Mar. 29, 1993)

Where a Federal Register announcement of two grant programs under the Indian Self-Determination Act, 25 U.S.C. § 450h (1988), includes a particular provision in the criteria for one of the programs, and omits that provision from the criteria for the other program, the omission is significant to show that a different intent existed.

Although sec. 103 of the Indian Self-Determination Act, 25 U.S.C. § 450h (1988), contemplates that "tribal organizations" may receive planning grants, the BIA's discretionary authority under this section includes the authority to limit eligibility for planning grants to Indian tribes.

Ramah Navajo School Board, Inc. v. Albuquerque Area Director, Bureau of Indian Affairs, 24 IBIA 104 (July 13, 1993)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

BIA regulations and guidelines concerning grant programs for Indian tribes are subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

In administering competitive grant programs for Indian tribes, BIA has a duty to provide fair and equitable treatment to all applicants. This duty includes an obligation to ensure that the Bureau's Area Offices interpret the basic eligibility criteria for the programs in a consistent matter. It also includes an obligation to provide clear notice of the eligibility criteria to potential grant applicants.

Reno-Sparks Indian Colony v. Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 199 (Sept. 21, 1993)

The BIA is not authorized, either by the regulations governing the Bureau's general assistance program or by the corresponding provisions of the BIA Manual, to require a non-Indian spouse of a grant recipient to submit job search reports. However, the Bureau may require the grant recipient to submit verified information concerning the spouse's employment situation.

Pat Hayes v. Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 50 (Nov. 30, 1993)

Under 25 CFR 103.10(f), in order to be eligible for a loan guaranty from BIA, a borrower must have at least 20-percent equity in the business to be financed.

River Bottom Cattle Co., Inc. v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 25 IBIA 110 (Jan. 6, 1994)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Organizational costs cannot be used in calculating whether an applicant for a U.S. Direct Loan has met the 20-percent equity requirement of 25 CFR Part 101.

Although regulations in 25 CFR Part 101, governing the U.S. Direct Loan Program, require that an economic enterprise be at least 51 percent Indian-owned in order to be eligible for a direct loan, they do not specifically require that the economic enterprise be Indian-intended that the Indian ownership be substantially and actively involved in direction and management of the enterprise.

Applicants for a U.S. Direct Loan must show that their proposed operations will contribute to the economy of an Indian reservation or the members thereon.

Danard House Information Services Div., Ltd. v. Sacramento Area Director, Bureau of Indian Affairs, 25 IBIA 212 (Mar. 7, 1994)

It is error for BIA to deny an application under the Indian Financing Act on the grounds that an applicant failed to provide certain information when that information was not required by either the applicable program regulations or specific request.

Each application for assistance under the Indian Financing Act is unique. In considering an application, it is important that BIA address the specific facts of that application.

Shiree Dupuis-Ryan v. Acting Portland Area Director, Bureau of Indian Affairs, 25 IBIA 139 (Jan. 25, 1994)

Individual Indian Money Accounts

Due process requires that the owner of an IIM account be afforded a prompt hearing when a hold is placed on funds in the account.

The Secretary of the Interior is authorized to waive use of funds in Individual Indian Money accounts to satisfy indebtedness of Indians to the United States

INDIANS--Continued

FINANCIAL MATTERS--Continued

Individual Indian Money Accounts--Continued

resulting from errors in recording Indian probate distributions.

Ardis Robinson v. Acting Billings Area Director, Bureau of Indian Affairs, 20 IBIA 168 (Aug. 13, 1991)

Under 25 CFR 115.9(b) an individual must be informed that a hold has been placed on funds in his or her IIM account and given the right to request a hearing. However, the regulation further provides that, if the individual fails to request a hearing, he or she is deemed to consent to the limitation on and/or disbursement of funds from the account as set forth in the notice.

John Fredericks, Jr. v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 24 IBIA 115 (July 27, 1993)

When a claim for "finder's fees" arises within the context of a probate proceeding, seeks recovery from the IIM account of an heir or devisee, and is based on a contract that requires Departmental approval but has not been approved, the ALJ is an "authorized representative" of the Secretary of the Interior within the meaning of 25 CFR 115.9 for the purpose of considering whether the contract should be approved.

Estate of John Charlie, 24 IBIA 253 (Oct. 20, 1993)

The Secretary of the Interior must exercise his authority under 25 U.S.C. § 410 (1988), in accordance with the trust responsibility of the United States for funds held in IIM accounts.

Due process requires that the owner of an IIM account be afforded a prompt hearing when a hold is placed on funds in the account.

Marjorie L. Miller v. Anadarko Area Director, Bureau of Indian Affairs, 26 IBIA 97 (July 6, 1994)

INDIANS--Continued

GAMING

Self-executing legislation contains the standards necessary for its enforcement without the need for implementing regulations.

The Indian Gaming Regulatory Act, 25 U.S.C. § 2711(c), requires BIA to examine the capital investment structure against the income projections for the gaming activity in determining whether or not to approve a split of income between a tribe and a management company under which less than 70 percent of the net income would go to the tribe.

The Indian Gaming Regulatory Act, 25 U.S.C. § 2711(b), requires BIA to compare the capital investment required and the income projections for the gaming activity in determining whether or not to approve a gaming management contract with a term exceeding 5 years.

White Earth Band of Chippewa Indians v. Minneapolis Area Director, Bureau of Indian Affairs, 23 IBIA 216 (Mar. 3, 1993)

GRANTS

Jurisdiction

The Board has jurisdiction to decide disputes arising from grants made under the Tribally Controlled Schools Act of 1988, 25 U.S.C. §§ 2501-2511.

Appeal of Rough Rock Community School Board, IBCA-3037 (Feb. 12, 1993) 100 I.D. 45

Tribally Controlled Schools Act

Grant recipients under the Tribally Controlled Schools Act are not entitled to interest pursuant to the Prompt Payment Act on late payments, because the Prompt Payment Act by its terms applies only to contracts as such; and any payment of interest on the Tribally Controlled Schools Act grants would require express statutory authority, which clearly does not exist.

Appeal of Rough Rock Community School Board, IBCA-3037 (Feb. 12, 1993) 100 I.D. 45

INDIANS--Continued

HOUSING

Generally

Where a lease of Indian land provides that it may not be cancelled absent the consent of HUD unless HUD's interest has been terminated, a BIA Superintendent may not approve cancellation of the lease without either evidence of HUD's consent or participation by HUD in a determination concerning termination of its interest.

Comanche Housing Authority & Chloveta A. Caudill v. Anadarko Area Director, Bureau of Indian Affairs, 22 IBIA 271 (Sept. 9, 1992)

Housing Improvement Program

The Board of Indian Appeals will refer to the Assistant Secretary--Indian Affairs an appeal requiring a decision as to whether to waive regulations set forth in 25 CFR 256.5(b), limiting certain categories of assistance under the Housing Improvement Program.

Jimmie L. Sanders v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 213 (Feb. 12, 1991)

Under the BIA's 1979 Housing Improvement Program regulations, title to a house constructed on tribal land did not vest in the grant recipient during the first 5 years following construction.

Christine A. Nix v. Acting Sacramento Area Director, BIA, 21 IBIA 42 (Nov. 7, 1991)

Although the BIA normally would be bound by the terms of a Housing Improvement Program grant agreement it had signed, it may be excused from performance in a case where performance is impossible.

Mildred Hartman v. Anadarko Area Director, Bureau of Indian Affairs, 23 IBIA 122 (Dec. 18, 1992)

INDIANS--Continued

HUNTING, FISHING, AND GATHERING RIGHTS

Generally

The Act of Mar. 14, 1940 requires BOR to further both irrigation and tribal fishing uses of the Bull Lake Reservoir. However, the 1940 Act also requires that inconsistencies between tribal uses and reservoir purposes must be resolved to permit fulfillment of the reservoir purposes.

Where there is no reserved water right for maintenance of pool elevations in Bull Lake Reservoir, the Shoshone and Arapohoe Tribes cannot require BOR to maintain a particular reservoir level.

Bureau of Reclamation Responsibilities in Operating Bull Lake Reservoir, M-36973 (Feb. 21, 1992) 100 I.D. 185

On Reservation

Water claimed under potentially prior tribal fishing rights is not subject to the "just and equal distribution" requirement of 25 U.S.C. § 381 (1988).

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 31 (Oct. 23, 1990)

INDIAN CHILD WELFARE ACT OF 1978

Financial Grant Applications

Generally

A Federal Register notice of the availability of funds under Title II of the Indian Child Welfare Act which states that post marks will not be considered in determining whether an application for funding is timely submitted, places the applicant on notice that it bears the burden of ensuring timely submission of its application.

Grand Traverse Band of Ottawa & Chippewa Indians v. Acting Deputy to the Ass't Secretary--Indian Affairs (Tribal Services), 18 IBIA 450 (Sept. 24, 1990)

INDIANS--Continued

INDIAN CHILD WELFARE ACT OF 1978--Continued

Financial Grant Applications--Continued

Funding

Continued funding under a multi-year Indian Child Welfare Act grant is dependent upon the grantee's progress in achieving the project objectives as set forth in the approved work plans.

Grand Traverse Band of Ottawa & Chippewa Indians v. Acting Deputy to the Ass't Secretary--Indian Affairs (Tribal Services), 18 IBIA 450 (Sept. 24, 1990)

INDIAN REORGANIZATION ACT

Neither the IRA, 25 U.S.C. §§ 461-479 (1988), nor any other Federal law, contains a general requirement for approval of tribal ordinances by Federal officials. However, Indian tribes may, as a matter of tribal law, include an approval provision in their constitutions.

Review of tribal ordinances, even though required by a tribal constitution, is an intrusion into tribal self-government. Review should, therefore, be undertaken in such a way as to avoid unnecessary interference with tribal self-government.

Ute Indian Tribe of the Uintah & Ouray Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 24 (Oct. 22, 1991)

Although required by statute, review of amendments to the IRA constitutions is an intrusion into tribal self-government. Review should therefore be undertaken in such a way as to avoid unnecessary interference with tribal self-government.

Cheyenne River Sioux Tribe v. Aberdeen Area Director, Bureau of Indian Affairs, 24 IBIA 55 (June 15, 1993)

INDIANS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Generally

The Core Management grant program is administered under authority of the Snyder Act, 25 U.S.C. § 13 (1982), rather than the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1982 and Supps.).

La Jolla Band of Mission Indians v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 263 (Apr. 26, 1990)

A formula for the distribution of Indian Self-Determination Act contract funds among several Indian tribes must be made available for comment and discussion by the tribes prior to negotiation of the contracts for the fiscal year to which the formula applies.

Shoshone-Paiute Tribes of the Duck Valley Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 423 (Sept. 13, 1990)

The Indian Self-Determination Act does not give a subcontractor an explicit or implicit right to appeal under 25 CFR Part 2 from an action taken by an Indian tribe pursuant to a contact under the Act.

The BIA must implement the Federal commitment to tribal self-determination, which includes a policy of respect for tribal courts, in fulfilling its oversight responsibilities under the Indian Self-Determination Act.

Larry Martin v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 279 (Apr. 4, 1991) 98 I.D. 200

A decision distributing funds among several tribes, for purposes of contracting under the Indian Self-Determination Act, is a decision based on the exercise of discretion. In reviewing such decisions, the Board of Indian Appeals does not substitute its judgment for that of the Bureau but, rather, seeks to ensure that proper

INDIANS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Generally--Continued

consideration was given to all legal prerequisites to the exercise of discretion.

Ponca Tribe of Oklahoma, Pawnee Tribe of Oklahoma, & Otoe-Missouria Tribe v. Acting Anadarko Area Director, Bureau of Indian Affairs, 22 IBIA 199 (Aug. 7, 1992)

Under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. § 450f(b)(3) (1988), whenever the Secretary declines to enter into a self-determination contract, he must provide the tribal organization with a hearing on the record. A BLM decision declining a self-determination contract application will be set aside if BLM has not afforded the tribe an opportunity for a hearing, and the case will be assigned to an ALJ to conduct the statutorily mandated hearing. The record of the hearing shall then be forwarded to the Director, BLM, for review and issuance of a decision with appeal rights to the Ass't Secretary, Land and Minerals Management.

Absentee Shawnee Tribe of Oklahoma, 124 IBLA 259 (Nov. 3, 1992)

Where an appeal procedure for certain decisions under the Indian Self-Determination Act appears only in the BIA Manual, and is not required either by statute or regulation, an appellant may waive the procedure in the Manual and proceed under the Bureau's general appeal regulations in 25 CFR Part 2.

Under 25 U.S.C. § 450j-1(b)(3) (1988), the BIA is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under the Indian Self-Determination Act.

Even in the case of a decision based on the exercise of discretionary authority, the BIA has a

INDIANS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Generally--Continued

responsibility to explain the rationale and factual basis of the decision.

Kaw Nation v. Anadarko Area Director, Bureau of Indian Affairs, 24 IBIA 21 (May 26, 1993)

Where a Federal Register announcement of two grant programs under the Indian Self-Determination Act, 25 U.S.C. § 450h (1988), includes a particular provision in the criteria for one of the programs, and omits that provision from the criteria for the other program, the omission is significant to show that a different intent existed.

Although sec. 103 of the Indian Self-Determination Act, 25 U.S.C. § 450h (1988), contemplates that "tribal organizations" may receive planning grants, the BIA's discretionary authority under this section includes the authority to limit eligibility for planning grants to Indian tribes.

Ramah Navajo School Board, Inc. v. Albuquerque Area Director, Bureau of Indian Affairs, 24 IBIA 104 (July 13, 1993)

Under 25 U.S.C. § 450b(h) (1988), a "mature contract" is a self-determination contract that has been continuously operated by a tribal organization for 3 or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization.

Tohatchi Special Education & Training Center, Inc. v. Navajo Area Director, Bureau of Indian Affairs, 25 IBIA 259 (Apr. 7, 1994)

INDIANS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Generally--Continued

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over certain threshold decisions rendered by BIA officials in considering proposals to contract under the Indian Self-Determination Act, P.L. 93-638, despite the special appeal procedure in 25 CFR Part 271.

Colorado River Indian Tribes v. Phoenix Area Director, Bureau of Indian Affairs, 26 IBIA 39 (June 8, 1994)

Under 25 U.S.C. § 450m-1(c) (1988), the EAJA applies to administrative appeals filed by tribal organizations regarding contracts under the Indian Self-Determination Act.

Tohatchi Special Education & Training Center, Inc. v. Navajo Area Director, Bureau of Indian Affairs, 26 IBIA 138 (July 25, 1994)

For purposes of review by the Board of Indian Appeals of a decision rendered by a BIA Area Director concerning tribal performance of functions covered by a contract or self-governance compact under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n (1988 and Supps.), the contract or compact is conclusive evidence that the tribe has the authority to perform the functions.

DOI lacks authority to waive the government-to-government relationship between the Federal Government and the Indian tribes, which was reaffirmed by Congress in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n (1988 and Supps.).

Mark H. Perrault v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 26 IBIA 214 (Sept. 9, 1994)

INDIANS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Generally--Continued

The Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1988 and Supps.), preserves the trust responsibility of the United States toward the Indian people, prohibits the Secretary of the Interior from entering into any contract which would impair his ability to discharge his trust responsibility, and authorizes the Secretary to decline a contract where adequate protection of trust resources is not assured.

Where an Alaska Native village has contracted under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1988 and Supps.), to perform realty services, the BIA may reject a request that the contract service area be based on village membership if the Bureau reasonably finds that adequate protection of trust resources will not be assured under a membership-based contract.

Kwethluk Ira Council v. Juneau Area Director, Bureau of Indian Affairs, 26 IBIA 262 (Oct. 18, 1994)

Under the circumstances of this case, the Board of Indian Appeals finds no reason why self-governance decisions signed by the Deputy Commissioner of Indian Affairs should be immune from the general right of review by the Board. If these decisions are actually decisions of the Assistant Secretary--Indian Affairs, they should be signed by the Assistant Secretary, not by the Deputy Commissioner or any other subordinate official.

Mille Lacs Band of Ojibwe v. Acting Deputy Commissioner of Indian Affairs, 27 IBIA 94 (Dec. 21, 1994)

JUDGMENT FUNDS

Use and distribution of funds awarded to an Indian tribe by the Indian Claims Commission or the U.S. Court of Federal Claims is governed by the provisions of the Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. §§ 1401-1408, which inter alia, requires the

INDIANS--Continued

JUDGMENT FUNDS--Continued

Secretary of the Interior to submit to Congress a plan for the use and distribution of the funds awarded.

Ottawa Indian Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 24 IBIA 92 (July 8, 1993)

LANDS

Generally

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of that statute, if that question was not addressed by the Judge.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

Public Law 100-638, 102 Stat. 3327, imposes a trust responsibility on the BIA in its administration of lands transferred to the Quinault Indian Nation by that Act.

Dahlstrom Lumber Co. v. Portland Area Director, Bureau of Indian Affairs & Mayr Brothers Logging Co., Inc., et al., Portland Area Director, Bureau of Indian Affairs, 20 IBIA 143 (July 17, 1991)

Lease income from trust lands is not specifically excluded by Federal statute from consideration as a resource available to meet an individual Indian's need within the meaning of 25 CFR 20.21, which governs the general assistance program of the BIA.

Diedre Wilson v. Acting Portland Area Director, Bureau of Indian Affairs, 21 IBIA 188 (Feb. 14, 1992)

INDIANS--Continued

LANDS--Continued

Generally--Continued

The Board of Indian Appeals is not a court of general jurisdiction. It has only that authority which has been delegated to it by the Secretary of the Interior. It has not been delegated authority to determine whether title to land is properly in the United States in trust for an Indian tribe or individual as opposed to being in fee ownership.

It is the responsibility of the BIA to take action against a person shown by state and Federal land title records to be in trespass on land held by the United States in trust for an Indian tribe.

Phil Foutz v. Acting Navajo Area Director, Bureau of Indian Affairs, 21 IBIA 273 (Mar. 27, 1992)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of title to Indian land.

Severo Leon et al. v. Albuquerque Area Director, Bureau of Indian Affairs, 23 IBIA 248 (Mar. 23, 1993)

When surveying the boundaries of an Indian reservation created in 1891 on an island off the coast of Alaska, it was not proper to include an island in the reservation that clearly was not included as the reservation was defined by the President in 1916.

State of Alaska, Forest Service, U.S. Dept. of Agriculture, 127 IBLA 1 (July 12, 1993)

The determination of the nature of an agreement relating to the use of Indian trust land is a question of Federal law. It is appropriate to apply state contract law to this determination only when there are no Federal cases on point, and then only so far as state law does not conflict with the Federal interest in protecting the use of Indian resources. The decisions of

INDIANS--Continued

LANDS--Continued

Generally--Continued

the Board of Indian Appeals are part of the Federal law relating to contracts involving the use of trust land.

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

Actions taken by BIA on lands held in trust for an Indian tribe or individual are subject to the requirements of NEPA, 42 U.S.C. §§ 4321-4335 (1988).

Friends of the Wild Swan v. Portland Area Director, Bureau of Indian Affairs, 27 IBIA 8 (Nov. 14, 1994)

Aboriginal Title

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine aboriginal title to land.

Novo River Indian Community v. Acting Sacramento Area Director, Bureau of Indian Affairs, 19 IBIA 63 (Nov. 14, 1990)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of a trust patent issued by BLM or to determine aboriginal title to land.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

INDIANS--Continued

LANDS--Continued

Allotments

Generally

An application for attorney fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (West Supp. 1989), for services rendered in obtaining BLM approval of an allotment under the General Allotment Act of 1887, 25 U.S.C. § 334 (1982), is properly denied when no adversary adjudication has occurred or when the Office of Hearings and Appeals has not conducted an adjudication.

Ann Marie Sayers, 115 IBLA 40 (June 8, 1990)

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of that statute, if that question was not addressed by the Judge.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

In considering matters raised by one Indian against a second Indian relating to the second Indian's trust allotment, the Bureau of Indian Affairs' trust duty is to the person for whom the land is held in trust.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

A patentee takes title to land described in his patent, as surveyed on the ground at the time of patent. A successor-in-interest to a portion of land conveyed will not be permitted to overturn the dependent resurvey of the boundaries of the patent on the basis that

INDIANS--Continued

LANDS--Continued

Allotments--Continued

Generally--Continued

the description in the patent encompassed other or different land than the land intended to be patented.

In the absence of evidence of an original corner of the public land survey, the location of the lost corner is properly determined by means of proportionate measurement in a dependent resurvey. A BLM decision denying a protest of the resurvey on the basis of a local corner asserted to be a perpetuation of the lost corner will be affirmed where the preponderance of the evidence including distances and directions to natural and artificial landmarks indicate that the local corner is not a reliable perpetuation of the survey corner.

Lorna L. Boykin, Reynold L. Allgood, 130 IBLA 301 (Aug. 31, 1994)

Alienation

In determining whether to approve a gift deed of Indian trust land, the BIA's trust duty requires it to refrain from approving the deed if there is any question as to the Indian landowner's intent.

Estates of Evan Gillette, Sr., & Lizzie Gillette/Yellow Bird/Bellanger/Paint/Bedell, aka Elizabeth Burdell, 22 IBIA 133 (June 18, 1992)

It is ultimately a decision within the informed discretion of BIA as to whether any conveyance of trust property, including one presented after the death of the grantor, should be approved.

Neither the statutes nor the regulations concerning approval of conveyances of trust property by BIA mandate a hearing in these matters.

Estate of George Levi, 26 IBIA 50 (June 17, 1994)

INDIANS--Continued

LANDS--Continued

Allotments--Continued

Right to Receive

BLM properly rejected an Indian allotment application filed in 1978 for land allegedly in the public domain that was included in a trust patent issued to another Indian in 1907.

Irene Mitchell Pallin, 126 IBLA 344 (June 22, 1993)

Allotments on Public Domain

Generally

An individual Indian landowner's standing to bring an appeal in a matter concerning Indian lands is limited to her own ownership interest unless she has been authorized by other landowners to represent them and is a qualified representative under 43 CFR 1.3.

Decisions of Bureau of Indian Affairs officials concerning whether to seek legislation affecting Indian allotments on the public domain are decisions based on the exercise of discretionary authority. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau.

Cora Marion v. Billings Area Director, Bureau of Indian Affairs, 18 IBIA 395 (Aug. 15, 1990)

The Board of Indian Appeals lacks jurisdiction over appeals from decisions of officials of the General Land Office or the Bureau of Land Management concerning Indian allotments on the public domain.

An untimely appeal from the rejection of an Indian allotment application must be dismissed.

James Robert Burchard v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 254 (Mar. 8, 1991)

INDIANS
(See also Board of Indian Appeals, Bureau of Indian Affairs, Indian Probate)

LANDS

Allotments on Public Domain

Generally

BLM properly rejected an application under sec. 4 of the Indian General Allotment Act, as amended, 25 U.S.C. § 334 (1988), for an Indian allotment when the applicant failed to provide, either with her application or in response to a BLM decision requiring her to do so, a certificate of eligibility showing that she is or is entitled to be a recognized member of a Federally recognized Indian tribe.

Ramona L. Randa, 125 IBLA 153 (Jan. 21, 1993)

Lands Subject to

BLM properly rejected an Indian allotment application filed in 1978 for land allegedly in the public domain that was included in a trust patent issued to another Indian in 1907.

Irene Mitchell Pallin, 126 IBLA 344 (June 22, 1993)

Ceded Lands

Restoration

Issuance of patent under the Color of Title Act, as amended, 43 U.S.C. §§ 1068-1068b (1988), is not warranted if the land was restored to tribal ownership prior to when the color-of-title claimant's chain of title was initiated.

Estate of Edna Turney, 123 IBLA 354 (July 20, 1992)

INDIANS--Continued

LANDS--Continued

Environmental Impact Statements

Actions taken by BIA on lands held in trust for an Indian tribe or individual are subject to the requirements of NEPA, 42 U.S.C. §§ 4321-4335 (1988).

Friends of the Wild Swan v. Portland Area Director, Bureau of Indian Affairs, 27 IBIA 8 (Nov. 14, 1994)

Fair Rental Value

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

Wapato Orchard Partnership v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 254 (Apr. 24, 1990)

The role of the Board of Indian Appeals in reviewing a BIA determination of fair rental value is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence.

An appellant who challenges a BIA rental adjustment for a lease of Indian land bears the burden of proving that the adjustment is unreasonable.

A determination of fair annual rental for a lease of Indian land should be made in accordance with generally accepted appraisal principles.

John Strain v. Portland Area Director, Bureau of Indian Affairs et al., 23 IBIA 114 (Dec. 18, 1992)

Fee Lands

"Federal lands." "Indian lands." The term "Indian lands," as defined by sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1291(9) (1982)), includes non-Federal lands satisfying the statutory criteria that they either be situated within the exterior boundaries of

INDIANS--Continued

LANDS--Continued

Fee Lands--Continued

a Federal Indian Reservation or held in trust for or supervised by an Indian tribe. By the same token, lands owned by the United States are "Indian lands" under SMCRA only if they meet these statutory criteria.

"Indian lands" are specifically excepted from the definition of "Federal lands." Therefore, under SMCRA, the categories of "Indian lands" and "Federal lands" are mutually exclusive. Thus, a holding that lands are not "Indian lands" because neither the surface nor the mineral estate are "Federal lands" is properly reversed.

Lands located outside a Federal Indian reservation, the surface estate of which is owned by an Indian tribe and the mineral estate of which is privately owned, are "Indian lands" within the meaning of sec. 701(9) of SMCRA (30 U.S.C. § 1291(9)), and thus are subject to OSMRE's jurisdiction.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

Individual Rights in Tribal Lands

An individual, even if a tribal member, does not acquire an ownership interest in tribal land by virtue of a tribal allocation of a right to occupy the land.

Janie Jovita Flores et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12, 1993)

Individual Trust or Restricted Land

Generally

In evaluating an application for acquisition of land in restricted fee status under 25 CFR 117.8, which lacks evaluation criteria, the BIA reasonably employed as guidelines the criteria for acquisition of land in trust status listed in 25 CFR 151.10.

The approval of requests to acquire land in restricted fee status for Osage Indians is committed to

INDIANS--Continued

LANDS--Continued

Individual Trust or Restricted Land--Continued

Generally--Continued

the discretion of the BIA. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Nancy Tillman Keil v. Muskogee Area Director, Bureau of Indian Affairs, 21 IBIA 126 (Dec. 19, 1991)

Under 25 CFR 162.2(a)(4), the BIA may grant leases of individually owned trust or restricted land when the heirs or devisees have not been able to agree upon a lease during the 3-month period immediately following the date on which a lease may be entered into.

Peace Pipe, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 22 IBLA 1 (Apr. 2, 1992)

Under 25 U.S.C. § 380 (1988), and 25 CFR 162.2(a)(4), the BIA may grant leases of individually owned trust or restricted land when the heirs have not been able to agree upon a lease during a 3-month period, provided the land is not in use by any of the heirs.

Lower Peoples Creek Cooperative v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 297 (Apr. 22, 1993)

Where a tribe has adopted a policy concerning "owner's use" of land in fractionated ownership, the provisions of 25 CFR 162.2(a)(4) must be read in conjunction with the tribal policy.

Vincent Blackhawk v. Billings Area Director, Bureau of Indian Affairs, 24 IBIA 275 (Oct. 21, 1993)

INDIANS--Continued

LANDS--Continued

Individual Trust or Restricted Land--Continued

Alienation

The Secretary of the Interior has the authority to approve a conveyance of Indian trust or restricted land after the death of the Indian grantor if the Secretary is satisfied that the consideration for the conveyance was adequate; the grantor received the consideration; and there was no fraud, overreaching, or other illegality in the procurement of the conveyance.

Decisions to approve or disapprove conveyances of Indian trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

Sonney Thornburg v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 239 (Apr. 13, 1990)

Decisions concerning the approval of a mortgage of Indian trust or restricted land under 25 U.S.C. § 483a (1988), are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Caroline D. & James D. Tyler v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 144 (Jan. 8, 1991)

The Secretary of the Interior has the authority to approve a conveyance of Indian trust or restricted land after the death of the Indian grantor if the Secretary is satisfied that the consideration for the conveyance

INDIANS--Continued

LANDS--Continued

Individual Trust or Restricted Land--Continued

Alienation--Continued

was adequate; the grantor received the consideration; and there was no fraud, overreaching, or other illegality in the procurement of the conveyance.

Decisions to approve or disapprove conveyances of Indian trust or restricted land are committed to the discretion of BIA. In reviewing such decisions, the Board does not substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

In retroactively approving a conveyance of Indian trust or restricted property, BIA need not find that the conveyance complied in every respect with the statutes and regulations in force at the time of the conveyance, but must be satisfied that the fundamental intent of the statutes and regulations has been fulfilled.

In determining whether a change in law or in the interpretation of law should be given retroactive effect, the Board of Indian Appeals will consider: (1) the nature of the reliance placed upon the prior applications of law by the parties; (2) the harm or prejudice to those who relied upon previous principles of law; (3) the purpose of the law in light of public policy; and (4) the harm to the administration of justice or public purpose.

Severo Leon et al. v. Albuquerque Area Director, Bureau of Indian Affairs, 23 IBIA 248 (Mar. 23, 1993)

In actions relating to the sale of an individual Indian's interest in trust property to another Indian or an Indian tribe, BIA's trust duty is to the Indian for whom the interest is held in trust, not the prospective purchaser or purchasers.

Kenneth Gullickson v. Aberdeen Area Director, Bureau of Indian Affairs, 24 IBIA 247 (Oct. 14, 1993)

INDIANS--Continued

LANDS--Continued

Individual Trust or Restricted Land--Continued

Alienation--Continued

Upon default by the purchaser under a deferred sale contract for trust or restricted land, all previous payments, including interest, are forfeited to the Indian owner. 25 U.S.C. § 372 (1988); 25 CFR 152.35.

Rose Stuart v. Acting Billings Area Director, Bureau of Indian Affairs, 25 IBIA 282 (Apr. 19, 1994)

No conveyance of individually owned trust land is valid unless approved by the Secretary of the Interior or his authorized representative.

In approving a conveyance of trust land, BIA acts as a trustee for the Indian owner, even where the prospective grantee is also Indian and a member of the owner's family.

In determining whether to approve a gift deed of trust land, BIA must ensure that the prospective donor understands and intends the effect of his/her action; must make a careful examination of the circumstances to determine whether the transaction is in the donor's best interest; and must refrain from approving a gift deed where there is any question as to the donor's intent or where the facts show the conveyance is not in the donor's best interest.

Estate of Clifford Celestine v. Acting Portland Area Director, Bureau of Indian Affairs, 26 IBIA 220 (Sept. 9, 1994)

Ingress and Egress

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Morana Cheepo v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 131 (Feb. 1, 1990)

INDIANS--Continued

LANDS--Continued

Rights-of-Way

Under 25 CFR 169.19, the renewal of a right-of-way across individually owned Indian land requires the consent of the owners of a majority of the interests in the land.

The owner of an interest in individually owned Indian land may withdraw his/her consent to a right-of-way at any time prior to the granting of the right-of-way easement by the Bureau of Indian Affairs.

Nellie Moccasin v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 184 (Feb. 5, 1991)

In determining whether to revoke a permit for a drainage ditch, at the request of the Indian owner of a tract crossed by the ditch, the Bureau of Indian Affairs must consider, not only its trust obligation toward that landowner, but also its trust obligation toward other Indian landowners served by the ditch.

Christine Murphy v. Acting Sacramento Area Director, Bureau of Indian Affairs, 19 IBIA 228 (Feb. 20, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)
98 I.D. 398

INDIANS--Continued

LANDS--Continued

Trespass

Generally

It is the responsibility of the BIA to take action against a person shown by state and Federal land title records to be in trespass on land held by the United States in trust for an Indian tribe.

Phil Foutz v. Acting Navajo Area Director, Bureau of Indian Affairs, 21 IBIA 273 (Mar. 27, 1992)

Damages

Under 25 CFR 166.24(b), a Bureau of Indian Affairs Superintendent is required to take action to collect penalties and damages from the owner of the cattle grazing in trespass upon trust or restricted Indian lands.

Damages assessed under 25 CFR 166.24(b) for cattle trespass to trust or restricted Indian lands should be calculated in accordance with 25 CFR 166.24(d), even if it is determined that they are payable to a lessee.

Once the fact of cattle trespass on Indian grazing lands has been established, a prima facie case has been made that forage has been consumed.

Tim Kimmet v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 72 (Nov. 20, 1990)

Under 25 CFR 166.24(b), a BIA Superintendent is required to take action to collect penalties and damages from the owner of cattle grazing in trespass upon trust or restricted Indian lands. However, it is within the Superintendent's discretion to determine whether or not a lessee should receive any of the damages.

Tim Kimmet v. Billings Area Director, Bureau of Indian Affairs, 22 IBIA 148 (June 25, 1992)

INDIANS--Continued

LANDS--Continued

Trespass--Continued

Damages--Continued

Regulations in 25 CFR 166.24 authorize BIA to assess damages for livestock trespass on trust or restricted Indian lands against the owner of the livestock.

Narconon Chilocco New Life Center v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 273 (Apr. 19, 1994)

Tribal Lands

"Federal lands." "Indian lands." The term "Indian lands," as defined by sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1291(9) (1982)), includes non-Federal lands satisfying the statutory criteria that they either be situated within the exterior boundaries of a Federal Indian Reservation or held in trust for or supervised by an Indian tribe. By the same token, lands owned by the United States are "Indian lands" under SMCRA only if they meet these statutory criteria.

"Indian lands" are specifically excepted from the definition of "Federal lands." Therefore, under SMCRA, the categories of "Indian lands" and "Federal lands" are mutually exclusive. Thus, a holding that lands are not "Indian lands" because neither the surface nor the mineral estate are "Federal lands" is properly reversed.

Lands located outside a Federal Indian reservation, the surface estate of which is owned by an Indian tribe and the mineral estate of which is privately owned, are "Indian lands" within the meaning of sec. 701(9) of SMCRA (30 U.S.C. § 1291(9)), and thus are subject to OSMRE's jurisdiction.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

INDIANS--Continued

LANDS--Continued

Tribal Lands--Continued

A revocable land-use permit for tribal land terminates upon the death of the permittee when the permit so provides.

Christine A. Nix v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 387 (July 24, 1990)

The Bureau of Indian Affairs does not have authority to negotiate a lease of tribal land.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

The principle that tribal bingo management agreements are invalid absent approval under 25 U.S.C. § 81 (1988), applies to tribal agreements for bingo enterprises on tribal land within the St. Regis Mohawk Reservation.

Donald S. Jacobs v. Eastern Area Director, Bureau of Indian Affairs, 20 IBIA 69 (June 10, 1991)

Under the BIA's 1979 Housing Improvement Program regulations, title to a house constructed on tribal land did not vest in the grant recipient during the first 5 years following construction.

Christine A. Nix v. Acting Sacramento Area Director, BIA, 21 IBIA 42 (Nov. 7, 1991)

Under 25 CFR 162.3, an Indian tribe has the authority to grant leases of tribally owned lands.

Thor K. Lande v. Acting Billings Area Director, Bureau of Indian Affairs, 22 IBIA 188 (July 22, 1992)

INDIANS--Continued

LANDS--Continued

Tribal Lands--Continued

BIA officials are not authorized to grant leases of tribal land.

Lower Peoples Creek Cooperative v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 297 (Apr. 22, 1993)

In a matter concerning the use and/or distribution of funds generated from tribal lands, the BIA trust responsibility is to the tribe.

Arthur J. Welmas & Linda Streeter Dukic, Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 264 (Oct. 20, 1993)

Indian tribes have the power to restrict the assignment of tribal lands to tribal members.

Janie Jovita Flores et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12, 1993)

In matters relating to the use of tribal property, the BIA's trust responsibility is to the tribe, not a person doing business with the tribe, even though that person may be Indian and a tribal member.

Robert & Krista Johnson v. Acting Phoenix Area Director, Bureau of Indian Affairs, 25 IBIA 18 (Nov. 12, 1993)

Although Secretarial approval of tribal leases is required by statute, and BIA must review and approve such leases in accordance with the trust responsibility, the Bureau must also undertake its approval role in such a way as to avoid unnecessary interference with tribal self-government.

First Mesa Consolidated Villages v. Phoenix Area Director, Bureau of Indian Affairs, 26 IBIA 18 (May 27, 1994)

INDIANS--Continued

LANDS--Continued

Trust Acquisitions

In the absence of any statutory or regulatory criteria for the approval of a "plan for the acquisition of land in trust status for an Indian tribe" under 25 CFR 151.2(h), a Bureau of Indian Affairs official may devise and employ reasonable criteria to review such a plan.

It was not reasonable for the Bureau of Indian Affairs to disapprove a tribal plan for the acquisition of land in trust status under 25 CFR 151.2(h) on the basis of criteria derived from a provision in the Indian Land Consolidation Act, 25 U.S.C. § 2203 (1983 and 1984 Supps.), concerning sale or exchange of tribal lands.

Absentee Shawnee Tribe of Indians of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 156 (Feb. 20, 1990)

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure the proper consideration was given to all legal prerequisites to the exercise of discretion.

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof that these factors were considered must appear in the administrative record. A trust acquisition request can, however, be denied on the basis of less than all of the factors, if BIA's analysis shows that factor or factors weighed heavily against the trust acquisition.

Johnnie Louis McAlpine v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 2 (Oct. 10, 1990)

INDIANS--Continued

LANDS--Continued

Trust Acquisitions--Continued

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Land may be acquired in trust status under the Indian Reorganization Act, 25 U.S.C. § 465 (1988), or the Oklahoma Indian Welfare Act, 25 U.S.C. § 501 (1988), for members of the Five Civilized Tribes who possess less than 1/2 Indian blood.

Jack & Shirley Baker v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 164 (Jan. 25, 1991) 98 I.D. 5

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Under 25 CFR 151.8 the written consent of the governing tribe of a reservation is required before land within the reservation may be taken in trust for another tribe.

Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 296 (Apr. 17, 1991)

A change in regulations governing the acquisition of lands in trust status should not be applied retroactively to a matter pending before the Bureau of Indian Affairs when the person affected detrimentally relied upon the policy and procedures that were in place at the time the trust acquisition was approved.

Georgiana Kautz v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 305 (Apr. 18, 1991)

INDIANS--Continued

LANDS--Continued

Trust Acquisitions--Continued

In evaluating an application for acquisition of land in restricted fee status under 25 CFR 117.8, which lacks evaluation criteria, the BIA reasonably employed as guidelines the criteria for acquisition of land in trust status listed in 25 CFR 151.10.

Nancy Tillman Keil v. Muskogee Area Director, Bureau of Indian Affairs, 21 IBIA 126 (Dec. 19, 1991)

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the BIA. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

When a challenge is raised to a discretionary decision issued by a BIA official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

John Ross, Jr. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 21 IBIA 251 (Mar. 18, 1992)

The Board of Indian Appeals lacks jurisdiction to review decisions rendered by the Assistant Secretary--Indian Affairs except when those decisions are specifically referred to it by the Secretary or the Assistant Secretary, or when a right of review is established in regulations.

State of South Dakota & Town of Oacoma v. Aberdeen Area Director, Bureau of Indian Affairs, 22 IBIA 126 (June 12, 1992)

When Congress enacts legislation providing for the trust acquisition of land for an Indian tribe, it should be deemed to intend that the normal title standards for

INDIANS--Continued

LANDS--Continued

Trust Acquisitions--Continued

trust acquisitions will apply unless it provides otherwise in the statute.

Tohono O'Odham Nation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 22 IBIA 220 (Aug. 14, 1992)

Under 25 CFR 151.3(b), land in unrestricted fee status may be acquired in trust for individual Indians only if it is located within the exterior boundaries of an Indian reservation or adjacent thereto.

While 25 U.S.C. § 465 (1988), vests broad discretion in the Secretary of the Interior to acquire land in trust for Indians, the Secretary has imposed limitations on his discretion by promulgating the regulations in 25 CFR Part 151.

"Adjacent." Where the term "adjacent" is used but not defined in the regulations governing trust acquisitions of land for Indians, the Board of Indian Appeals declines to impose an interpretation upon the BIA, but, instead refers to the Ass't Secretary--Indian Affairs an appeal in which the meaning of the term is at issue.

Virginia Cross v. Acting Portland Area Director, Bureau of Indian Affairs, 23 IBIA 149 (Jan. 11, 1993)

The Coquille Restoration Act provides that the Secretary shall accept up to 1,000 acres in Coos and Curry Counties, Oregon, in trust for the Coquille Tribe if conveyed or otherwise transferred to the Secretary, provided that, at the time of acceptance, there are no adverse legal claims on the property. 25 U.S.C. § 715c(a) (Supp. I 1989).

Confederated Tribes of Coos, Lower Umpqua, & Siuslaw Indians v. Portland Area Director, Bureau of Indian Affairs, 27 IBIA 48 (Nov. 30, 1994)

INDIANS--Continued

LANDS--Continued

Trust Patent

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of a trust patent issued by BLM or to determine aboriginal title to land.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)
98 I.D. 398

BLM properly rejected an Indian allotment application filed in 1978 for land allegedly in the public domain that was included in a trust patent issued to another Indian in 1907.

Irene Mitchell Pallin, 126 IBLA 344 (June 22, 1993)

A patentee takes title to land described in his patent, as surveyed on the ground at the time of patent. A successor-in-interest to a portion of land conveyed will not be permitted to overturn the dependent resurvey of the boundaries of the patent on the basis that the description in the patent encompassed other or different land than the land intended to be patented.

In the absence of evidence of an original corner of the public land survey, the location of the lost corner

INDIANS--Continued

LANDS--Continued

Trust Patent--Continued

is properly determined by means of proportionate measurement in a dependent resurvey. A BLM decision denying a protest of the resurvey on the basis of a local corner asserted to be a perpetuation of the lost corner will be affirmed where the preponderance of the evidence including distances and directions to natural and artificial landmarks indicate that the local corner is not a reliable perpetuation of the survey corner.

Lorna L. Boykin, Reynold L. Allgood, 130 IBLA 301 (Aug. 31, 1994)

LAW AND ORDER

Civil Jurisdiction

The BIA does not have the authority or responsibility to enforce a tribal court order. That authority and responsibility resides with the tribal court.

Sherry Camel v. Ass't Portland Area Director, Bureau of Indian Affairs, 21 IBIA 179 (Feb. 10, 1992)

LEASES AND PERMITS

Generally

Notification given to a lessee by the Bureau of Indian Affairs that a lease has expired by its own terms is an appealable action within the meaning of 25 CFR 2.2.

Bekco Oil & Gas Corp. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 202 (Mar. 26, 1990)

A Bureau of Indian Affairs determination that an Indian oil and gas lease has expired by its own terms is not a cancellation of the lease within the meaning of 25 CFR 211.27.

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

The administration of Indian oil and gas leases under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), is a trust responsibility of the United States.

An oil and gas lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), for a primary term and "as long thereafter as oil and/or gas is produced in paying quantities" expires by operation of law when, after the primary term, production ceases.

No prior notice to the lessee is required where an oil and gas lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), expires by operation of law. The lessee's right to due process is protected by the administrative appeals process at 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Mobil Oil Corp. v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 315 (July 2, 1990)
97 I.D. 215

All persons dealing with the Federal Government are presumed to have knowledge of duly promulgated regulations.

No prior notice to the lessee is required when an oil and gas lease for restricted lands of members of the Five Civilized Tribes expires by its own terms.

K. S. Hays v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 380 (July 20, 1990)

A revocable land-use permit for tribal land terminates upon the death of the permittee when the permit so provides.

Christine A. Nix v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 387 (July 24, 1990)

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

A guideline of the Bureau of Indian Affairs, published in the Federal Register, which states that "lessees of Indian lands are encouraged to submit all future communitization agreements * * * not less than 90 days prior to the date of expiration of the first Indian lease in the proposed unit," does not require that all communitization agreements must be submitted at least 90 days prior to the expiration of the Indian lease in order to be considered or to prevent expiration of the lease.

Black Hawk Oil Co. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 414 (Sept. 13, 1990)

A settlement agreement is a contract, and the normal rules of contract construction govern its interpretation. Contracts entered into by an Indian tribe and approved by the Secretary of the Interior are subject to the same rules of interpretation applicable to contracts between private parties. Federal law, which controls the construction of Federal contracts including Indian contracts, follows the principles of general contract law.

The primary function of contract interpretation is to ascertain the intention of the parties, and that intention must be gathered from the instrument as a whole, preferably giving a reasonable meaning to all parts of the instrument and ascribing to the contract language its ordinary and commonly accepted meaning. If the principal purpose of the parties in entering into the agreement is ascertainable, that purpose is given great weight in interpreting the contract. When a paragraph in a settlement agreement provides that the provisions for minimum royalties in that agreement are in addition to the minimum royalty provisions in the subject mining leases, the Minerals Management Service properly interprets that paragraph as requiring that the total minimum royalties due under the leases and the agreement be combined before subtracting the production royalties to calculate the amount of minimum royalties due.

ASARCO Inc., 116 IBLA 120 (Sept. 21, 1990)

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

Under 25 U.S.C. § 415 (1988), leases of trust or restricted land must be approved by the Secretary of the Interior or his authorized delegate. A provision which is specifically omitted from a lease before approval is granted is not part of the lease and cannot be made part of the lease by unilateral action of the Indian leasor.

Mr. & Mrs. W. A. Merrill v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 81 (Nov. 23, 1990)

An ambiguity in a written contract can be overcome by the contemporaneous actions and understandings of the parties to the contract.

The creation of a third-party beneficiary under a lease does not constitute an assignment or sublease and does not otherwise render the lease invalid.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

Where an oil and gas lease of Indian land imposes a duty upon the lessee to avoid waste and protect trust property, the lease does not expire because of a shut-in required to avoid an oil spill.

When the administrative record fails to support a Bureau of Indian Affairs Area Director's decision that an oil and gas lease of Indian land has expired because of failure to produce oil and/or gas in paying quantities, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

Duncan Oil, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 131 (July 12, 1991)

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

Under 25 U.S.C. §§ 177 and 415 (1988), any lease of Indian trust or restricted land that is not approved by the Secretary of the Interior or his authorized representative is void ab initio, has no force or effect, and grants no rights to either the attempted lessor or lessee.

Bulletproofing, Inc., & Richard Medlin (President) v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 179 (Aug. 13, 1991)

BIA is bound by the terms of leases it has approved, when the leases are in accord with governing regulations.

Where BIA has approved an oil and gas lease which provides that the lease may not be included in a communitization agreement without the Indian landowner's consent, an Area Director may not approve a communitization agreement which includes the lease unless the landowner consents.

Kenneth F. Abbott v. Billings Area Director, Bureau of Indian Affairs, 20 IBIA 268 (Sept. 24, 1991)

BIA is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations.

Although the BIA must approve a lease of trust or restricted land for the lease to be effective, it is not the lessor under the lease, and is not a party to the lease.

The Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director, Bureau of Indian Affairs, 21 IBIA 45 (Nov. 12, 1991)

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

Where the lessors under a lease of Indian trust land have authorized a BIA Superintendent to take certain actions on their behalf, the Superintendent's authority to act remains subject to limitations imposed by the trust responsibility.

Ramona Button & Harlan Bohnee v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 57 (Nov. 13, 1991)

An agreement which is, in essence, a lease of Indian trust land, although not so termed, is invalid unless approved by the Secretary of the Interior. Lacking approval, it grants no rights to either party.

In assessing an oil and gas lessee for past disposal of salt water on an off-lease tract of Indian land, the BIA should determine the fair market value of the use by means of an appraisal.

Citation Oil & Gas, Ltd. v. Acting Billings Area Director, Bureau of Indian Affairs, 21 IBIA 75 (Dec. 17, 1991)

A BIA determination that an Indian oil and gas lease has expired by its own terms is not a cancellation of the lease within the meaning of 25 CFR 211.27.

An oil and gas lease issued under the IMLA of 1938, 25 U.S.C. §§ 396a-396f (1988), for a primary term and "as long thereafter as oil and/or gas is produced in paying quantities" expires by operation of law when, after the primary term, production ceases. The expiration occurs under the terms of the statute, not under any rule or regulation of the Department of the Interior.

Any test for "production in paying quantities" sought to be applied to an oil and gas lease of Indian land must be analyzed in context to ensure that there is no conflict with overriding principles of Federal Indian law.

Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director, Bureau of Indian Affairs, 21 IBIA 88 (Dec. 18, 1991) 98 I.D. 419

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

Decisions concerning whether or not to grant a lease of trust or restricted land are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

The owner of an interest in individually owned Indian land may withdraw his/her consent to a lease at any time prior to the approval of the lease by the BIA.

Darrell Rathkamp v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 144 (Jan. 5, 1992)

All persons dealing with the Federal Government are presumed to have knowledge of duly promulgated regulations.

All Materials of Montana, Inc. v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 202 (Feb. 27, 1992)

In determining whether an instrument is a tribal lease for purposes of a particular Federal statute, the critical inquiry is whether it has the characteristics Congress had in mind when employing the term "tribal lease" in the statute.

State of Utah, Board of Indian Affairs & Division of Indian Affairs v. Navajo Area Director, Bureau of Indian Affairs, 21 IBIA 282 (Mar. 31, 1992) 99 I.D. 39

Under 25 CFR 162.3, an Indian tribe has the authority to grant leases of tribally owned lands.

When an official of BIA has reason to question a tribal decision which requires action by the Bureau, such as the leasing of tribal trust land, he or she should make the question known to the proper tribal

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

official or forum and ask for clarification of the tribal position.

Thor K. Lande v. Acting Billings Area Director, Bureau of Indian Affairs, 22 IBIA 188 (July 22, 1992)

A lessee of Indian trust or restricted property has a duty and responsibility to familiarize itself with the regulations governing its lease.

Craig McGriff Exploration, Inc. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 22 IBIA 265 (Sept. 8, 1992)

BIA is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations.

Comanche Housing Authority & Chloveta A. Caudill v. Anadarko Area Director, Bureau of Indian Affairs, 22 IBIA 271 (Sept. 9, 1992)

A lease issued under the IMLA, 25 U.S.C. §§ 396a-396f (1988), does not expire because of a temporary shut-in caused by a mechanical breakdown or accident, as long as the shut-in does not continue beyond the time reasonably necessary to make repairs and resume production.

Citation Oilfield Supply & Leasing, Ltd, & Murphy Oil U.S.A., Inc. v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 163 (Jan. 28, 1993)

The Bureau of Indian Affairs is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations.

American Indian Land Development Corp. v. Sacramento Area Director, Bureau of Indian Affairs, 23 IBIA 208 (Feb. 25, 1993)

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

BIA officials are not authorized to grant leases of tribal land.

Lower Peoples Creek Cooperative v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 297 (Apr. 22, 1993)

The BIA is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations. Specifically, the parties can agree to extend the period established in 25 CFR 162.14 during which a breach of a lease can be cured.

The starting point for understanding a contract is the language of the document.

The lessee of trust or restricted property is responsible for ensuring that actions taken under the lease are properly approved.

Nevaco, Inc. & Pyramid Lake Paiute Tribe of Indians v. Acting Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 157 (Aug. 31, 1993)

The determination of the nature of an agreement relating to the use of Indian trust land is a question of Federal law. It is appropriate to apply state contract law to this determination only when there are no Federal cases on point, and then only so far as state law does not conflict with the Federal interest in protecting the use of Indian resources. The decisions of the Board of Indian Appeals are part of the Federal law relating to contracts involving the use of trust land.

An agreement which is, in essence, a lease of Indian trust land, although not so termed, is invalid unless approved by the Secretary of the Interior. Lacking approval, it grants no rights to either party.

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

Decisions concerning whether or not to grant a lease of trust or restricted land are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

In leasing individually owned trust or restricted property, BIA is responsible to all of the landowners, not to a group of co-owners. Furthermore, the Bureau's responsibility is not to the Tribe or to tribal members in general.

Theresa Jerry Moses et al. v. Acting Portland Area Director, Bureau of Indian Affairs, 24 IBIA 233 (Sept. 29, 1993)

Where BIA implements a tribal policy concerning the leasing of Indian lands on the tribe's reservation, the Bureau shares the tribe's responsibility to inform affected persons about the requirements of the policy.

Where a tribe has adopted a policy concerning "owner's use" of land in fractionated ownership, the provisions of 25 CFR 162.2(a)(4) must be read in conjunction with the tribal policy.

Decisions concerning whether or not to grant a lease of trust or restricted land are committed to the discretion of BIA. It is not the Board's function, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Vincent Blackhawk v. Billings Area Director, Bureau of Indian Affairs, 24 IBIA 275 (Oct. 21, 1993)

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

The fact that a prospective lessee of Indian land has been granted extensions of time in which to submit its lease documents and to make its initial rental payment does not grant it the right to receive further extensions.

Decisions concerning whether or not to approve a lease of trust or restricted land are committed to the discretion of BIA. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

When a challenge is raised to a discretionary decision issued by a BIA official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

Novak Brothers et al. v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 25 IBIA 104 (Jan. 5, 1994)

A person doing business on trust lands has the responsibility to familiarize himself with duly promulgated regulations governing his activities, and is deemed to have knowledge of regulations published in the CFR.

Racquet Club Properties, Inc. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 25 IBIA 251 (Apr. 6, 1994)

A lessee of trust or restricted property has the responsibility to become familiar with duly promulgated regulations governing activities on the leased property, and is deemed to have knowledge of regulations published in the CFR.

Narconon Chilocco New Life Center v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 273 (Apr. 19, 1994)

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

Where BIA has approved a lease which grants the lessee a right to renew, and the lease is not in conflict with governing regulations, the Bureau is bound by the lease and must recognize the lessee's right to renew it.

First Mesa Consolidated Villages v. Phoenix Area Director, Bureau of Indian Affairs, 26 IBIA 18 (May 27, 1994)

In discerning the intent of the parties to a contract, one must start with the language of the contract.

An ambiguity in a written contract can be overcome by the contemporaneous actions and understandings of the parties to the contract.

Pinoleville Indian Community v. Acting Sacramento Area Director, Bureau of Indian Affairs, 26 IBIA 292 (Oct. 25, 1994)

In order to meet their particular needs, the parties to a lease of Indian land may agree to lease provisions different than those contained in a standard BIA lease form. Where these special provisions are approved by the Bureau and are not in conflict with governing regulations, they are binding on the parties and the Bureau.

Frank Poafpybitty et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 27 IBIA 29 (Nov. 16, 1994)

Amendments

A change in the date on which annual rental payments are due under a lease of Indian trust land is a modification of the lease.

Ramona Button & Harlan Bohnee v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 57 (Nov. 13, 1991)

INDIANS--Continued

LEASES AND PERMITS--Continued

Amendments--Continued

Under the circumstances of this case, DOI lacks authority to modify a lease of trust lands over the objections of the beneficial owners, or to order the owners to negotiate a new lease on the terms specified by the lessee.

Racquet Club Properties, Inc. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 25 IBIA 251 (Apr. 6, 1994)

Arbitration

When a lease of trust or restricted land provides that arbitration "may" be used to resolve disputes arising between the parties, arbitration is not the exclusive remedy available to the parties. The BIA and the Board of Indian Appeals have authority to consider disputes arising under such a lease when the parties do not agree to the use of arbitration.

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 33 (Oct. 24, 1991)

There is a general Federal policy favoring the use of arbitration. There is no statute suggesting that Congress intended to exempt the commercial dealings of Indians from that policy. Therefore, in the absence of extenuating circumstances, a provision in a lease of trust or restricted land requiring the use of arbitration for resolving disputes arising under the lease will be enforced.

The Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director, Bureau of Indian Affairs, 21 IBIA 45 (Nov. 12, 1991)

INDIANS--Continued

LEASES AND PERMITS--Continued

Arbitration--Continued

Parties to a lease of trust or restricted property may contract to use arbitration to resolve disputes arising under the lease. Under such circumstances, the use of arbitration is a matter of contract between the parties and will be enforced in accordance with the apparent intent of the parties.

American Indian Land Development Corp. v. Sacramento Area Director, Bureau of Indian Affairs, 23 IBIA 208 (Feb. 25, 1993)

Assignments

An assignment of a lease of trust or restricted Indian lands is not effective until approved by the Secretary of the Interior or his delegate.

The Bureau of Indian Affairs is not required to give notice of actions relating to the management of a lease of trust or restricted Indian lands to a person who is not a party to the lease.

A person who is not a party to a lease of trust or restricted Indian lands lacks standing to challenge actions taken by the Bureau of Indian Affairs in the management of the lease.

HCB Industries, Inc. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 222 (Mar. 28, 1990)

Where a lease of Indian land is assigned in violation of the requirements for assignment contained in the lease, and the lessee fails to cure the violation after notice, the lease is properly cancelled under 25 CFR 162.14.

Douglas M. Rhead v. Acting Portland Area Director, Bureau of Indian Affairs, 18 IBIA 257 (Apr. 25, 1990)

INDIANS--Continued

LEASES AND PERMITS--Continued

Assignments--Continued

The creation of a third-party beneficiary under a lease does not constitute an assignment or sublease and does not otherwise render the lease invalid.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

The assignment of the obligation to make royalty payments is not related to an assignment of a lease or an interest in a lease that must be approved by BIA under 25 CFR 212.22.

Mesa Operating Ltd Partnership, 125 IBLA 28 (Dec. 31, 1992) 99 I.D.272

In the absence of a regulation and a PIF explicitly stating that filing the form constitutes the assumption of the lessee's obligation to pay royalty by the person filing it, a document evidencing the person's agreement to accept this responsibility is necessary.

A division order may constitute evidence that the obligation to pay royalty has been assigned.

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

Cancellation or Revocation

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs decision increasing a bond for an oil and gas lease under 25 CFR 213.15(c) is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence.

GMG Oil & Gas Corp. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 187 (Mar. 7, 1990)

K. D. McPhail, dba Macro Oil Co. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 353 (July 6, 1990)

INDIANS--Continued

LEASES AND PERMITS--Continued

Cancellation or Revocation--Continued

Where a lease of Indian land is assigned in violation of the requirements for assignment contained in the lease, and the lessee fails to cure the violation after notice, the lease is properly cancelled under 25 CFR 162.14.

Douglas M. Rhead v. Acting Portland Area Director, Bureau of Indian Affairs, 18 IBIA 257 (Apr. 25, 1990)

A BIA determination that an Indian oil and gas lease has expired by its own terms is not a cancellation of the lease within the meaning of 25 CFR 211.27.

Mobil Oil Corp. v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 315 (July 2, 1990)
97 I.D. 215

Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director, Bureau of Indian Affairs, 21 IBIA 88 (Dec. 18, 1991) 98 I.D. 419

A Bureau of Indian Affairs official is bound by a decision in an administrative appeal which has become final for the Department of the Interior.

A Bureau of Indian Affairs Superintendent must follow the procedures in 25 CFR 162.14 when cancelling a lease of Indian land issued under 25 CFR Part 162.

Bryan Knows Ground et al. v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 50 (Nov. 6, 1990)

Where a lessee of Indian trust land has been given ample opportunity to cure a breach of his lease and has failed to do so, 25 CFR 162.14 does not require that he be given yet another opportunity.

Alan & Bernice Mast v. Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 96 (Nov. 28, 1990)

INDIANS--Continued

LEASES AND PERMITS--Continued

Cancellation or Revocation--Continued

Unless there is a determination that a breach cannot be cured within a reasonable period of time or the lessee has already been given an opportunity to cure a breach and has failed to do so, leases subject to 25 CFR Part 162 cannot be cancelled without providing the lessee a reasonable opportunity to cure a breach.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

In determining whether to revoke a permit for a drainage ditch, at the request of the Indian owner of a tract crossed by the ditch, the Bureau of Indian Affairs must consider, not only its trust obligation toward that landowner, but also its trust obligation toward other Indian landowners served by the ditch.

Christine Murphy v. Acting Sacramento Area Director, Bureau of Indian Affairs, 19 IBIA 228 (Feb. 20, 1991)

Due process does not require that an evidentiary hearing under the Administrative Procedure Act be provided prior to cancellation of a lease of Indian land.

Dawn Mining Co. v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 50 (May 29, 1991)

A lease of trust or restricted Indian property is subject to cancellation when the lessee admits that a breach of the lease was not cured after the lessee was informed of the breach and was given an opportunity to cure it.

U.S. Fish Corp. v. Eastern Area Director, Bureau of Indian Affairs, 20 IBIA 93 (June 25, 1991)

INDIANS--Continued

LEASES AND PERMITS--Continued

Cancellation or Revocation--Continued

Where a lessee of Indian trust land has been given ample opportunity to cure a breach of the lease and has failed to do so, 25 CFR 162.14 does not require that he be given yet another opportunity.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

Where the Bureau of Indian Affairs conducts a hearing under 25 CFR 211.27, it is responsible for preserving the evidence presented at the hearing.

Duncan Oil, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 131 (July 12, 1991)

Due process does not require that an evidentiary hearing be provided prior to cancellation of a lease of Indian land.

All Materials of Montana, Inc. v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 202 (Feb. 27, 1992)

The failure to make timely rental payments for leased Indian trust or restricted property constitutes a breach of contract for which the lease may be cancelled.

When BIA believes that, because of a decision regarding a lease of trust or restricted property, immediate action is necessary to protect trust resources or to mitigate damages that might accrue against the lessee of that property, the best practice would be for the official to whom an appeal is taken, or to whom an appeal could be taken, to place the decision into immediate effect pursuant to 25 CFR 2.6(a).

The fact that prior breaches of a lease of Indian trust or restricted land have been forgiven after the lessee cured the breaches does not create a right in the lessee to breach the lease in the future with impunity,

INDIANS--Continued

LEASES AND PERMITS--Continued

Cancellation or Revocation--Continued

nor does it deprive the Indian landowners of rights they have under the lease.

Doyle French v. Aberdeen Area Office, Bureau of Indian Affairs, 22 IBIA 211 (Aug. 11, 1992)

Where a valid sublease of trust land has been made, the parties to the main lease may not defeat the rights of the sublessee by a voluntary cancellation of the lease to which the sublessee has not consented.

Where a lease of Indian land provides that it may not be cancelled absent the consent of HUD unless HUD's interest has been terminated, a BIA Superintendent may not approve cancellation of the lease without either evidence of HUD's consent or participation by HUD in a determination concerning termination of its interest.

Comanche Housing Authority & Chloveta A. Caudill v. Anadarko Area Director, Bureau of Indian Affairs, 22 IBIA 271 (Sept. 9, 1992)

When a lessee of Indian land has been given ample opportunity to cure a breach of his lease and has failed to do so, despite notice given pursuant to the cancellation procedures in the lease, the BIA may cancel the lease.

Tiger Outdoor Advertising, Inc. v. Eastern Area Director, Bureau of Indian Affairs, 22 IBIA 280 (Sept. 9, 1992)

A BIA Superintendent must follow the procedures in 25 CFR 162.14 when cancelling a lease of Indian land issued under 25 CFR Part 162.

Paul Chissoe v. Acting Muskogee Area Director, Bureau of Indian Affairs, 25 IBIA 146 (Jan. 25, 1994)

INDIANS--Continued

LEASES AND PERMITS--Continued

Cancellation or Revocation--Continued

When a lessee of Indian land has been given ample opportunity to cure a breach of a lease and has failed to do so, BIA may cancel the lease.

Mr. & Mrs. Mario J. Rossi, Jr. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 26 IBIA 3 (May 18, 1994)

25 CFR 212.23(a) does not mandate cancellation of an Indian oil and gas lease whenever there is a violation of the lease terms or the regulations. Instead, when there is such a violation, BIA has discretion to review the circumstances surrounding the violation and determine whether cancellation is warranted, taking into consideration, inter alia, the trust responsibility to act in the best interest of the Indian landowner(s).

Absent contrary provisions in the lease, the lessee under a lease of Indian oil and/or gas has the right to cure lease violations, and once cure has been effected, the lessee is considered to be in good standing.

Shirley Delgado v. Acting Anadarko Area Director, Bureau of Indian Affairs, 27 IBIA 65 (Dec. 12, 1994)

Commercial Leases

A lease of the surface of an Indian allotment for uses incidental to the extraction of underlying Federal coal is a lease for business purposes within the meaning of 25 U.S.C. § 415 (1982).

Matilda Arviso et al. v. Ass't Navajo Area Director, Bureau of Indian Affairs, 18 IBIA 118 (Jan. 18, 1990)

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 33 (Oct. 24, 1991)

INDIANS--Continued

LEASES AND PERMITS--Continued

Farming and Grazing

Decisions governing the granting of a farming lease of trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

Under 25 U.S.C. § 466 (1988) and 25 CFR Part 166, the Bureau of Indian Affairs' principal responsibilities with respect to Indian grazing lands are to protect them and to promote their efficient use for the benefit of the Indian owners.

Under 25 CFR 166.24(b), a Bureau of Indian Affairs Superintendent is required to take action to collect penalties and damages from the owner of the cattle grazing in trespass upon trust or restricted Indian lands.

Damages assessed under 25 CFR 166.24(b) for cattle trespass to trust or restricted Indian lands should be calculated in accordance with 25 CFR 166.24(d), even if it is determined that they are payable to a lessee.

Once the fact of cattle trespass on Indian grazing lands has been established, a prima facie case has been made that forage has been consumed.

Tim Kimmet v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 72 (Nov. 20, 1990)

Under 25 CFR 166.10, the Bureau of Indian Affairs is authorized to implement an approved tribal program for allocation of grazing privileges when the land involved is individually, rather than tribally, owned.

Howard J. Conway v. Billings Area Director, Bureau of Indian Affairs, 20 IBIA 29 (May 9, 1991)

INDIANS--Continued

LEASES AND PERMITS--Continued

Farming and Grazing--Continued

Under 25 CFR 166.6, stocking rates on Indian range units are to be monitored and adjusted as conditions warrant. Accordingly, an appeal from a stocking rate is not necessarily untimely merely because it was not filed when the grazing permit was issued.

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Gilbert Keester v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 20 IBIA 277 (Sept. 24, 1991)

Where a lease of Indian land provides for damages for noncompliance, damages may be assessed for a negligent act of noncompliance as well as an intentional one.

Gary H. Carlsen v. Acting Portland Area Director, Bureau of Indian Affairs, 20 IBIA 281 (Sept. 30, 1991)

BIA has authority to allocate grazing privileges on Indian land in accordance with a tribal allocation program.

Hugh E. Monroe v. Acting Billings Area Director, Bureau of Indian Affairs, 21 IBIA 266 (Mar. 25, 1992)

Under 25 CFR 166.24(b), a BIA Superintendent is required to take action to collect penalties and damages from the owner of cattle grazing in trespass upon trust or restricted Indian lands. However, it is within the Superintendent's discretion to determine whether or not a lessee should receive any of the damages.

Tim Kimmet v. Billings Area Director, Bureau of Indian Affairs, 22 IBIA 148 (June 25, 1992)

INDIANS--Continued

LEASES AND PERMITS--Continued

Farming and Grazing--Continued

25 CFR 166.4 provides that tribal law may supersede BIA grazing regulations under certain circumstances.

Where a grazing permit covers trust land in multiple ownership, the BIA must take the interests of all Indian landowners into consideration when determining whether or not to evoke the permit for cause.

Cheyenne River Sioux Tribe v. Aberdeen Area Director, Bureau of Indian Affairs, 23 IBIA 103 (Dec. 14, 1992)

Damages for livestock trespass on trust or restricted are properly determined in accordance with the formula set forth in 25 CFR 166.24.

Trespass damages can be assessed against any person whose livestock is found on trust or restricted property for which that person does not have an approved grazing permit.

Darrell Rathkamp v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 266 (Mar. 24, 1993)

Negotiated Leases

The Bureau of Indian Affairs does not have authority to negotiate a lease of tribal land.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

Under 25 CFR 162.3 and 162.6(a), adult Indian owners of trust property have the authority to negotiate leases of that property, subject to the approval of the Secretary of the Interior.

Under the circumstances of this case, DOI lacks authority to modify a lease of trust lands over the objections of the beneficial owners, or to order the

INDIANS--Continued

LEASES AND PERMITS--Continued

Negotiated Leases--Continued

owners to negotiate a new lease on the terms specified by the lessee.

Racquet Club Properties, Inc. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 25 IBIA 251 (Apr. 6, 1994)

Rental Rates

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

Wapato Orchard Partnership v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 254 (Apr. 24, 1990)

The role of the Board of Indian Appeals in reviewing a BIA determination of fair rental value is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence.

An appellant who challenges a BIA rental adjustment for a lease of Indian land bears the burden of proving that the adjustment is unreasonable.

A determination of fair annual rental for a lease of Indian land should be made in accordance with generally accepted appraisal principles.

John Strain v. Portland Area Director, Bureau of Indian Affairs et al., 23 IBIA 114 (Dec. 18, 1992)

The rental adjustment provision in 25 CFR 162.8 does not apply to those leases of Indian lands for which

INDIANS--Continued

LEASES AND PERMITS--Continued

Rental Rates--Continued

nominal rentals are authorized and approved under 25 CFR 162.5(b)(1) or (2).

Pinoleville Indian Community v. Acting Sacramento Area Director, Bureau of Indian Affairs, 26 IBIA 292 (Oct. 25, 1994)

Secretarial Approval

The owner of an interest in individually owned Indian land may withdraw his/her consent to a lease at any time prior to the approval of the lease by the BIA.

When the BIA obtains knowledge that there were improprieties in the execution of a negotiated lease of trust or restricted land, it has a duty to investigate the matter. This duty is inherent in and the essence of the Secretary's trust responsibility to approve such leases.

Darrell Rathkamp v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 144 (Jan. 9, 1992)

Under 25 CFR 162.2(a)(4), the BIA may grant leases of individually owned trust or restricted land when the heirs or devisees have not been able to agree upon a lease during the 3-month period immediately following the date on which a lease may be entered into.

Peace Pipe, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 22 IBLA 1 (Apr. 2, 1992)

Under 25 U.S.C. § 380 (1988), and 25 CFR 162.2(a)(4), the BIA may grant leases of individually owned trust or restricted land when the heirs have not been able to agree upon a lease during a 3-month period, provided the land is not in use by any of the heirs.

Lower Peoples Creek Cooperative v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 297 (Apr. 22, 1993)

INDIANS--Continued

LEASES AND PERMITS--Continued

Secretarial Approval--Continued

Under 25 CFR 162.2(a)(4), the BIA has discretion in determining whether to approve a proposed lease of trust or restricted property when the owners have not agreed to a lease.

Joe Brooks v. Muskogee Area Director, Bureau of Indian Affairs, 25 IBIA 31 (Nov. 12, 1993)

Although Secretarial approval of tribal leases is required by statute, and BIA must review and approve such leases in accordance with the trust responsibility, the Bureau must also undertake its approval role in such a way as to avoid unnecessary interference with tribal self-government.

First Mesa Consolidated Villages v. Phoenix Area Director, Bureau of Indian Affairs, 26 IBIA 18 (May 27, 1994)

Subleases

The creation of a third-party beneficiary under a lease does not constitute an assignment or sublease and does not otherwise render the lease invalid.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

Where a valid sublease of trust land has been made, the parties to the main lease may not defeat the rights of the sublessee by a voluntary cancellation of the lease to which the sublessee has not consented.

Comanche Housing Authority & Chloveta A. Caudill v. Anadarko Area Director, Bureau of Indian Affairs, 22 IBIA 271 (Sept. 9, 1992)

INDIANS--Continued

LEASES AND PERMITS--Continued

Violation/Breach

Generally

Unless there is a determination that a breach cannot be cured within a reasonable period of time or the lessee has already been given an opportunity to cure a breach and has failed to do so, leases subject to 25 CFR Part 162 cannot be cancelled without providing the lessee a reasonable opportunity to cure a breach.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

The fact that a lessee abides by the terms of a lease of Indian trust or restricted land for a period of time does not excuse a later breach of those lease terms, or give the lessee some form of "right" to remain in possession of the leasehold.

Grace Isosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

The failure to make timely rental payments for leased Indian trust or restricted property constitutes a breach of contract for which the lease may be cancelled.

Doyle French v. Aberdeen Area Office, Bureau of Indian Affairs, 22 IBIA 211 (Aug. 11, 1992)

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

Maurice & Brian Schwan v. Aberdeen Area Director, Bureau of Indian Affairs, 23 IBIA 10 (Oct. 29, 1992)

INDIANS--Continued

LEASES AND PERMITS--Continued

Violation/Breach--Continued

Generally--Continued

25 CFR 212.23(a) does not mandate cancellation of an Indian oil and gas lease whenever there is a violation of the lease terms or the regulations. Instead, when there is such a violation, BIA has discretion to review the circumstances surrounding the violation and determine whether cancellation is warranted, taking into consideration, inter alia, the trust responsibility to act in the best interest of the Indian landowner(s).

Absent contrary provisions in the lease, the lessee under a lease of Indian oil and/or gas has the right to cure lease violations, and once cure has been effected, the lessee is considered to be in good standing.

Shirley Delgado v. Acting Anadarko Area Director, Bureau of Indian Affairs, 27 IBIA 65 (Dec. 12, 1994)

Damages

Where a lease of Indian land provides for damages for noncompliance, damages may be assessed for a negligent act of noncompliance as well as an intentional one.

Gary H. Carlsen v. Acting Portland Area Director, Bureau of Indian Affairs, 20 IBIA 281 (Sept. 30, 1991)

When BIA believes that, because of a decision regarding a lease of trust or restricted property, immediate action is necessary to protect trust resources or to mitigate damages that might accrue against the lessee of that property, the best practice would be for the official to whom an appeal is taken, or to whom an appeal could be taken, to place the decision into immediate effect pursuant to 25 CFR 2.6(a).

Doyle French v. Aberdeen Area Office, Bureau of Indian Affairs, 22 IBIA 211 (Aug. 11, 1992)

INDIANS--Continued

MINERAL RESOURCES

Gravel

Under Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), gravel is a mineral reserved to the U.S. by sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1988). When an Indian tribe receives title to minerals reserved under this provision, it receives title to the reserved gravel.

Sampsel J. Bitz v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 286 (Apr. 6, 1993)

Mining

Allotted Lands

The assignment of the obligation to make royalty payments is not related to an assignment of a lease or an interest in a lease that must be approved by BIA under 25 CFR 212.22.

Mesa Operating Ltd Partnership, 125 IBLA 28 (Dec. 31, 1992) 99 I.D. 272

In the absence of a regulation and a PIF explicitly stating that filing the form constitutes the assumption of the lessee's obligation to pay royalty by the person filing it, a document evidencing the person's agreement to accept this responsibility is necessary.

A division order may constitute evidence that the obligation to pay royalty has been assigned.

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

INDIANS--Continued

MINERAL RESOURCES--Continued

Mining--Continued

Royalties

A settlement agreement is a contract, and the normal rules of contract construction govern its interpretation. Contracts entered into by an Indian tribe and approved by the Secretary of the Interior are subject to the same rules of interpretation applicable to contracts between private parties. Federal law, which controls the construction of Federal contracts including Indian contracts, follows the principles of general contract law.

The primary function of contract interpretation is to ascertain the intention of the parties, and that intention must be gathered from the instrument as a whole, preferably giving a reasonable meaning to all parts of the instrument and ascribing to the contract language its ordinary and commonly accepted meaning. If the principal purpose of the parties in entering into the agreement is ascertainable, that purpose is given great weight in interpreting the contract. When a paragraph in a settlement agreement provides that the provisions for minimum royalties in that agreement are in addition to the minimum royalty provisions in the subject mining leases, the Minerals Management Service properly interprets that paragraph as requiring that the total minimum royalties due under the leases and the agreement be combined before subtracting the production royalties to calculate the amount of minimum royalties due.

ASARCO Inc., 116 IBLA 120 (Sept. 21, 1990)

Oil and Gas

Generally

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Louis Kahan & the Louis Kahan Trust v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 180 (Mar. 2, 1990)

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Generally--Continued

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs decision increasing a bond for an oil and gas lease under 25 CFR 213.15(c) is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence.

GMG Oil & Gas Corp. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 187 (Mar. 7, 1990)

A Bureau of Indian Affairs determination that an Indian oil and gas lease has expired by its own terms is not a cancellation of the lease within the meaning of 25 CFR 211.27.

The administration of Indian oil and gas leases under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), is a trust responsibility of the United States.

An oil and gas lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), for a primary term and "as long thereafter as oil and/or gas is produced in paying quantities" expires by operation of law when, after the primary term, production ceases.

No prior notice to the lessee is required where an oil and gas lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), expires by operation of law. The lessee's right to due process is protected by the administrative appeals process at 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Mobil Oil Corp. v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 315 (July 2, 1990)

97 I.D. 215

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Generally--Continued

No prior notice to the lessee is required when an oil and gas lease for restricted lands of members of the Five Civilized Tribes expires by its own terms.

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

K. S. Hays v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 380 (July 20, 1990)

In determining whether a saltwater disposal well is leaking, the Bureau of Indian Affairs may consider as probative evidence the results of an Environmental Protection Agency mechanical integrity test of the well which is conducted pursuant to that agency's Underground Injection Control program under the Safe Drinking Water Act, 41 U.S.C. § 300h (1982).

Linda Mashunkashey Kays v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 431 (Sept. 17, 1990)

25 CFR 226.33 prohibits drilling within 300 feet of the boundary of an Osage oil and gas lease without the written permission of the Osage Agency Superintendent.

Jimmy D. Fox, Sr. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 444 (Sept. 21, 1990)

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Generally--Continued

Disagreement with the terms of a signed contract does not negate those terms.

Thomas J. Sweeney v. Acting Anadarko Area Director, Bureau of Indian Affairs, 19 IBIA 101 (Nov. 29, 1990)

Under Bureau of Indian Affairs Lease Form 5-157 (1957), paragraphs 10 and 1, the term "natural gas" unambiguously includes coalbed methane.

Before approving drilling permits for wells on the lease, the Department, pursuant to the Federal Government's trust responsibility to protect tribal resources, needs to satisfy itself that the proposed activities will be carried out with due regard for possible future coal mining operations.

Rights to Coalbed Methane Under an Oil & Gas Lease For Lands in the Jicarilla Apache Reservation, M-36970 (Oct. 16, 1990) 98 I.D. 59

Where an oil and gas lease of Indian land imposes a duty upon the lessee to avoid waste and protect trust property, the lease does not expire because of a shut-in required to avoid an oil spill.

When the administrative record fails to support a Bureau of Indian Affairs Area Director's decision that an oil and gas lease of Indian land has expired because of failure to produce oil and/or gas in paying quantities, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

Duncan Oil, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 131 (July 12, 1991)

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Generally--Continued

In assessing an oil and gas lessee for past disposal of salt water on an off-lease tract of Indian land, the BIA should determine the fair market value of the use by means of an appraisal.

Citation Oil & Gas, Ltd. v. Acting Billings Area Director, Bureau of Indian Affairs, 21 IBIA 75 (Dec. 17, 1991)

A BIA determination that an Indian oil and gas lease has expired by its own terms is not a cancellation of the lease within the meaning of 25 CFR 211.27.

An oil and gas lease issued under the IMLA of 1938, 25 U.S.C. §§ 396a-396f (1988), for a primary term and "as long thereafter as oil and/or gas is produced in paying quantities" expires by operation of law when, after the primary term, production ceases. The expiration occurs under the terms of the statute, not under any rule or regulation of the Department of the Interior.

Any test for "production in paying quantities" sought to be applied to an oil and gas lease of Indian land must be analyzed in context to ensure that there is no conflict with overriding principles of Federal Indian law.

Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director, Bureau of Indian Affairs, 21 IBIA 88 (Dec. 18, 1991) 98 I.D. 419

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within DOI.

As a general rule, reasonable value for the purpose of calculating royalties due to the United States will be the highest price paid for the major portion of like quality products produced or sold from the same field or area or the gross proceeds actually received by the lessee, whichever is greater. When the lessee fails to receive the posted upper-tier price for the new oil produced from its leases because that oil was not timely

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Generally--Continued

certified as upper-tier oil, royalties based on the posted upper-tier price are due, notwithstanding the lessee's assertions that it did not have sufficient information to know the percentage of new oil subject to the upper-tier price; that it could not control the certification filing procedures that would have enabled it to obtain the upper-tier price; that it relied on the unit operator to fulfill its responsibilities in this regard; and that it diligently pursued litigation against the unit operator to recover the upper-tier price which litigation was ultimately settled for far less than the posted price of the upper-tier oil.

Anadarko Petroleum Corp., 122 IBLA 141 (Feb. 3, 1992)

A Federal oil and gas lessee is under an obligation to assume the expenses of placing any gas produced and sold into "marketable condition." No deduction from royalty is allowed for the expenses of gathering and compressing gas required to place it in marketable condition regardless of whether these costs are paid directly by the lessee or by a third party. The price of gas sold at the wellhead which has been reduced from the price of gas in marketable condition by the costs of gathering the gas and compressing it as required for marketing to a pipeline purchaser does not establish the value of the gas in marketable condition.

R. E. Yarbrough & Co., 122 IBLA 217 (Feb. 21, 1992)

Assessments for the late reporting of royalties pursuant to 30 CFR 218.40 are properly distinguished from penalties assessed under sec. 109 of FOGRMA, 30 U.S.C. § 1719 (1988), and do not effectively increase the royalty rate designated in an oil and gas lease.

An assessment of $10 per report for the late reporting of royalty on production pursuant to 30 CFR 218.40 will be affirmed where 30 CFR 210.52 requires the filing of a completed Form MMS-2014 by the end of the

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Generally--Continued

month following the production month and it appears from the record that the reports were filed late.

Linmar Petroleum Co., 123 IBLA 45 (May 6, 1992)

A lease issued under the IMLA, 25 U.S.C. §§ 396a-396f (1988), does not expire because of a temporary shut-in caused by a mechanical breakdown or accident, as long as the shut-in does not continue beyond the time reasonably necessary to make repairs and resume production.

Citation Oilfield Supply & Leasing, Ltd, & Murphy Oil U.S.A., Inc. v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 163 (Jan. 28, 1993)

When an oil and gas development agreement entered into under the Indian Mineral Development Act, 25 U.S.C. §§ 2101-2108 (1988), provides that it remains in effect after its initial term as long as oil and/or gas is produced in paying quantities, it expires by its own terms when production in paying quantities ceases.

Jay Magness v. Albuquerque Area Director, Bureau of Indian Affairs, 25 IBIA 65 (Dec. 6, 1993)

Where a decision by BIA declaring that an Indian oil and gas lease held in its extended term by production terminated for lack of production is not appealed, review of that termination is barred by the doctrine of administrative finality. Further, neither BLM nor the Board of Land Appeals has jurisdiction to review BIA's decision, which is committed entirely to its authority.

Where an Indian oil and gas lease held by production has been deemed by BIA to have terminated due to lack of production, BLM properly requires the lessee of record to plug and abandon wells on the leased land.

Cross Creek Corp., 131 IBLA 32 (Sept. 29, 1994)

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Generally--Continued

25 CFR 212.23(a) does not mandate cancellation of an Indian oil and gas lease whenever there is a violation of the lease terms or the regulations. Instead, when there is such a violation, BIA has discretion to review the circumstances surrounding the violation and determine whether cancellation is warranted, taking into consideration, inter alia, the trust responsibility to act in the best interest of the Indian landowner(s).

Absent contrary provisions in the lease, the lessee under a lease of Indian oil and/or gas has the right to cure lease violations, and once cure has been effected, the lessee is considered to be in good standing.

Shirley Delgado v. Acting Anadarko Area Director, Bureau of Indian Affairs, 27 IBIA 65 (Dec. 12, 1994)

Allotted Lands

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs decision increasing a bond for an oil and gas lease under 25 CFR 213.15(c) is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence.

K. D. McPhail, dba Macro Oil Co. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 353 (July 6, 1990)

Communitization Agreements

A guideline of the Bureau of Indian Affairs, published in the Federal Register, which states that "lessees of Indian lands are encouraged to submit all future communitization agreements * * * not less than 90 days prior to the date of expiration of the first Indian lease in the proposed unit," does not require that all communitization agreements must be submitted at least 90

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Communitization Agreements--Continued

days prior to the expiration of the Indian lease in order to be considered or to prevent expiration of the lease.

The Bureau of Indian Affairs properly declines to approve a proposed communitization agreement when that agreement is first filed in approvable form after the expiration of the underlying Indian lease.

Black Hawk Oil Co. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 414 (Sept. 13, 1990)

Where BIA has approved an oil and gas lease which provides that the lease may not be included in a communitization agreement without the Indian landowner's consent, an Area Director may not approve a communitization agreement which includes the lease unless the landowner consents.

Kenneth F. Abbott v. Billings Area Director, Bureau of Indian Affairs, 20 IBIA 268 (Sept. 24, 1991)

BLM properly required oil production to be reported on a leasehold basis after finding it was not subject to a communitization agreement because wells drilled on a restricted Indian lease included in a 640-acre communitized area produced oil instead of natural gas and associated liquid hydrocarbons identified in the agreement as the substances communitized.

Home-Stake Royalty Corp., 130 IBLA 36 (July 12, 1994)

Royalties

Under 30 U.S.C. § 1714 (1988), the Department of the Interior lacks authority to escrow oil and gas royalties derived from production on Indian lands, or

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Royalties--Continued

allocated thereto, beyond the last business day of the month in which they were received.

Cherokee Nation of Oklahoma, Chickasaw Nation, & Choctaw Nation of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 22 IBIA 240 (Aug. 24, 1992)

MMS properly required a Federal and Indian oil and gas lessee to review royalty accounts in order to determine whether royalty underpayment was caused by exclusion of state tax reimbursements from gross proceeds of sales of oil and gas.

The Federal and Indian lessee was properly required to compute and pay additional royalties where there was evidence of systematic exclusion of tax reimbursements in reporting production proceeds for royalty purposes.

BHP Petroleum (Americas) Inc., 124 IBLA 185 (Oct. 14, 1992)

"Bona fide selling price," "posted price," and "offered price." These words are defined for purposes of 25 CFR Part 226.

A sale price that is not offered to a producer is not an "offered price" as to that producer within the meaning and intent of 25 CFR 226.11(a)(2).

For purposes of determining the amount of royalty due to the Osage Tribe under 25 CFR 226.11, the price paid pursuant to a contract for the future delivery of crude oil does not constitute an "offered price" on the actual date of purchase.

Okie Crude Co., et al. v. Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 174 (Feb. 5, 1993)

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Royalties--Continued

Regulations are interpreted in accordance with traditional principles of statutory construction. Where a BIA regulation contains parallel sections applicable to different classes of persons, and one section is lacking a provision which is included in the other section, the omission is significant to show that a different intent existed.

The regulations in 25 CFR Part 226 do not authorize a gas lessee to deduct allowances from royalties owing to the Osage Tribe.

ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 228 (Mar. 8, 1993)

Tribal Lands

In a case where the interests of an Indian tribe are arguably in conflict with the interests of some members of the tribe, the Board of Indian Appeals declines to invoke the canon regarding construction of statutory ambiguities in favor of Indians.

Where a statute concerning Indians manifests two competing purposes, an expansive reading of the statute should be avoided if that reading would disserve one of the two purposes.

By analogy to the canon that a state may tax Indians only when congressional consent to such taxation is unmistakably clear, the Board of Indian Appeals finds that a state may share in the oil and gas royalties from tribal property only when Congress has given its unequivocal consent.

In determining whether an instrument is a tribal lease for purposes of a particular Federal statute, the critical inquiry is whether it has the characteristics

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Tribal Lands--Continued

Congress had in mind when employing the term "tribal lease" in the statute.

State of Utah, Board of Indian Affairs & Division of Indian Affairs v. Navajo Area Director, Bureau of Indian Affairs, 21 IBIA 282 (Mar. 31, 1992) 99 I.D. 39

BLM properly overruled an order of the Colorado Oil and Gas Commission refusing to reduce spacing requirements for coalbed methane gas wells in a formation on tribal-owned lands within an Indian reservation where such action was shown to be reasonable and was supported by the record.

When reducing spacing requirements for coalbed methane gas wells in a formation on tribal lands within an Indian reservation, BLM could protect offsetting operators from drainage by restricting production to one-half the estimated ultimate recovery of gas from each well when there was no evidence such action would not be adequate to protect offsetting wells.

BLM properly confined review of the environmental consequences of allowing a limited number of coalbed methane gas wells to be drilled on tribal lands within an Indian reservation to the impact of such activity where there was no evidence that approval of the project would necessarily lead to additional drilling throughout a larger oil and gas field.

BLM was not required by sec. 102(2)(C) of NEPA, as amended, 42 U.S.C. § 4332(2)(C) (1988), to prepare an EIS assessing the impact of drilling coalbed methane gas wells and related activity on tribal lands within an Indian reservation when it had taken a hard look at the environmental consequences of such activity, taking into account all relevant matters of environmental concern, and made a convincing case either that no significant impact would result or that any potentially significant impact would be reduced to insignificance by mitigating measures.

San Juan Citizens Alliance et al., 129 IBLA 1 (Mar. 14, 1994)

INDIANS--Continued

OSAGE HEADRIGHTS

The Secretary of the Interior, as trustee under a testamentary trust including an Osage headright interest, is bound to carry out the testamentary restrictions imposed by the testator.

Scott W. Bradshaw et al. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 339 (July 3, 1990)

RESERVATIONS

Generally

Where the general intent to lease all gases is clear, the absence of specific intent to include coalbed methane as a gas in Bureau of Indian Affairs Lease Form 5-157 (1947), cannot create a reservation of that gas.

Rights to Coalbed Methane Under an Oil & Gas Lease For Lands in the Jicarilla Apache Reservation, M-36970 (Oct. 16, 1990) 98 I.D. 59

SOCIAL SERVICES

In accordance with 25 CFR 271.4(h), a tribal contractor under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1982 and Supps.), must apply the eligibility criteria for the contracted program which are established in the Bureau of Indian Affairs' regulations governing the program.

Under the Bureau of Indian Affairs' social services program regulations, the eligibility criteria for miscellaneous assistance in 25 CFR 20.23 do not incorporate the eligibility criteria for general assistance in 25 CFR 20.21.

Muscogee (Creek) Nation v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 135 (Feb. 1, 1990)

INDIANS--Continued

SOCIAL SERVICES--Continued

Under 25 CFR 20.21(e)(1), the payment standard for general assistance from BIA is based on the payment standard for the Aid to Families with Dependent Children program in the state where the applicant or recipient resides.

Under 25 CFR 20.23, BIA is not required to provide miscellaneous financial assistance to applicants who have other resources available to meet current living costs.

Pat Hayes v. Acting Anadarko Area Director, BIA, 22 IBIA 65 (June 3, 1992)

The BIA is not authorized, either by the regulations governing the Bureau's general assistance program or by the corresponding provisions of the BIA Manual, to require a non-Indian spouse of a grant recipient to submit job search reports. However, the Bureau may require the grant recipient to submit verified information concerning the spouse's employment situation.

Pat Hayes v. Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 50 (Nov. 30, 1993)

TAXATION

By analogy to the canon that a state may tax Indians only when congressional consent to such taxation is unmistakably clear, the Board of Indian Appeals finds that a state may share in the oil and gas royalties from tribal property only when Congress has given its unequivocal consent.

State of Utah, Board of Indian Affairs & Division of Indian Affairs v. Navajo Area Director, Bureau of Indian Affairs, 21 IBIA 282 (Mar. 31, 1992) 99 I.D. 39

INDIANS--Continued

TAXATION--Continued

The distinction between a real property tax and a special assessment is that a tax is levied against all similarly situated property for purposes which will benefit the public generally and a special assessment is levied only against the specific property which benefits from the improvement financed by the assessment.

In determining whether charges imposed by an irrigation district are real property taxes for purposes of a particular Federal statute, the critical inquiry is whether such charges have the characteristics Congress had in mind in employing the term "real property taxes" in the statute.

Tohono O'Odham Nation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 22 IBIA 220 (Aug. 14, 1992)

TIMBER RESOURCES

Generally

The sale of timber on trust or restricted land by an Indian tribe is controlled by 25 U.S.C. § 407 (1988), not by 25 U.S.C. § 81 (1988).

Bernell Kombol, dba Grass Mountain Logging Co. v. Acting Ass't Portland Area Director (Economic Development), Bureau of Indian Affairs, 19 IBIA 123 (Dec. 26, 1990)

Decisions made by officials of the BIA as supervisors of Indian timber leases will be upheld when they are reasonable and based upon substantial evidence in the record.

Bernell Kombol, dba Grass Mountain Logging Co. v. Ass't Portland Area Director, Bureau of Indian Affairs, 21 IBIA 116 (Dec. 19, 1991)

INDIANS--Continued

TIMBER RESOURCES--Continued

Generally--Continued

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

All Materials of Montana, Inc. v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 202 (Feb. 27, 1992)

Timber Sales Contracts

Generally

The Uniform Commercial Code and state statutory and decisional law can be examined in determining the principles of general contract law in interpreting a contract for the logging and sale of Indian timber.

Winlock Veneer Co. v. Acting Juneau Area Director, Bureau of Indian Affairs, 20 IBIA 3 (May 2, 1991)

Under the terms of the timber contract at issue, the conditions of sale could only be modified in writing and with the approval of the BIA Agency Superintendent.

John P. Taylor, dba Taylor Logging v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 101 (July 5, 1991)

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Keith Dahl v. Ass't Portland Area Director, Bureau of Indian Affairs, 20 IBIA 225 (Aug. 28, 1991)

INDIANS--Continued

TIMBER RESOURCES--Continued

Timber Sales Contracts--Continued

Generally--Continued

Under the BIA's general forest regulations, "stumpage rate" means the stumpage value of timber, i.e., the value of uncut timber as it stands in the woods. 25 CFR 163.1.

D. G. & D. Logging Co. v. Billings Area Director, Bureau of Indian Affairs, 20 IBIA 229 (Aug. 29, 1991)

Breach and Damages

Failure to make advance deposits required under a contract for the sale of Indian timber or to begin operations constitutes a breach of the contract.

Performance under a contract for the sale of Indian timber is not excused by the doctrine of commercial impracticality based upon a downturn in the timber market when the possibility of such a downturn is not shown to have been an unexpected or unforeseeable occurrence, the risk of such a downturn is allocated to the purchaser by the terms of the contract, and the purchaser has not shown that performance is commercially impracticable.

Bernell Kombol, dba Grass Mountain Logging Co. v. Acting Ass't Portland Area Director (Economic Development), Bureau of Indian Affairs, 19 IBIA 123 (Dec. 26, 1990)

TRADERS

Decisions concerning whether or not to grant a trader's license or peddler's permit are committed to the discretion of BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

When determining whether to grant a trader's license or peddler's permit, it is a denial of due process for BIA to rely on adverse allegations relating

INDIANS--Continued

TRADERS--Continued

to the character of the applicant without giving the applicant an opportunity to respond to those allegations.

Jane Rush v. Acting Navajo Area Director, Bureau of Indian Affairs, 25 IBIA 198 (Mar. 4, 1994)

TRIBAL GOVERNMENT

Generally

The Bureau of Indian Affairs properly declines to recognize actions taken at a tribal meeting at which a quorum is not present.

Joy Sundberg v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 207 (Mar. 27, 1990)

In determining whether an Indian group is an "Indian tribe" under statutes and regulations which do not define "Indian tribe," Department of the Interior officials are bound by the regulations in 25 CFR Part 83.

Edwards, McCoy & Kennedy & Western Shoshone Business Council of the Duck Valley Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 454 (Sept. 24, 1990)

The Department of the Interior is bound by its own properly promulgated regulations which have the force and effect of law.

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Kiowa Tribe v. Acting Anadarko Area Director, Bureau of Indian Affairs, 19 IBIA 157 (Jan. 22, 1991)

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Generally--Continued

In furthering the doctrines of tribal sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes to resolve their own internal disputes.

Edgar A. Bowen v. Acting Portland Area Director, Bureau of Indian Affairs, 20 IBIA 263 (Sept. 23, 1991)

In determining whether an Indian entity is an Indian tribe for purposes of a particular BIA program, the Bureau must first look to the definition of "Indian tribe" in the statute or regulation governing the program. If the relevant statute or regulation does not define the term, the regulations in 25 CFR Part 83 control the determination.

Central Council of Tlingit & Haida Indian Tribes v. Chief, Branch of Judicial Services, Bureau of Indian Affairs, 26 IBIA 159 (Aug. 3, 1994)

Constitutions, Bylaws, and Ordinances

The Board of Indian Appeals undertakes to interpret tribal law only where there is a clear necessity for it to do so.

Erin Forrest v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 372 (July 19, 1990)

Where the Secretary of the Interior has approved the constitution of an Indian tribe, no Department of the Interior official has authority to "recognize" a portion of the tribe as a separate tribal entity.

Edwards, McCoy & Kennedy & Western Shoshone Business Council of the Duck Valley Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 454 (Sept. 24, 1990)

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Constitutions, Bylaws, and Ordinances--Continued

A challenge to an election conducted under 25 CFR Part 81 must be filed within 3 days following posting of the election results. 25 CFR 81.22.

25 CFR 81.23(a) provides for posting of election results in the local BIA office.

Mildred Frazier v. Acting Portland Area Director, Bureau of Indian Affairs, 21 IBIA 11 (Oct. 8, 1991)

Neither the IRA, 25 U.S.C. §§ 461-479 (1988), nor any other Federal law, contains a general requirement for approval of tribal ordinances by Federal officials. However, Indian tribes may, as a matter of tribal law, include an approval provision in their constitutions.

Review of tribal ordinances, even though required by a tribal constitution, is an intrusion into tribal self-government. Review should, therefore, be undertaken in such a way as to avoid unnecessary interference with tribal self-government.

Ute Indian Tribe of the Uintah & Ouray Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 24 (Oct. 22, 1991)

The BIA properly disapproves a tribal ordinance found to be in conflict with Federal law.

White Mountain Apache Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 151 (Jan. 9, 1992)

In furthering the doctrines of tribal sovereignty and self-determination, the Department of the Interior has recognized their right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Constitutions, Bylaws, and Ordinances--Continued

given deference to that tribe's reasonable interpretation of its own laws.

Article X of the Constitution of the Seneca-Cayuga Tribe of Oklahoma gives the Grievance Committee the power to investigate complaints of misconduct or other acts by the Business Committee, and call a special meeting of the Seneca-Cayuga Council to act upon such complaints if a proper showing is made.

Henry P. Rhatigan v. Muskogee Area Director, Bureau of Indian Affairs, 21 IBIA 258 (Mar. 20, 1992)

In furthering the doctrines of tribal sovereignty and self-determination, DOI has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's interpretation of its own laws.

When neither tribal sovereignty nor tribal historical values are at issue, review of a tribal ordinance by BIA and the Board of Indian Appeals in order to discharge the government-to-government relationship does not substantially interfere with the tribe's ability to maintain itself as a culturally and politically distinct entity.

In discharging its government-to-government relationship with an Indian tribe, BIA has the authority and the responsibility to decline to recognize the results of a tribal election when it finds that a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988), has tainted the election results.

Because of the possibility of abuse of power by a group of individuals temporarily in office, tribal legislation disenrolling certain tribal members must meet the standards established by the tribe's constitution or other governing documents. Since the passage of the Indian Civil Rights Act, 15 U.S.C. § 1302 (1988),

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Constitutions, Bylaws, and Ordinances--Continued

these standards have included the matters covered by the Act.

United Keetoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, & Joe Grayson, Jr., & Pam Thurman Jumper, Muskogee Area Director, Bureau of Indian Affairs, 22 IBIA 75 (June 4, 1992)

In furthering the doctrines of tribal sovereignty and self-determination, DOI has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's reasonable interpretation of its own laws.

A tribal action which deprives an individual of procedural rights set out in the tribal constitution violates the due process requirement of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988).

James C. Greendeer v. Minneapolis Area Director, Bureau of Indian Affairs, 22 IBIA 91 (June 10, 1992)

The Board of Indian Appeals undertakes to interpret tribal law only where there is a clear necessity for it to do so. It therefore does not consider moot issues where, in order to render a decision on the merits, it would be required to interpret tribal law.

In accordance with the Federal policy of fostering tribal self-determination, which counsels respect for the right of tribes to interpret their own governing documents, BIA should avoid interpreting a tribal constitution unless there is a clear necessity for it to do so.

Parmenton Decorah et al. v. Minneapolis Area Director, Bureau of Indian Affairs, 22 IBIA 98 (June 10, 1992)

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Constitutions, Bylaws, and Ordinances--Continued

In furthering the doctrines of tribal sovereignty and self-determination, DOI has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's reasonable interpretation of its own laws.

Pinoleville Indian Community Governing Council v. Sacramento Area Director, Bureau of Indian Affairs, 22 IBIA 176 (July 16, 1992)

Donna Van Zile & James Crawford v. Minneapolis Area Director, Bureau of Indian Affairs, 25 IBIA 163 (Feb. 14, 1994)

Although required by statute, review of amendments to the IRA constitutions is an intrusion into tribal self-government. Review should therefore be undertaken in such a way as to avoid unnecessary interference with tribal self-government.

Cheyenne River Sioux Tribe v. Aberdeen Area Director, Bureau of Indian Affairs, 24 IBIA 55 (June 15, 1993)

Tribal legislation is not subject to review or approval by the BIA unless a Federal statute or the tribal constitution so provides.

Even where BIA involvement in tribal matters is required by Federal or tribal law, or is necessary to implement the government-to-government relationship, the Bureau must act in such a way as to avoid unnecessary interference with tribal self-government.

Intra-tribal controversies concerning the validity of tribal council actions are properly resolved in tribal courts or other tribal forums.

Wallace W. Wells, Jr., Randy Shields, & Leonard Pease, Jr. v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 24 IBIA 142 (Aug. 19, 1993)

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Constitutions, Bylaws, and Ordinances--Continued

Proposals for constitutional amendments made by the tribal councils of the Five Tribes are not subject to the legislation approval requirement of sec. 28 of the Five Tribes Act of Apr. 26, 1906, 34 Stat. 137.

Under the Act of Oct. 22, 1970, 84 Stat. 1091, procedures for the selection of the principal chiefs of the Cherokee, Choctaw, Muscogee (Creek) and Seminole Nations and the governor of the Chickasaw Nation are subject to approval by the Secretary of the Interior.

Where a tribal constitution gives a BIA official authority to approve or disapprove amendments, and no limitations are placed on that authority by the constitution or by Federal statute, the Bureau official has the discretion to disapprove an amendment which would remove the requirement for approval of future amendments.

Seminole Nation of Oklahoma v. Acting Director, Office of Tribal Services, Bureau of Indian Affairs, 24 IBIA 209 (Sept. 23, 1993)

Where there are discrepancies between a BIA regulation and a later-enacted statute, the statute controls.

In furthering the doctrines of tribal sovereignty and self-determination, DOI has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's reasonable interpretation of its own laws.

While BIA should give deference to a tribe's interpretation of its own laws, the Bureau's responsibilities under Federal and tribal law may require it to make an independent determination concerning voter eligibility in a Secretarial election.

Prairie Island Indian Community v. Minneapolis Area Director, Bureau of Indian Affairs, 25 IBIA 187 (Feb. 25, 1994)

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Constitutions, Bylaws, and Ordinances--Continued

25 CFR 81.22 provides a mechanism for challenging the manner in which a Secretarial election is conducted, but does not authorize a challenge to the substance of a tribal constitution or constitutional amendment adopted at the election, or a challenge to BIA's review of the constitution or amendment.

A tribal member lacks standing to challenge BIA's approval or disapproval of an amendment to a tribe's constitution.

Thurman L. Welbourne v. Anadarko Area Director, Bureau of Indian Affairs, 26 IBIA 69 (June 20, 1994)

Where Secretarial review of tribal legislation is required by a tribal constitution, but not by Federal law, the Secretary's review authority is only as broad as the tribal constitution provides. Thus, where the Secretary has approved tribal legislation within the review period specified in the constitution, he has no authority to revoke his approval once the period has expired.

Pawnee Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs, 26 IBIA 284 (Oct. 24, 1994)

Elections

Where an Indian tribe resolves an election dispute in a valid tribal forum, neither the Bureau of Indian Affairs nor the Board of Indian Appeals may disregard the resolution reached by that forum.

Beverly A. Smalley et al. v. Eastern Area Director, Bureau of Indian Affairs, 18 IBIA 459 (Sept. 27, 1990)

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Elections--Continued

A challenge to an election conducted under 25 CFR Part 81 must be filed within 3 days following posting of the election results. 25 CFR 81.22.

25 CFR 81.23(a) provides for posting of election results in the local BIA office.

Mildred Frazier v. Acting Portland Area Director, Bureau of Indian Affairs, 21 IBIA 11 (Oct. 8, 1991)

In discharging its government-to-government relationship with an Indian tribe, BIA has the authority and the responsibility to decline to recognize the results of a tribal election when it finds that a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988), has tainted the election results.

United Keetoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, & Joe Grayson, Jr., & Pam Thurman Jumper, Muskogee Area Director, Bureau of Indian Affairs, 22 IBIA 75 (June 4, 1992)

In discharging its government-to-government relationship with an Indian tribe, the BIA has the authority and the responsibility to decline to recognize the results of a tribal election when it finds that a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988), has tainted the election results.

Neddeen Naylor, Mary L. Wuester, Irene Button, & Noreen E. Sellberg v. Sacramento Area Director, Bureau of Indian Affairs, 23 IBIA 76 (Nov. 13, 1992)

While BIA should give deference to a tribe's interpretation of its own laws, the Bureau's responsibilities under Federal and tribal law may require it to make an

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Elections--Continued

independent determination concerning voter eligibility in a Secretarial election.

Prairie Island Indian Community v. Minneapolis Area Director, Bureau of Indian Affairs, 25 IBIA 187 (Feb. 25, 1994)

The decisions of BIA officials in election contests under 25 CFR 81.22 may be appealed under 25 CFR Part 2.

When an election is contested under 25 CFR 81.22, the grounds for the contest must be presented to BIA within 3 days after the election. The Board of Indian Appeals cannot consider arguments based on grounds presented for the first time in an appeal to the Board.

25 CFR 81.22 provides a mechanism for challenging the manner in which a Secretarial election is conducted, but does not authorize a challenge to the substance of a tribal constitution or constitutional amendment adopted at the election, or a challenge to BIA's review of the constitution or amendment.

Thurman L. Welbourne v. Anadarko Area Director, Bureau of Indian Affairs, 26 IBIA 69 (June 20, 1994)

Judicial System

The BIA must implement the Federal commitment to tribal self-determination, which includes a policy of respect for tribal courts, in fulfilling its oversight responsibilities under the Indian Self-Determination Act.

Larry Martin v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 279 (Apr. 4, 1991) 98 I.D. 200

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Judicial System--Continued

Intra-tribal controversies concerning the validity of tribal council actions are properly resolved in tribal courts or other tribal forums.

Wallace W. Wells, Jr., Randy Shields, & Leonard Pease, Jr. v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 24 IBIA 142 (Aug. 19, 1993)

Officers

In discharging its government-to-government relationship with an Indian tribe, BIA has the authority and the responsibility to decline to recognize a removal of tribal officials when the removal action was tainted by a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988).

James C. Greendeer v. Minneapolis Area Director, Bureau of Indian Affairs, 22 IBIA 91 (June 10, 1992)

TRIBAL ORGANIZATION

Oklahoma Tribes

Absent convincing evidence, the Board cannot conclude that the requirement for approval of tribal legislation in sec. 28 of the Five Tribes Act of Apr. 26, 1906, 34 Stat. 137, was impliedly repealed by the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (1988).

Proposals for constitutional amendments made by the tribal councils of the Five Tribes are not subject to the legislation approval requirement of sec. 28 of the Five Tribes Act of Apr. 26, 1906, 34 Stat. 137.

Under the Act of Oct. 22, 1970, 84 Stat. 1091, procedures for the selection of the principal chiefs of the Cherokee, Choctaw, Muscogee (Creek) and Seminole Nations and the governor of the Chickasaw Nation are subject to approval by the Secretary of the Interior.

Seminole Nation of Oklahoma v. Acting Director, Office of Tribal Services, Bureau of Indian Affairs, 24 IBIA 209 (Sept. 23, 1993)

INDIANS--Continued

TRIBAL POWERS

Generally

When an official of BIA has reason to question a tribal decision which requires action by the Bureau, such as the leasing of tribal trust land, he or she should make the question known to the proper tribal official or forum and ask for clarification of the tribal position.

Thor K. Lande v. Acting Billings Area Director, Bureau of Indian Affairs, 22 IBIA 188 (July 22, 1992)

The Board of Indian Appeals has jurisdiction over decisions issued by BIA officials under 25 CFR Chapter I. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

Arthur J. Welmas & Linda Streeter Dukic, Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 264 (Oct. 20, 1993)

Self-Determination

When statutorily required review of tribal decisions by the DOI constitutes an intrusion into tribal self-government, the Department should undertake that review in such a way as to avoid unnecessary interference with tribal self-government.

Ottawa Indian Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 24 IBIA 92 (July 8, 1993)

Although Secretarial approval of tribal leases is required by statute, and BIA must review and approve such leases in accordance with the trust responsibility, the Bureau must also undertake its approval role in such a way as to avoid unnecessary interference with tribal self-government.

First Mesa Consolidated Villages v. Phoenix Area Director, Bureau of Indian Affairs, 26 IBIA 18 (May 27, 1994)

INDIANS--Continued

TRIBAL POWERS--Continued

Tribal Sovereignty

A tribal court decision concerning the condemnation of an undivided nontrust interest in an Indian allotment is not reviewable by the Board.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

In furthering the doctrines of tribal sovereignty and self-determination, DOI has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's reasonable interpretation of its own laws.

Henry P. Rhatigan v. Muskogee Area Director, Bureau of Indian Affairs, 21 IBIA 258 (Mar. 20, 1992)

James C. Greendeer v. Minneapolis Area Director, Bureau of Indian Affairs, 22 IBIA 91 (June 10, 1992)

Pinoleville Indian Community Governing Council v. Sacramento Area Director, Bureau of Indian Affairs, 22 IBIA 176 (July 16, 1992)

Donna Van Zile & James Crawford v. Minneapolis Area Director, Bureau of Indian Affairs, 25 IBIA 163 (Feb. 14, 1994)

Prairie Island Indian Community v. Minneapolis Area Director, Bureau of Indian Affairs, 25 IBIA 187 (Feb. 25, 1994)

In furthering the doctrines of tribal sovereignty and self-determination, DOI has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's interpretation of its own laws.

When neither tribal sovereignty nor tribal historical values are at issue, review of a tribal ordinance by

INDIANS--Continued

TRIBAL POWERS--Continued

Tribal Sovereignty--Continued

BIA and the Board of Indian Appeals in order to discharge the government-to-government relationship does not substantially interfere with the tribe's ability to maintain itself as a culturally and politically distinct entity.

United Keetoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, & Joe Grayson, Jr., & Pam Thurman Jumper, Muskogee Area Director, Bureau of Indian Affairs, 22 IBIA 75 (June 4, 1992)

Respect for tribal self-government requires that tribal remedies be exhausted before a Federal forum may entertain a challenge to tribal actions or authority. This is particularly true where the matter at issue involves tribal membership.

Indian tribes have the power to restrict the assignment of tribal lands to tribal members.

Janie Jovita Flores et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12, 1993)

TRUST RESPONSIBILITY

The administration of Indian oil and gas leases under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), is a trust responsibility of the United States.

Mobil Oil Corp. v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 315 (July 2, 1990)
97 I.D. 215

INDIANS--Continued

TRUST RESPONSIBILITY--Continued

A non-Indian lacks standing to raise an alleged violation of the Federal trust responsibility.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

In considering matters raised by one Indian against a second Indian relating to the second Indian's trust allotment, the Bureau of Indian Affairs' trust duty is to the person for whom the land is held in trust.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

Public Law 100-638, 102 Stat. 3327, imposes a trust responsibility on the BIA in its administration of lands transferred to the Quinault Indian Nation by that Act.

Dahlstrom Lumber Co. v. Portland Area Director, Bureau of Indian Affairs & Mayr Brothers Logging Co., Inc., et al., Portland Area Director, Bureau of Indian Affairs, 20 IBIA 143 (July 17, 1991)

Where the lessors under a lease of Indian trust land have authorized a BIA Superintendent to take certain actions on their behalf, the Superintendent's authority to act remains subject to limitations imposed by the trust responsibility.

Ramona Button & Harlan Bohnee v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 57 (Nov. 13, 1991)

In determining whether to approve a gift deed of Indian trust land, the BIA's trust duty requires it to refrain from approving the deed if there is any question as to the Indian landowner's intent.

Estates of Evan Gillette, Sr., & Lizzie Gillette/Yellow Bird/Bellanger/Paint/Bedell, aka Elizabeth Burdell, 22 IBIA 133 (June 18, 1992)

INDIANS--Continued

TRUST RESPONSIBILITY--Continued

There is nothing in the legislative histories of the Hawaiian Homes Commission Act of 1920, 42 Stat. 108, as amended (HHCA), or the Hawaiian Statehood, 73 Stat. 4 (1959), to indicate the creation of a trust relationship between the United States and native Hawaiians. This opinion concludes that the United States had no trust responsibilities to the native Hawaiians either before Statehood or after.

Deputy Solicitor Ferguson's letter of Aug. 27, 1979, regarding the United States as trustee to Hawaiian natives for the years 1920 to 1959, is expressly overruled to the extent it is inconsistent with this memorandum.

The Scope of Federal Responsibility for Native Hawaiians Under the Hawaiian Homes Commission Act, M-36978 (Jan. 19, 1993) 100 I.D. 431

In actions relating to the sale of an individual Indian's interest in trust property to another Indian or an Indian tribe, BIA's trust duty is to the Indian for whom the interest is held in trust, not the prospective purchaser or purchasers.

Kenneth Gullickson v. Aberdeen Area Director, Bureau of Indian Affairs, 24 IBIA 247 (Oct. 14, 1993)

In a matter concerning the use and/or distribution of funds generated from tribal lands, the BIA trust responsibility is to the tribe.

Arthur J. Welmas & Linda Streeter Dukic, Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 264 (Oct. 20, 1993)

In matters relating to the use of tribal property, the BIA's trust responsibility is to the tribe, not a person doing business with the tribe, even though that person may be Indian and a tribal member.

Robert & Krista Johnson v. Acting Phoenix Area Director, Bureau of Indian Affairs, 25 IBIA 18 (Nov. 12, 1993)

INDIANS--Continued

TRUST RESPONSIBILITY--Continued

The Secretary of the Interior must exercise his authority under 25 U.S.C. § 410 (1988), in accordance with the trust responsibility of the United States for funds held in IIM accounts.

Marjorie L. Miller v. Anadarko Area Director, Bureau of Indian Affairs, 26 IBIA 97 (July 6, 1994)

In approving a conveyance of trust land, BIA acts as a trustee for the Indian owner, even where the prospective grantee is also Indian and a member of the owner's family.

In determining whether to approve a gift deed of trust land, BIA must ensure that the prospective donor understands and intends the effect of his/her action; must make a careful examination of the circumstances to determine whether the transaction is in the donor's best interest; and must refrain from approving a gift deed where there is any question as to the donor's intent or where the facts show the conveyance is not in the donor's best interest.

Estate of Clifford Celestine v. Acting Portland Area Director, Bureau of Indian Affairs, 26 IBIA 220 (Sept. 9, 1994)

The Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1988 and Supps.), preserves the trust responsibility of the United States toward the Indian people, prohibits the Secretary of the Interior from entering into any contract which would impair his ability to discharge his trust responsibility, and authorizes the Secretary to decline a contract where adequate protection of trust resources is not assured.

Where an Alaska Native village has contracted under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1988 and Supps.), to perform realty services, the BIA may reject a request that the contract service area be based on village membership if the Bureau reasonably finds that adequate protection of trust resources will not be assured under a membership-based contract.

Kwethluk Ira Council v. Juneau Area Director, Bureau of Indian Affairs, 26 IBIA 262 (Oct. 18, 1994)

INDIANS--Continued

TRUST RESPONSIBILITY--Continued

The Federal trust responsibility applies to each bureau or office within DOI that has authority to take actions relating to or reflecting Indian trust resources.

Shirley Delgado v. Acting Anadarko Area Director, Bureau of Indian Affairs, 27 IBIA 65 (Dec. 12, 1994)

WATER AND POWER RESOURCES

Irrigation Projects

Water claimed under potentially prior tribal fishing rights is not subject to the "just and equal distribution" requirement of 25 U.S.C. § 381 (1988).

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 31 (Oct. 23, 1990)

The distinction between a real property tax and a special assessment is that a tax is levied against all similarly situated property for purposes which will benefit the public generally and a special assessment is levied only against the specific property which benefits from the improvement financed by the assessment.

In determining whether charges imposed by an irrigation district are real property taxes for purposes of a particular Federal statute, the critical inquiry is whether such charges have the characteristics Congress had in mind in employing the term "real property taxes" in the statute.

Tohono O'Odham Nation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 22 IBIA 220 (Aug. 14, 1992)

INDIANS--Continued

WATER AND POWER RESOURCES--Continued

Water Rights

Water claimed under potentially prior tribal fishing rights is not subject to the "just and equal distribution" requirement of 25 U.S.C. § 381 (1988).

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 31 (Oct. 23, 1990)

INTERVENTION

Where an application for review of a permit is pending before an Administrative Law Judge and the permittee and OSMRE agree to the nature of the issue remaining after settlement by them of the other issues raised by the application, such agreement will not preclude consideration of any of the settled issues at the behest of an intervenor in the proceeding, whether intervention occurred before or after the settlement.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

An intervenor in an appeal before the Board of Indian Appeals is normally limited to the issues raised by the appellant.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992)
99 I.D. 219

JUDICIAL REVIEW
(See also Administrative Procedure)

When it becomes necessary to protect the water supply of a Federal reclamation project, the United States is obligated and entitled to make filings in

JUDICIAL REVIEW--Continued

general stream adjudications on behalf of project water rights to which the United States holds legal title.

The United States is not obligated to make water rights filings or present evidence of beneficial use on behalf of individual water users. In addition, when the United States files in general stream adjudications in states that do not distinguish between storage rights and rights to receive water, it has no evidentiary burden to carry for the individual water users. However, by making the filings of Reclamation project water rights held in its name, the United States protects its interest in the project water rights, and the project water rights users are afforded the opportunity to protect their water rights, based on their ability to establish beneficial use of water.

Filings of Claims for Water Rights in General Stream Adjudications, M-36966 (July 6, 1989) 97 I.D. 21

A statute establishing time limitations for commencement of civil actions for damages by the United States does not apply to limit administrative review within DOI.

Mobil Exploration & Producing U.S., Inc., 119 IBLA 76 (Apr. 5, 1991) 98 I.D. 207

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within DOI.

Anadarko Petroleum Corp., 122 IBLA 141 (Feb. 3, 1992)

Benson-Montin-Greer Drilling Corp., 123 IBLA 341 (July 15, 1992) 99 I.D. 115

Bolling Construction Co. & Bob Bolling, 125 IBLA 303 (Mar. 16, 1993)

Texaco, Inc., 129 IBLA 46 (Mar. 23, 1994)

LACHES

That BLM did not take action on a request for relinquishment of a coal lease until 2 years after it was filed, during which time late payment charges accrued, does not relieve the lessee of the obligation to pay late payment charges.

Ametex Corp., 121 IBLA 291 (Nov. 25, 1991)

LIEU SELECTIONS

A right to select lieu lands under the authority of sec. 13 of the Act of Mar. 13, 1921, 41 Stat. 1239, was a claim required to be recorded with the Department within 2 years from the effective date of the Act of Aug. 5, 1955, 69 Stat. 534. Failure to present the claim within the time established by the 1955 Recordation Act barred acquisition of the land. Filing a selection application in 1946 did not constitute compliance with the 1955 recordation requirement.

Tommy Chavez, 127 IBLA 395 (Nov. 2, 1993)

MATERIALS ACT

A for-profit corporation which does not qualify for the free use of mineral materials under the provisions of the Materials Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1988), and its implementing regulations, 43 CFR Part 3600, is properly cited for trespass for the unauthorized removal of mineral materials when it removes aggregate from a BLM pit without prior payment in violation of the terms of its material sales contract and 43 CFR 3610.1-3, even though it asserts that it was told by BLM personnel that it would not have to pay royalty for the material since the material was to be used on a BLM road-surfacing project. Reliance on such representations, although insufficient to grant appellant rights not authorized by law, may, however, demonstrate that the trespass was innocent, not willful, and an assessment of triple damages for such trespass

MATERIALS ACT--Continued

will be set aside and the case remanded for reevaluation of the appropriate measure of damages.

So. Way Co., dba Southway Construction Co., Inc., 123 IBLA 122 (May 21, 1992)

When the record supports a finding that the purchaser under a mineral materials sale contract committed a willful trespass by removing sand and gravel in excess of the volume limitation in the contract, a BLM levy of trespass damages determined in accordance with applicable state law will be affirmed.

Frehner Construction Co., Inc., 124 IBLA 310 (Nov. 4, 1992)

The regulations at 43 CFR 3603.1 and 43 CFR 9239.0-7 prohibit the removal of mineral material except when authorized by a sale or permit issued under the Materials Act and Departmental regulations. A finding that no trespass occurred because BLM authorized the removal of gravel by means other than issuance of a permit or sales contract will be reversed.

When BLM has indicated to a trespasser that gravel extraction operations may continue, there is no basis for concluding that the continued operations were unreasonable or lacked good faith. Absent evidence showing knowledge that the violation is occurring or a reckless disregard for whether a violation is occurring, there is no justification for imposing what are essentially punitive damages for willful trespass. In such a case the Board will find, in the interest of fundamental fairness, that BLM is precluded from charging that the operator, who remained in trespass with permission to continue operations, but absent formal authorization, was in willful trespass.

Absent clearly controlling state law, damages for unintentional gravel trespass may be based on either the value of the gravel in place or market value at the site of the processed gravel, less the expenses of severing and processing it, whichever is greater.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

MATERIALS ACT--Continued

The decision to sell mineral materials is discretionary. When BLM considers relevant factors and concludes that removal of boulders from an area classified as Category I desert tortoise habitat would cause adverse impacts on the tortoise habitat which cannot be mitigated, BLM may properly reject an application for sale of the boulders.

Glenn B. Sheldon, 128 IBLA 188 (Feb. 8, 1994)

Where there is no substantial dispute that a purchaser of materials under a materials sale contract removed more bank material than the amount authorized by contract after the expiration date of that contract, an act of trespass has occurred and the unauthorized user is liable for damages to the United States. Where the purchaser has not effectively challenged BLM's computation of the volume removed in excess of the authorized amount, BLM's decision is properly affirmed. In the absence of controlling State law, the appropriate measure of damages is the in-place value of the material, as previously determined following hearing, in the absence of additional evidence showing that relevant circumstances have changed since the hearing date.

An area-wide appraisal assigning a value to representative sand and gravel deposits located in a BLM resource area is a master appraisal. In appraisal cases where BLM attempts to implement the comparable use method of valuation by using a master appraisal, the Board seeks to determine whether the material subject to appraisal actually conforms to the representative material. It is improper for BLM to apply a master appraisal without making a thorough comparison of various factors considered in appraising the representative material, and a BLM decision using a master appraisal to establish value of materials is insufficient where the master appraisal acknowledges that there are significant potential differences in sand and gravel found in the resource area, the record fails to demonstrate any relationship between the materials being appraised and the master appraisal, and there is no indication that the specific materials at issue matched the comparable factors identified in BLM's appraisal of the representative material.

An assessment of damages for intentional trespass against the purchaser of sand and gravel under a materials sale contract because he processed and removed materials after expiration of the contract is properly reversed where the terms of the contract provide that

MATERIALS ACT--Continued

title to the materials pass to the purchaser when he has paid for the materials and they are extracted, and those terms suggest that "removal" of materials after expiration of the contract is not trespass; where the contract does not expressly provide for reversion of title to the materials to the United States; and where the purchaser has in fact tendered payment and extracted the material.

Extraction of sand and gravel bank material beyond amounts authorized by sales contract and after expiration thereof is intentional trespass where BLM repeatedly expressly warned that removal of material would constitute trespass. However, where the record is unclear as to how much material was removed, the decision setting damages is properly set aside and remanded for clarification.

Richard C. Nielson (dba Nielson Sand and Rock), 129 IBLA 316 (May 27, 1994)

Removal of mineral material without a sales contract or permit issued under the Materials Act and Departmental regulations is an act of trespass. When trespass damages are based on the "value in place" that would have been paid had the mineral material been removed under contract, the assessment of trespass damages is in accord with rulings governing damages for unintentional trespass.

Wesley Corp., 130 IBLA 311 (Sept. 2, 1994)

MIGRATORY BIRD CONSERVATION ACT
(See also Wildlife Refuges & Projects)

GENERALLY

The sale of timber by BLM does not involve a "taking" of migratory birds under the Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988). This Act was not intended to include habitat modification or degradation among its prohibitions.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

MIGRATORY BIRD CONSERVATION ACT--Continued

GENERALLY--Continued

The approval of a mining plan of operations does not involve a "taking" of migratory birds under the Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988). This Act was not intended to include habitat modification or degradation among its prohibitions.

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

MILLSITES
(See also Mining Claims)

GENERALLY

Where the Government has presented evidence that various dependent millsites are not being used or occupied for mining or milling purposes, the Government has established a prima facie case of invalidity because such use or occupancy is a prerequisite to the validity of a millsite claim under 30 U.S.C. § 42 (1982). Upon presentation of such evidence, the burden shifts to the millsite claimant to affirmatively establish that the claim is used or occupied for mining and milling purposes.

Where a millsite claim is located in conjunction with lode mining claims, an applicant for mineral patent must show that the millsite claim is located on nonmineral land and is used or occupied for mining operations. 30 U.S.C. § 42(a) (1982).

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

Pursuant to 43 CFR 3809.3-2(d), a notice of noncompliance properly issues upon a determination that the mining claimants and the operators have failed to operate in such a manner as to prevent undue or unnecessary degradation or to complete reclamation of a millsite to the standards set forth in 43 CFR 3809.1-3.

B. K. Lowndes et al., 113 IBLA 321 (Mar. 14, 1990)

MILLSITES--Continued

GENERALLY--Continued

Under 30 U.S.C. § 42 (1982), the proprietor of a mining claim may appropriate nonmineral ground as a millsite for mining, milling, or other operations in connection with such claim. Occupancy of a millsite claim for purposes not related to mining operations constitutes a trespass.

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

A decision finding a dependent placer millsite valid will be affirmed on appeal when the evidence demonstrates that the millsite was needed by the proprietor of a placer claim for fuel storage, equipment repair, and a sawmill and millsite, and was used or occupied by the proprietor of the claim for mining, milling, processing, beneficiation, or other operations in connection with the placer claim.

United States v. Donald L. & Dorothy E. Clark, 121 IBLA 260 (Nov. 15, 1991)

A Government contest of a millsite claim is not subject to dismissal for failure to name all interested parties.

United States v. Loyall Fraker, 122 IBLA 24 (Jan. 3, 1992)

MILLSITES--Continued

GENERALLY--Continued

The failure of the owner of a millsite to file an annual notice of intention to hold the millsite is a curable defect and before BLM declares a millsite abandoned and void for failure to make such a filing, it must provide the owner notice and an opportunity to cure the defect.

Where BLM declares a millsite abandoned and void following a failure by the owner of the millsite to respond to a notice of an annual filing deficiency, and later vacates that decision, concluding that the annual filing had been made, it may not subsequently retroactively reinstate the abandoned and void decision. Notice and an opportunity to cure must be given, and, if no filing is made in response thereto, a new decision must be issued. The effective date of abandonment will run from the date of that new decision.

Libra Mining & Mineral Corp., Floyd Robertson, 128 IBLA 84 (Dec. 10, 1993)

DEPENDENT

When the Government has presented evidence that a millsite is not being used or occupied for mining and milling purposes, and the claimant fails to refute that evidence, the millsite does not qualify as a dependent millsite pursuant to 30 U.S.C. § 42 (1988).

United States v. Loyall Fraker, 122 IBLA 24 (Jan. 3, 1992)

DETERMINATION OF VALIDITY

Where a millsite claim is located in conjunction with lode mining claims, an applicant for mineral patent must show that the millsite claim is located on nonmineral land and is used or occupied for mining operations. 30 U.S.C. § 42(a) (1982).

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

MILLSITES--Continued

DETERMINATION OF VALIDITY--Continued

A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude further consideration of the character of the land based on subsequent exploration and development.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

A decision finding a dependent placer millsite valid will be affirmed on appeal when the evidence demonstrates that the millsite was needed by the proprietor of a placer claim for fuel storage, equipment repair, and a sawmill and millsite, and was used or occupied by the proprietor of the claim for mining, milling, processing, beneficiation, or other operations in connection with the placer claim.

United States v. Donald L. & Dorothy E. Clark, 121 IBLA 260 (Nov. 15, 1991)

When the Government has presented evidence that a quartz mill or reduction works is not present on a millsite, and the claimant fails to refute that evidence, the millsite does not qualify as an independent millsite pursuant to 30 U.S.C. § 42 (1988).

When the Government has presented evidence that a millsite is not being used or occupied for mining and milling purposes, and the claimant fails to refute that evidence, the millsite does not qualify as a dependent millsite pursuant to 30 U.S.C. § 42 (1988).

United States v. Loyall Fraker, 122 IBLA 24 (Jan. 3, 1992)

MILLSITES--Continued

INDEPENDENT

When the Government has presented evidence that a quartz mill or reduction works is not present on a millsite, and the claimant fails to refute that evidence, the millsite does not qualify as an independent millsite pursuant to 30 U.S.C. § 42 (1988).

United States v. Loyall Fraker, 122 IBLA 24 (Jan. 3, 1992)

MINERAL LANDS
(See also Mining Claims)

GENERALLY

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

A placer claim larger than 10 acres in size must have a discovery within its boundaries and each 10-acre tract within the claim must be shown to be mineral in character.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

MINERAL LANDS--Continued

DETERMINATION OF CHARACTER OF

A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude further consideration of the character of the land based on subsequent exploration and development.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

"Innocent purchaser for value." The phrase "innocent purchaser for value" appearing in the Transportation Act of 1940 does not refer to a subjective state of mind, but indicates instead the absence of knowledge of mineral character of land sold by a land grant railroad.

Lands may be mineral in character even though there has been no discovery of a valuable mineral on the land itself: external conditions may give mineral character to a tract. In railroad grant lands cases, mineral character is to be determined as of the time when the land was covered by the railroad.

Southern Pacific Transportation Co., Eugene F. Snow, & Lloyd D. Hayes, 118 IBLA 78 (Feb. 27, 1991)

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral

MINERAL LANDS--Continued

DETERMINATION OF CHARACTER OF--Continued

deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

A placer claim larger than 10 acres in size must have a discovery within its boundaries and each 10-acre tract within the claim must be shown to be mineral in character.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

The Secretary may allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska. Land is mineral in character when known conditions at the relevant time are such as to reasonably engender the belief that the land contains mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end.

The Department has held that the critical time for determination of whether the land in a nonmineral entry is mineral in character is the time when equitable title vests. With respect to Native allotments, this occurs when the Department has approved the allotment application after completion of the required period of qualifying use and occupancy.

Where an application for patent is filed by a nonmineral claimant which embraces public lands within the boundaries of mineral claims located under the mining laws, the rights of the mining claimants must be considered prior to any ultimate disposition of the land. In such a context, a hearing is properly ordered upon notice to the competing nonmineral and mining claimants for the purpose of determining the character of the land claimed.

Anne Lynn Purdy, Heirs of Arthur Purdy, Sr., 122 IBLA 209 (Feb. 12, 1992)

MINERAL LANDS--Continued

DETERMINATION OF CHARACTER OF--Continued

Where the United States completes a mineral-in-character report after equitable title has passed to the Native allotment applicant, the determinative date for that report is the date of passage of equitable title, and BLM must establish that the facts in existence at the time equitable title passed required a determination that the land was mineral in character.

Mary Johansen, 122 IBLA 344 (Mar. 11, 1992)

The critical date for determination of the mineral character of public land within a nonmineral land application is the date when equitable title to the land passes to the applicant. This is the point when the applicant has done all that is required to obtain title to the land under the authorizing statute. In the case of a Native allotment application, this ordinarily occurs when the application has been filed, the required period of use and occupancy has been completed, and acceptable proof of use and occupancy has been filed.

Anne Lynn Purdy, Heirs of Arthur Purdy, Sr., 128 IBLA 161 (Jan. 13, 1994)

ENVIRONMENT

BLM properly approves a plan for the drilling of a series of holes for the purpose of identifying the presence and extent of lead mineralization where it has adequately considered the impact of such drilling and associated activity on the environment, and determined that, given certain mitigation measures, any impact will be insignificant. BLM need not consider the impact of full-scale mining where approval of drilling does not commit BLM to approve further mining.

Missouri Coalition for the Environment et al., 124 IBLA 211 (Oct. 23, 1992)

MINERAL LANDS--Continued

LEASES

Gold and silver on public domain lands are generally not subject to mineral leasing, but may be claimed only under the authority of the Mining Act of 1872, subject to the availability of the lands to mineral entry.

William Bade, 112 IBLA 312 (Jan. 10, 1990)

An application for a noncompetitive fringe acreage lease under 43 CFR Subpart 3565 is properly rejected when there is competitive interest in the resource on the part of the holder of another active mining unit in the area.

United States Gypsum Co. (On Reconsideration), 115 IBLA 297 (July 31, 1990)

MINERAL RESERVATION

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

Where patents issued pursuant to the Act of July 17, 1914, as amended, reserve "all oil and gas and all shale or other rock valuable as a source of petroleum," that reservation is properly held to include sodium which occurs as an integral component of the reserved oil shale rock.

Shell Western E&P, Inc., 119 IBLA 125 (Apr. 22, 1991)

MINERAL LANDS--Continued

MINERAL RESERVATION--Continued

In determining the appropriate amount of a bond for the protection of the owner of the surface estate of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. §§ 291-301 (1976), BLM properly considers possible damages from projected mining operations within the entirety of the mining claims sought to be re-entered and occupied, relying on the current value of tangible improvements and of the projected lost grazing use of that land from such operations and subsequent reclamation. However, where BLM improperly discounts the value of future lost grazing use, the Board will recompute that value and set the proper bond amount.

William C. Hayes et ux., 122 IBLA 68 (Jan. 10, 1991)

Where BLM determines, prior to the filing of satisfactory reclamation final proof, that land within a reclamation homestead entry is valuable for oil and gas, the entryman may petition for reclassification of the land as not valuable for oil and gas in accordance with 43 CFR 2093.3(d). If that petition is denied, the entryman is to be offered the opportunity to request a hearing. At such a hearing, the entryman has the burden of showing that the land is not valuable for oil and gas.

Jaye W. & Linda L. Johnson, 124 IBLA 196 (Oct. 20, 1992)

NONMINERAL ENTRIES

Where an application for patent is filed by a nonmineral claimant which embraces public lands within the boundaries of mineral claims located under the mining laws, the rights of the mining claimants must be considered prior to any ultimate disposition of the land. In such a context, a hearing is properly ordered upon notice to the competing nonmineral and mining claimants for the purpose of determining the character of the land claimed.

Anne Lynn Purdy, Heirs of Arthur Purdy, Sr., 122 IBLA 209 (Feb. 12, 1992)

MINERAL LANDS--Continued

PROSPECTING PERMITS

BLM properly approves a plan for the drilling of a series of holes for the purpose of identifying the presence and extent of lead mineralization where it has adequately considered the impact of such drilling and associated activity on the environment, and determined that, given certain mitigation measures, any impact will be insignificant. BLM need not consider the impact of full-scale mining where approval of drilling does not commit BLM to approve further mining.

Missouri Coalition for the Environment et al., 124 IBLA 211 (Oct. 23, 1992)

Lands, including mineral estates, which have never left the ownership of the United States are public domain lands and the patenting of public domain lands, with a reservation of the minerals, to a state pursuant to the Bankhead-Jones Farm Tenant Act of July 22, 1937, as amended, does not transform the retained mineral estate into acquired lands. BLM properly rejects a hardrock minerals prospecting permit for reserved public domain minerals where the regulations governing hardrock mineral leasing do not authorize the leasing of such public domain minerals.

Scott J. Hill, 126 IBLA 16 (Apr. 2, 1993)

The Secretary has discretionary authority to issue mineral prospecting permits when prospecting or exploratory work is necessary to determine the existence of workability of a particular hardrock mineral deposit. It is not appropriate to issue a prospecting permit if there is sufficient data regarding the quality and quantity of a deposit to conclude that only an increase in the price of the commodity would render a deposit workable.

BLM may reject a prospecting permit if further prospecting or exploratory work would not disclose the existence or workability of a deposit of hardrock mineral. A deposit is considered workable when the value of the commodity is greater than the cost of extracting it. A workability determination is made by

MINERAL LANDS--Continued

PROSPECTING PERMITS--Continued

examining only those factors directly related to production of the mineral.

When considering what evidentiary burden should be placed upon BLM in an appeal from a rejection of a prospecting permit application, it is proper to weigh the cost of that burden against the nature of the appellant's interest and the risk that an appellant would be improperly deprived of that interest if the greater burden were not placed on BLM. A prospecting permit applicant holds an expectancy and not an interest in the land and BLM is not required to sustain its workability determinations with the same quantum of evidence needed to sustain a discovery determination under the 1872 Mining Law.

Vanderbilt Gold Corp., 126 IBLA 72 (Apr. 19, 1993)

MINERAL LEASING ACT
(See also Bureau of Land Management, Coal Leases & Permits, Geothermal Leases, Oil & Gas Leases, Phosphate Leases & Permits, Potassium Leases & Permits, Sodium Leases & Permits)

GENERALLY

To establish the discovery of a valuable deposit of sodium, a preference right lease applicant must show the existence of a mineral deposit within the permit area of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. This test is almost identical to the objective standard for determining whether a person locating a claim under the 1872 Mining Law (30 U.S.C. § 21 (1982)) has perfected his claim by the discovery of a valuable mineral. The "marketability test" is also applied to determine if there is a reasonable prospect for developing a "paying mine." This requires a showing of a reasonable prospect that the "valuable mineral" can be extracted, removed, and marketed at a profit.

The "prudent person" and "marketability" tests require a showing that as a present fact (considering historic price and cost factors and assuming those factors will continue) there is a reasonable likelihood that a paying mine can be developed. Actual successful

MINERAL LEASING ACT--Continued

GENERALLY--Continued

exploitation need not be shown, and a preference right lease applicant is not required to show that mineral of sufficient quantity and quality has been exposed to demonstrate that a profitable mining operation can be developed. He need only show, based upon the mineralization exposed and reasonable geologic and market projections, that a person of ordinary prudence would expend further labor and means with the reasonable expectation that a profitable mine will thereby be developed.

If, at any time during mineral exploration, it is deemed prudent to commence development, the initiation of development activities is justified, even though further exploration may be warranted. However, if not enough is known about either the size or quality of the mineralization to justify commencing development, and it would be possible to have a paying mine if the size of the mineralized body or value of the mineral could be increased, further exploration is warranted. A determination that further exploration is warranted is not sufficient to establish the discovery of a valuable deposit of a mineral.

There is a clear distinction between "exploration" and "development" as those terms relate to discovery under the mining laws. The separate stages of mining activity serve as a basis for determining what further mining activity a prudent man would be justified in undertaking. Exploration work is that work which is undertaken to determine whether valuable minerals exist in sufficient quality and quantity that there is a reasonable prospect that a paying mine could be developed. Development work is undertaken only after this determination has been made. A preference right lease applicant must show that a discovery either existed or could reasonably have been anticipated prior to the expiration of the prospecting permits.

When further exploration work would not materially increase the reasonably projected quantity or quality of the sodium deposit, a discovery determination must be based on the showing that there is a reasonable prospect that the deposit can be mined, processed, and marketed at a profit. This determination must be made as of the date the preference right lease applicant fulfilled all the prerequisites for determining entitlement to a preference right lease. Thus evidence concerning subsequent costs and market conditions have relevance only to the extent they reflect what may reasonably have been anticipated at the expiration of

MINERAL LEASING ACT--Continued

GENERALLY--Continued

the prospecting permits. When making a final showing, the applicants must also show that there is a reasonable probability that the mineralization can be mined in a manner which will be in compliance with the proposed lease terms.

When determining whether it can reasonably be expected that a preference right lease applicant would be able to profitably market the leased products, given the costs of mining the deposit and producing the products, it is not necessary to know the exact cost of production or the exact price which might be received. This determination may be based upon a reasonable and rational estimate of the cost of production and a reasonable and rational estimate of the market price for the product.

It is reasonable to expect that during the course of mine development the operator will find it necessary to modify and further refine its mining plan. Thus, it is improper for BLM to reject an application because the data submitted by the preference right lease applicant was not sufficiently specific to form the basis for an assurance that a paying mine could be developed. The probability that there will be modifications does not so negate cost and price estimates so as to make them meaningless because the information concerning the anticipated costs and returns need not be exact. The applicable legal standard does not require an applicant to prove with absolute certainty that a paying mine will result. The applicant need only prove that a prudent person would expend additional labor and means with a reasonable prospect of success in developing a paying mine.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

Readjustment of a potassium lease is an event that occurs at the end of the lease term and may signal new minimum royalty requirements, depending upon regulations in force at the time of readjustment.

A decision to readjust the annual minimum royalty payable for a potassium lease to $3 per acre will be affirmed where the regulation in effect at readjustment provided for a minimum $3 royalty for leases readjusted after the effective date of the regulation. For leases

MINERAL LEASING ACT--Continued

GENERALLY--Continued

readjusted before the effective date of the regulation authorizing the $3 rate however, the royalty was correctly set at $2, as provided by regulations then in effect.

Texasgulf, Inc., 114 IBLA 66 (Apr. 6, 1990)

The intent of the proviso in a modified Federal coal lease that it is issued pursuant and subject to the terms and provisions of the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), and to all regulations of the Secretary of the Interior then in force or subsequently promulgated and to make them "a part hereof," is to incorporate future regulations, even though inconsistent with those in effect at the time of a modification of the lease under the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 203 (1982), and even though to do so creates additional obligations or burdens for the lease.

AMCA Coal Leasing, Inc. (On Reconsideration), 114 IBLA 246 (May 8, 1990)

An appraisal of fair market value for a natural gas compressor site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Where BLM has conducted an appraisal of fair market value of a natural gas compressor site right-of-way by utilizing comparable sales data for other compressor sites, its rental determination based thereon will not be overturned based on allegations that such sales are outdated, where the appraisal made negative adjustments for time and the sales presented by the right-of-way holder as comparable were not sales for compressor sites.

Western Field Production, Inc., 116 IBLA 225 (Oct. 12, 1990)

MINERAL LEASING ACT--Continued

GENERALLY--Continued

Where a mine fire occurs on fee land adjoining a Federal lease, and where the fee land and Federal lease are not part of a logical mining unit, the fire is not a force majeure providing grounds for relief from the terms of the Federal lease. Further, where the lessee fails to prove that the alleged force majeure event was the proximate cause of his nonperformance; that a good faith effort was made to overcome the problem; and that the problem was beyond his reasonable control, he is not entitled to relief.

A Federal coal lease may not be suspended under sec. 7(b) of the MLA, as amended, recognizing force majeure conditions, due to adverse market conditions.

Under sec. 7(b) of the MLA, as amended, a Federal coal lease is subject to two requirements: diligent development and continued operation. The requirement for continued operation may be suspended under that section "where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee," that is, by force majeure conditions. The requirement for diligent development, however, may not be suspended by the existence of force majeure conditions under sec. 7(b).

The only relief available under sec. 7(b) of the MLA, as amended, where force majeure conditions exist is from the lease requirement that "continued operation" be maintained. In order to achieve "continued operation," a lessee must, inter alia, achieve the production of not less than commercial quantities of recoverable coal reserves in each of the first 2 continued operation years "following the achievement of diligent development." Where lessees have not commenced operations on a Federal leasehold, they have not achieved either "diligent development" or "continued operation," so that no relief is available to them under the force majeure provision.

Alfred G. Hoyl, 123 IBLA 169 (June 3, 1992)
99 I.D. 87

MINERAL LEASING ACT--Continued

GENERALLY--Continued

BLM properly rejected sodium prospecting permit applications for lands withdrawn from sodium leasing (except if the Secretary or his delegate should find that development of the sodium would not adversely affect oil shale values) when BLM concluded that additional information from operations on existing leases was needed to determine whether sodium production would significantly damage oil shale resources.

Harry E. McCarthy et al., 128 IBLA 36 (Nov. 16, 1993)

The date of expiration of the permits is the critical date for determination of a discovery on sodium prospecting permits entitling the holder to the issuance of sodium preference right leases. Evidence concerning costs and market conditions after that date have relevance only to the extent they reflect what may have reasonably been anticipated at the expiration of the permits. Yankee Gulch Joint Venture v. BLM, 113 IBLA 106 (1990).

Where the Board has held that a hearing is required before an ALJ to determine whether a valuable deposit of sodium has been shown by a prospecting permittee applying for a preference right lease, evidence of the quantity and quality of the deposit is admissible to the extent it tends to show whether the deposit can be mined, processed, and marketed at a profit. A prior stipulation by BLM as to the sufficiency of the initial showing as to quantity and quality will not preclude evidence on the quantity and quality of the deposit of sodium.

The text for determining whether a permittee has discovered a valuable deposit of sodium justifying issuance of a preference right lease is similar to the test for determining whether the locator of a mining claim under the 1872 Mining Law, 30 U.S.C. § 21 (1988), has discovered a valuable mineral deposit, i.e., whether the mineral deposit found within the limits of the claim is of such quantity and quality that a prudent person would be justified in the further expenditure of his labor and funds with a reasonable prospect of success in developing a paying mine. This standard has been further refined to include a showing of marketability, a

MINERAL LEASING ACT--Continued

GENERALLY--Continued

reasonable expectation that the mineral can be extracted, processed, and marketed at a profit.

Bureau of Land Management v. Eugene Simons, 128 IBLA 99 (Dec. 20, 1993)

A BLM decision denying as untimely a protest of the approval of a phosphate prospecting permit application without any no-surface occupancy stipulations will be affirmed where approval occurred by decision 3 years prior to the filing of the protest, the appellant had knowledge of the approval, and the appellant did not appeal the earlier approval.

Chevron Chemical Co., F.S. Industries, Ltd., 131 IBLA 132 (Oct. 25, 1994)

BONDS

The automatic stay of the Bankruptcy Code invoked upon the filing of a petition in bankruptcy applies to the commencement or continuation of administrative or judicial proceedings against the debtor or the debtor's assets. As a general rule, the stay does not bar proceedings against a guarantor or surety on a coal lease bond securing the debtor's obligations under the lease. Hence, a motion on reconsideration to vacate the decision of the Board adjudicating the royalty due on a coal lease on the ground that the lessee came within the jurisdiction of the bankruptcy court prior to issuance of the Board's decision is properly denied where the decision is being relied upon to support a claim against the third party surety and not against the debtor/lessee.

Lone Star Steel Co. (On Reconsideration), 124 IBLA 144 (Sept. 30, 1992)

MINERAL LEASING ACT--Continued

CITIZENSHIP

The automatic stay of the Bankruptcy Code invoked upon the filing of a petition in bankruptcy applies to the commencement or continuation of administrative or judicial proceedings against the debtor or the debtor's assets. As a general rule, the stay does not bar proceedings against a guarantor or surety on a coal lease bond securing the debtor's obligations under the lease. Hence, a motion on reconsideration to vacate the decision of the Board adjudicating the royalty due on a coal lease on the ground that the lessee came within the jurisdiction of the bankruptcy court prior to issuance of the Board's decision is properly denied where the decision is being relied upon to support a claim against the third party surety and not against the debtor/lessee.

Lone Star Steel Co. (On Reconsideration), 124 IBLA 144 (Sept. 30, 1992)

CIVIL PENALTIES

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

ENVIRONMENT

A suspension granted under sec. 39 of the MLA, as amended, "in the interest of conservation" suspends the requirement of sec. 7(a) and (b) of the MLA, as amended, requiring diligent development within 10 years of the date of issuance of the coal lease.

Sec. 39 of the MLA, as amended, provides for suspension of a Federal coal lease either (1) as a matter of right where, through some act, omission, or delay by a Federal agency, beneficial enjoyment of a lease has been precluded, such as where delays imposed upon the lessee due to administrative actions addressing environmental concerns have the effect of denying lessee's operator "timely access" to the property; or (2) as a matter of discretion, in the interest of conservation, e.g., to prevent damage to the environment. Where there

MINERAL LEASING ACT--Continued

ENVIRONMENT--Continued

is no persuasive evidence either of undue delay imposed by administrative actions addressing environmental concerns or of environmental harm, an application for suspension under sec. 39 is properly denied. The fact that a substantial investment of funds was made in three Federal leases does not create any cognizable right to retain the leases indefinitely. To the contrary, in the FCLA Act, Congress required timely development of the leases on pain of termination.

Alfred G. Hoyl, 123 IBLA 169 (June 3, 1992)
99 I.D. 87

A decision approving a right-of-way for an oil and gas pipeline on public lands on the basis of an EA finding no significant impact which is tiered to a programmatic EIS for oil and gas leasing in the area will be affirmed where BLM has considered the cumulative impact of the right-of-way and the foreseeable oil and gas development to be served thereby and the record provides a reasonable basis for the conclusion that there will be no significant impacts other than those addressed in the EIS.

Southern Utah Wilderness Alliance, 127 IBLA 282 (Oct. 7, 1993)

GYPSUM LEASES AND PERMITS

Workability

In making a determination that lands were subject to leasing rather than prospecting under permit, BLM properly relied upon the opinions of its expert staff using available data to find the lands contained a workable deposit of gypsum.

United States Gypsum Co., 121 IBLA 174 (Oct. 31, 1991)

MINERAL LEASING ACT--Continued

RENTALS

Under 30 U.S.C. § 209 (1988), BLM is authorized to reduce the royalty rate and waiver rentals for a coal lease for the purpose of encouraging the greatest ultimate recovery of Federal coal and in the interest of conservation of natural resources, if it determines either that such relief is necessary to promote development, or the Federal lease cannot be operated successfully under its existing terms. A BLM decision denying a royalty rate reduction and waiver of rentals may be set aside and remanded where that decision is based on BLM guidelines that do not address the unique circumstances of a not-for-profit, captive mine, which sells its entire production at cost to one of its owners, a not-for-profit electric generation and transmission cooperative, and which is an integral part of a rural electric power project financed by loans guaranteed by the Rural Electrification Administration, and on appeal, the Board of Land Appeals determines that such circumstances are appropriate for consideration.

Western Fuels-Utah, Inc., 119 IBLA 231 (May 14, 1991)

A Federal coal lessee's obligation to pay rental may be suspended under sec. 39 of the MLA, as amended, as interpreted by Departmental regulation 43 CFR 3485.2(c), if he submits detailed supporting information, including (among other things) facts indicating whether the mine can be successfully operated under the existing lease terms. A request for suspension that does not comply with that regulation is properly rejected.

Alfred G. Hoyl, 123 IBLA 169 (June 3, 1992)
99 I.D. 87

ROYALTIES

Where, in accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), the Board has remanded a case to BLM for a determination of the proper royalty to be applied to coal recovered by underground mining operations on a Federal coal lease, and BLM's decision and the accompanying case record fail to disclose a rational basis for BLM's conclusion that conditions do not warrant a royalty rate lower than 8 percent, the decision will be set aside and the

MINERAL LEASING ACT--Continued

ROYALTIES--Continued

case remanded for a new determination and inclusion of BLM's analysis in the record.

Kanawha & Hocking Coal & Coke Co., 112 IBLA 365 (Jan. 19, 1990)

Ordinarily royalty is computed on the value of the gas removed or sold from the lease. Where gas must be transported from the field to the point of first sale, the deduction of reasonable transportation costs is allowed. The Secretary of the Interior's authority to determine the value of production upon which royalty payments are made extends to determining the factors used in computing transportation allowances for royalty purposes.

Operating leases are a proper component of a transportation allowance for a CO2 pipeline which is required to transport production to market. A decision limiting operating costs to 10 percent of undepreciated investment when calculating the relevant transportation allowance may be set aside and remanded where the effect is to eliminate a substantial percentage of operating costs and no rational basis for such a limitation is given in the decision or contained in the record.

The allowance of a reasonable rate of return on depreciated assets has been upheld in computing a transportation allowance for production for which there is no market in the field or at the wellhead. Application of a rate of return based on the prime interest rate at the time of the initial period for which the transportation allowance is calculated will be upheld as reasonable.

Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164 (June 28, 1990)

Effective Feb. 26, 1990, 43 CFR 3473.3-2 requires payment of a royalty of 8 percent of the value of coal removed from an underground mine for all new leases issued under the Mineral Leasing Act of 1920 and for all previously issued leases at the time of the next scheduled readjustment of the lease.

Utah Power & Light Co., 115 IBLA 366 (Aug. 15, 1990)

MINERAL LEASING ACT--Continued

ROYALTIES--Continued

The Minerals Management Service has been delegated the royalty management functions of the Secretary including the authority to audit a lessee's records to determine royalty liability.

The authority of the Minerals Management Service to conduct an audit of a coal lessee's records to determine royalty liability is properly distinguished from the authority of the Minerals Management Service under 30 CFR 217.200 to require a lessee to retain an independent certified public accountant to conduct a self-audit.

A royalty valuation decision will be affirmed on appeal where the record establishes a reasonable basis for the valuation using one or more of the factors enumerated in the regulation. The fact that another regulatory factor was not used as a basis for valuation will not justify a remand of the case in the absence of a showing that the failure to use that factor was arbitrary and capricious.

Lone Star Steel Co., 117 IBLA 96 (Dec. 3, 1990)

The discretionary authority conferred by 30 U.S.C. § 209 (1988), enables BLM to exercise prudent business judgment in considering whether to grant or deny an application for royalty reduction. Where BLM grants such a reduction "for the purpose of encouraging the greatest ultimate recovery of * * * oil, * * * and in the interest of conservation of natural resources," and where in its judgment "it is necessary to do so in order to promote development," BLM's determination will not be disturbed on appeal where it is amply supported by the facts of record and appellant has failed to show that the determination was either arbitrary, capricious, or an abuse of discretion.

State of Wyoming, 117 IBLA 316 (Jan. 24, 1991)

MINERAL LEASING ACT--Continued

ROYALTIES--Continued

Where, in accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), the Board has remanded a case to BLM for a determination of the proper royalty to be applied on coal recovered by underground mining operations from a Federal coal lease, and where BLM's subsequent decision and the accompanying case record fail to disclose a rational basis for its conclusion that conditions do not warrant a royalty rate lower than 8 percent, the decision will be set aside.

BLM should provide the lessee the opportunity to submit data concerning whether conditions warrant a royalty rate of less than 8 percent for coal recovered by underground mining operations on a Federal coal lease, prior to making such determination.

Kanawha & Hocking Coal & Coke Co., 118 IBLA 364 (Mar. 14, 1991)

Under 30 U.S.C. § 209 (1988), BLM is authorized to reduce the royalty rate and waiver rentals for a coal lease for the purpose of encouraging the greatest ultimate recovery of Federal coal and in the interest of conservation of natural resources, if it determines either that such relief is necessary to promote development, or the Federal lease cannot be operated successfully under its existing terms. A BLM decision denying a royalty rate reduction and waiver of rentals may be set aside and remanded where that decision is based on BLM guidelines that do not address the unique circumstances of a not-for-profit, captive mine, which sells its entire production at cost to one of its owners, a not-for-profit electric generation and transmission cooperative, and which is an integral part of a rural electric power project financed by loans guaranteed by the Rural Electrification Administration, and on appeal, the Board of Land Appeals determines that such circumstances are appropriate for consideration.

Western Fuels-Utah, Inc., 119 IBLA 231 (May 14, 1991)

MINERAL LEASING ACT--Continued

ROYALTIES--Continued

A coal lessee seeking reduction of the royalty rate on production from 12-1/2 percent to 8 percent must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms. Rejection of such an application may be affirmed where the record supports a finding that a royalty reduction is not necessary to encourage the greatest ultimate recovery of the Federally leased coal in that the bypass of any such coal in favor of privately leased coal would be merely temporary.

Western Energy Co., 119 IBLA 359 (June 21, 1991)

A decision on lease readjustment pursuant to 30 U.S.C. § 207(a) (1988), and the implementing regulation at 43 CFR 3473.3-2(a)(3) (1987), setting the royalty rate for coal mined by underground operations at 8 percent and declining to reduce it to 5 percent on the basis of lack of evidence of adverse geologic or engineering conditions which would justify a lower rate over the entire term of the lease will be affirmed where supported by the record. A distinction between long-term geologic and engineering conditions likely to continue for the term of the lease, on the one hand, and shorter-term economic conditions which may be addressed in the context of a petition for reduction in royalty under 30 U.S.C. § 209 (1988), on the other hand, will be upheld as a reasonable interpretation of the statute and regulations governing readjustment of the royalty rates for coal leases.

Atlantic Richfield Co., et al., 121 IBLA 373 (Dec. 19, 1991) 98 I.D. 429

Where royalty payments due on Federal oil and gas leases are not received by the Department on the date that such payments are due, or are less than the amount due, the Department is required by statute to charge interest on such late payments or underpayments. The MLA provides that interest charges collected on late payments under FOGRMA shall be paid into the Treasury of the United States, and that 50 percent thereof shall be paid by the Secretary of the Treasury to the State within the boundaries of which the leased land or deposits are located. The statute clearly contemplates

MINERAL LEASING ACT--Continued

ROYALTIES--Continued

that the lessee must pay all royalties, including those that will ultimately be paid to the State, into the U.S. Treasury. The Board of Land Appeals is bound to follow such statute and is not at liberty to consider whether interest may be forgiven based upon equitable considerations.

Wexpro Co., 122 IBLA 1 (Dec. 26, 1991)

It is proper for MMS to assess the full amount of the minimum royalty in lieu of production from a potassium lease for the calendar year in which the lease relinquishment was filed, without pro-rata reduction.

Earth Sciences, Inc., 123 IBLA 369 (July 23, 1992)

Under the pre-1989 regulations governing valuation of coal for royalty purposes, one of the factors to be considered in valuing coal sold under a non-arm's-length contract is the price reported to FERC.

Valuation of coal disposed of under a non-arm's-length contract at the higher of a price determined in a fair market value study or the cost of coal reported to FERC by the consuming utility will be affirmed.

Inclusion in the royalty valuation of coal disposed of under a non-arm's-length contract of that part of the cost of coal reported to FERC which consists of the cost (interest and amortization of principal) to repay a loan secured for development of the mine is proper. The fact that the payments included by the utility in the cost of coal reported to FERC are repaid by the lessee to the utility which extended the loan for development of the mine does not alter this result.

Under coal royalty valuation regulations effective Mar. 1, 1989, the value of coal disposed of under a non-arm's-length contract shall not be less than the gross proceeds accruing to the lessee less relevant allowances. Prices reported to the Energy Information Administration, Dept. of Energy, by lessee's affiliated coal purchaser, an electric utility, are an appropriate measure of gross proceeds.

Under the pre-1989 regulations, a transportation allowance is authorized when coal is valued for royalty

MINERAL LEASING ACT--Continued

ROYALTIES--Continued

purposes at a market point remote from the lease where the production is obtained. Costs of storing and loading the coal are costs of mining and are not allowed as a deduction. Where coal storage and loadout facilities are located offlease because the terrain precludes location on the leasehold, a decision denying a transportation allowance for an overload conveyor extending 1.2 miles from the lease to the loadout facilities will be affirmed.

Under the coal royalty valuation regulations effective Mar. 1, 1989, a transportation allowance is authorized for the "reasonable, actual costs incurred by the lessee" for moving coal to a point of sale or delivery remote from the mine and the lease. Movement of coal from the mine portal to storage facilities and loadout facilities of the mine situated offlease because of the terrain on the leasehold is considered part of the mining operation for which a transportation allowance is properly denied.

Under the pre-1989 royalty valuation regulations for coal, allowances for washing and transportation of coal are properly limited to certain costs of preparation/transportation of the coal which enhance the value of the coal prior to sale. A decision to deny washing and transportation allowances for payments made to local governmental entities pursuant to a socioeconomic impact mitigation agreement will be affirmed.

Under the coal royalty valuation regulations effective Mar. 1, 1989, transportation allowances are limited to lessee's actual costs for transportation and washing, including operating and maintenance expenses, overhead, and depreciation and a return on undepreciated investment. Socioeconomic impact payments to local government entities do not qualify as directly allocable and attributable operating expenses and, hence, are not an allowable expense.

Western Fuels-Utah, Inc., 130 IBLA 18 (July 8, 1994)

MINERAL LEASING ACT FOR ACQUIRED LANDS

GENERALLY

When a permittee fails to reclaim the land after expiration of the prospecting permit, BLM may undertake reclamation activities and seek reimbursement from the bond required by the regulations found at 43 CFR Part 3500, which is conditioned upon compliance with all terms and conditions of the prospecting permit.

Gerald Dee Foster, 115 IBLA 233 (July 12, 1990)

Filing a noncompetitive oil and gas lease offer when the lands are available for leasing does not establish a legal or equitable right to a lease if the land subsequently become unavailable for leasing by operation of law. Congress mandated that lands within the Ouachita National Forest be offered for competitive leasing even though valid noncompetitive lease offers may be outstanding. If lands were offered at a competitive sale and a bid in excess of the national minimum acceptable bid was received from a responsible qualified bidder then the pending noncompetitive offer to lease that tract was properly rejected.

William E. Dent, Jr., 122 IBLA 152 (Feb. 4, 1992)

Under sec. 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1988), the Secretary of the Interior lacks authority to issue an oil and gas lease over the objection of the agency having jurisdiction of the acquired land.

Blue Ridge Oil & Gas Exploration, Inc., 127 IBLA 279 (Oct. 5, 1993)

MINERALS EXPLORATION

Oil and gas geophysical exploration on public lands, the surface of which is administered by BLM, requires BLM approval.

When a protest against a notice of intent to conduct geophysical operations has been filed or an appeal has been filed from a decision to allow such operations, BLM is obliged to inform the party filing the notice of

MINERALS EXPLORATION--Continued

intent that the notice cannot be processed until the protest and any appeal therefrom has been resolved.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concerns have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

While Congress has prohibited the Secretary from issuing mineral leases for lands within a wilderness study area under 30 U.S.C. § 226-3(a) (Supp. V 1987), Congress also provided that nothing in this section shall affect any authority of the Secretary to issue permits for exploration by means not requiring construction of roads or improvement of existing roads if such activity is conducted in a manner compatible with the preservation of the wilderness environment. 30 U.S.C. § 226-3(b) (Supp. V 1987).

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

BLM properly approves a plan for the drilling of a series of holes for the purpose of identifying the presence and extent of lead mineralization where it has adequately considered the impact of such drilling and associated activity on the environment, and determined that, given certain mitigation measures, any impact will be insignificant. BLM need not consider the impact of full-scale mining where approval of drilling does not commit BLM to approve further mining.

Missouri Coalition for the Environment et al., 124 IBLA 211 (Oct. 23, 1992)

MINERALS MANAGEMENT SERVICE

GENERALLY

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within 10 business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

The Conservation Division Manual is an administrative manual which governed the internal operations of the Conservation Division, Geological Survey. It does not have the force of law and its provisions are guidelines rather than rules which are binding on the Board of Land Appeals. Review is not limited to determining whether its provisions were correctly applied and the Board may consider whether application of the provisions is arbitrary, capricious, an abuse of discretion, or contrary to law.

Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164 (June 28, 1990)

An MMS decision denying a transportation allowance is properly affirmed to the extent that the allowance deducts line losses attributed to the transportation of royalty natural gas from the wellhead of an Outer Continental Shelf oil and gas lease to an offshore delivery point.

A transportation allowance deducting a percentage for "gas consumed" may be allowable as a deduction for "lease-use" gas. Where the record is insufficient to determine whether circumstances warrant a "lease-use" gas deduction, a decision by MMS summarily denying the allowance will be set aside and the case remanded to

MINERALS MANAGEMENT SERVICE--Continued

GENERALLY--Continued

MMS for consideration of the extent to which the transportation allowance represents "lease-use" gas.

Arco Oil & Gas Co., 115 IBLA 393 (Aug. 21, 1990)

Where natural gas produced from a Federal lease is sold under an arrangement where the buyer pays the maximum lawful price allowed under the Natural Gas Policy Act of 1978 and also reimburses the producer for severance taxes it paid to the State of Montana, both the maximum Natural Gas Policy Act price and the severance tax reimbursement together constitute "gross proceeds" received for the gas from the lease. The Minerals Management Service properly includes such severance tax reimbursements when computing the value of gas for royalty purposes.

Miami Oil Producers, Inc., 116 IBLA 345 (Oct. 30, 1990)

The interpretation announced by MMS in its Procedure Paper concerning valuation of NGLP did not constitute a sudden change in policy such that its application violated appellant's due process rights and was arbitrary and capricious.

When MMS adopts an agency-wide interpretation that is reasonable and consistent with the law, the Board will affirm application of that interpretation. MMS' Procedure Paper concerning valuation of NGLP comports with 30 CFR 206.150 (1985), and MMS' reliance on it does not render its actions arbitrary and capricious.

Where the Department's regulations gave fair notice that royalty was due on NGLP, and in the absence of any well-established practice at odds with that announced in a Procedure Paper concerning valuation of NGLP at the time a party paid the royalties on NGLP, there is no bar to retroactive application of the Procedure Paper.

Where a party fails to provide an offer of proof regarding arm's-length contracts for NGLP in effect during the period at issue comparing its contract with the characteristics of arm's-length contracts, the yardstick price is properly applied in lieu of the non-arm's-length contract price. The contract price, even if applied, is subject to correction to remove impermissible

MINERALS MANAGEMENT SERVICE--Continued

GENERALLY--Continued

deductions for manufacturing costs and location differential.

In valuing NGLP for royalty computation purposes, where the NGLP was sold under a non-arm's-length contract not shown to be comparable to arm's-length contracts that represent market value, MMS may properly use published spot market prices to establish value. However, the Board will set aside an MMS decision instructing a lessee (where the reported price falls below the lowest spot market price) to use the average spot market price instead of the lowest spot market price.

Phillips Petroleum Co., 117 IBLA 255 (Jan. 10, 1991)

MINING CLAIMS
(See also Hearings, Millsites, Mineral Lands, Multiple Mineral Development Act, Surface Resources Act)

GENERALLY

To be entitled to a deferment from the requirement to perform annual assessment work on mining claims, a petitioner must show that he was prevented from performance of the work by denial of access to the claims for the purpose of doing such work. Failure to show that one of the impediments to such performance listed by 30 U.S.C. § 28b (1982), prevented access to the mining claims requires rejection of a deferment application.

Wheaton E. Blanchard, 112 IBLA 261 (Jan. 4, 1990)

When an exposure of locatable mineral in place has been shown to exist within the boundaries of each mining claim, a group of contiguous mining claims can be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a mine. The concept of developing a "mine" can

MINING CLAIMS--Continued

GENERALLY--Continued

reasonably contemplate operations on a series of contiguous claims.

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

A patent may be issued to a corporation organized under the laws of the United States or any state or territory irrespective of the ownership of the stock of the corporation by persons, corporations, or associations who are not citizens of the United States.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

To be entitled to a deferment from the requirement to perform annual assessment work on mining claims, a petitioner must comply with 43 CFR Subpart 3852. Failure to conform to requirements established by 43 CFR 3852.2, that a petition for deferment be filed with the state official where mining claim locations are required to be filed, state the requested term of deferment, be accompanied by a $25 filing fee, and describe in detail the reasons why the deferment is sought, subjects a petition to denial.

Sunrise Mining & Exploration Co., 117 IBLA 377 (Feb. 12, 1991)

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in U.S. v. Georgia-Pacific, 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct. The existence of a crucial misstatement of material fact upon which another party relied to its asserted detriment is a prerequisite to the invocation of estoppel.

United States v. Willie White et al., 118 IBLA 266 (Mar. 12, 1991) 98 I.D. 129

MINING CLAIMS--Continued

GENERALLY--Continued

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

When a mining claimant failed to show that the United States Forest Service denied him access to perform annual assessment work, his petition for deferment was properly denied. To be entitled to a deferment from the requirement to perform annual assessment work on mining claims, he was required to show that a legal impediment prevented performance of the work by denying access to the claims. 30 U.S.C. § 28(b) (1988).

Michael Greninger, 119 IBLA 383 (July 3, 1991)

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so

MINING CLAIMS--Continued

GENERALLY--Continued

by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented the claimant must present sufficient evidence to overcome the Government's case by a preponderence of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a minor distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

Under 30 U.S.C. § 35 (1988), no placer claim shall include more than 20 acres for each individual claimant. However, claimants may locate a claim of up to 160 acres in size. In order to hold a 160-acre claim the association must have no fewer than eight members. A corporation is considered to be an individual claimant within the meaning of the law, and, as an individual claimant, a corporation cannot locate a mining claim containing more than 20 acres. If a validly located 160-acre association placer claim has been perfected and contains a valid discovery on the date of conveyance to a corporate entity, all 160 acres can be conveyed. If, on the other hand, there was no discovery on the claim on the date of conveyance, the claim was not valid on that date, and a subsequent discovery by the corporation would only validate a 20-acre claim.

On appeal, the Forest Service urges a finding that too much weight was given to claimant's evidence. It does not, however, allege that there is any contrary evidence or tender any proof that it possesses evidence which would lead to a different result if another hearing were held. If an appellant seeks another hearing it must tender sufficient evidence indicating a discovery (or lack thereof) to convince this Board that such a

further hearing is warranted. Without such offer, no hearing will be ordered.

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

A placer claim larger than 10 acres in size must have a discovery within its boundaries and each 10-acre tract within the claim must be shown to be mineral in character.

In a contest not involving a patent application, when the Government raises an issue not set out in the complaint during the hearing or in its posthearing brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the doctrine of res judicata, that issue should be addressed if an adverse ruling on the issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use

of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be valid in an earlier contest is not dispositive of a mining claim contest.

The unrebutted evidence in a mining claim contest involving a claim subject to a patent application is that, as of the date of the hearing, there had been only one shipment of the mined product under an oral purchase and sales agreement. Being an oral contract, it was terminable at will, and a single shipment may have represented an isolated sale rather than the potential for continued sales of the mine product. Thus, the evidence was not sufficient to support a conclusion that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

Until patent has issued, the rights of the mining claimant are limited by the statutes and regulations under which those rights are acquired and maintained. The title to the lands subject to unpatented mining claims remains in the United States. As the title owner, the United States may regulate mining activities in national forests in order to protect the surface resources. Therefore, the motivation of the managing Government agency in initiating a contest against a mining claim is irrelevant.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

MINING CLAIMS--Continued

GENERALLY--Continued

In accordance with 43 CFR 3852.2(a), a petition for deferment of assessment work must be signed by at least one of the owners of each claim involved. Where BLM records do not show the petitioners as the owners of the claims, BLM may not approve a petition for deferment of assessment work even though the petitioners claim to be the owners of the mining claims. Jurisdiction over disputes between rival mining claimants is reserved to the courts.

A petition for the deferment of assessment work may only be granted pursuant to 30 U.S.C. § 28b (1988), where "legal impediments" exist which affect the right of the mining claimant to enter upon the land or gain access to the boundaries thereof. Pending litigation to establish ownership of mining claims is not, in itself, such a legal impediment to access.

Beryl J. & Beatrice M. Strong, 121 IBLA 309 (Dec. 3, 1991)

A notice that there was noncompliance with a mining plan of operations is affirmed where the record establishes that construction materials were stored contrary to a provision of the plan that prohibited outside storage.

An appeal from an order establishing a reclamation bond for a mining operation becomes moot if, during appeal, the plan expires or is modified.

Jim D. Wills, Reggie N. Wills, 123 IBLA 74 (May 11, 1992)

A miner claiming entitlement to exemption from payment of rental fees required by the Act of Oct. 5, 1992, for a group of 13 mining claims because access to the claims in order to perform assessment work had allegedly been denied was not entitled to exemption from such payment when the record showed he was not a small miner as that term is defined by regulations implementing the Act.

Clay Worst, 128 IBLA 165 (Jan. 21, 1994)

MINING CLAIMS--Continued

ABANDONMENT

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Howard G. Willison, 114 IBLA 323 (May 22, 1990)

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim located on or after Oct. 21, 1976, is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office on or before Dec. 30 of each year following the calendar year of location of the claim. Failure to file one of the instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

James R. Tucker, 116 IBLA 222 (Oct. 4, 1990)

MINING CLAIMS--Continued

ABANDONMENT--Continued

Under 43 U.S.C. § 1744 (1988), an owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the claim. An unpatented mining claim is not exempt from the filing requirement when the estate of the owner is in probate.

Estate of Steve Pederson, 118 IBLA 210 (Mar. 7, 1991)

An affidavit of labor was timely received by BLM pursuant to 43 CFR 3833.0-5(m) when it was received before Jan. 19, after it had been sent to BLM in an envelope postmarked prior to Dec. 31 of the preceding year.

Joe H. Vozza, 121 IBLA 370 (Dec. 19, 1991)

Failure to file in the proper BLM office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1988), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim.

Silver King Mining Co., 122 IBLA 357 (Mar. 19, 1992)

Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual payment of the claim rental fee as required by the Act shall conclusively constitute an abandonment of the unpatented mining claim, millsite, or tunnel site by the claimant. In the absence of a small miner exemption, an unpatented mining claim is deemed abandoned and void when there is no evidence of timely payment of the claim rental fee.

The Department is without authority to excuse lack of compliance with the rental fee requirement of the

MINING CLAIMS--Continued

ABANDONMENT--Continued

Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), to extend the time for compliance, or to afford any relief from the consequences provided in that Act. Congress did not provide for a waiver of the requirement that for each unpatented mining claim, millsite, or tunnel site on Federally owned lands, each claimant shall, except as provided by the Act, pay a claim rental fee on or before Aug. 31, 1993.

Lee H. & Goldie E. Rice, 128 IBLA 137 (Jan. 7, 1994)

Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Act), P.L. 102-381, 106 Stat. 1378-79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual payment of the claim rental fee as required by the Act shall conclusively constitute an abandonment of the unpatented mining claim, millsite, or tunnel site by the claimant. Excepting only the small miner exemption, there is no basis for BLM to grant a request for exemption from the rental fee requirements of that Act. Where a mining claimant fails to qualify for a small miner exemption from the rental fee requirement, failure to pay the fee in accordance with the Act and regulations results in a conclusive presumption of abandonment.

William B. Wray, 129 IBLA 173 (Apr. 22, 1994)

In the Department of the Interior and Related Agencies Appropriations Act for FY 1993, Congress mandated that failure to make the annual payment of claim rental fees as required by the Act shall conclusively constitute an abandonment of unpatented mining claims, mill, or tunnel sites. Where a mining claimant tenders payment of the fees via a check that is later dishonored by her bank, the effect is the same as if the rental fees are not paid. The claims are properly declared abandoned and void if the mining claimant did not apply for a small miner exemption from the rental fees requirement.

Elinor D. O'Rourke, 130 IBLA 87 (July 29, 1994)

MINING CLAIMS--Continued

ABANDONMENT--Continued

A claimant seeking a small miner exemption must timely file a certified statement including the information required by 43 CFR 3833.1-7(d). Where a timely certified statement is filed, but there is an unintentional failure to file all of the information required by that regulation, BLM is required to notify the claimant of the deficiency and provide 30 days from receipt of the notice within which to file the requested information. Failure to file the information within the time allowed results in a conclusive presumption of abandonment of the mining claims, millsites, or tunnel sites.

William C. Harrison, 130 IBLA 225 (Aug. 5, 1994)

The Department is without authority to excuse lack of compliance with the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), to extend the time for compliance, or to afford any relief from the consequences provided in that Act. Failure to pay the claim rental fee on or before Aug. 31, 1993, shall conclusively constitute an abandonment of the unpatented mining claim by the claimant.

As the mining claim rental fee required by Congress under the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), is in lieu of the statutory requirements to annually perform assessment work and to annually file with the Department, a claimant of an unpatented mining claim who has filed an application for a mineral patent is not excused from complying with the rental fee requirement unless a final certificate has been issued. The pendency of a mining contest against the claim does not excuse a claimant's lack of compliance.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties (On Recon.), Cyrus L. Colburn, Jr., 130 IBLA 314 (Sept. 8, 1994)

MINING CLAIMS--Continued

ABANDONMENT--Continued

A decision declaring an unpatented mining claim abandoned and void for failure to file the annual rental fee as required by statute will be upheld notwithstanding claimant's lack of actual advance knowledge of the requirement. When the statute has been published, implementing regulations have been published, and notices have been published in newspapers of general circulation, the decision will be sustained even though the BLM has not provided claimant with personal advance notice of the requirement by certified mail.

Dee W. Alexander Estate et al., 131 IBLA 39 (Oct. 12, 1994)

Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1374, 1378-79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual payment of the claim rental fee as required by the Act shall conclusively constitute an abandonment of the unpatented mining claim, millsite, or tunnel site. Failure to pay the fee in accordance with the Act and implementing regulations results in a conclusive presumption of abandonment. Neither the claimant's lack of actual knowledge of the statutory requirement to pay rental fees nor BLM's failure to advise the claimant of that statutory requirement excuses the claimant's lack of compliance with the rental fee requirement since all persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Lester W. Pullen, 131 IBLA 271 (Nov. 23, 1994)

ASSESSMENT WORK

To be entitled to a deferment from the requirement to perform annual assessment work on mining claims, a petitioner must show that he was prevented from performance of the work by denial of access to the claims for the purpose of doing such work. Failure to show that one of the impediments to such performance listed by

MINING CLAIMS--Continued

ASSESSMENT WORK--Continued

30 U.S.C. § 28b (1982), prevented access to the mining claims requires rejection of a deferment application.

Wheaton E. Blanchard, 112 IBLA 261 (Jan. 4, 1990)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

James L. Gleave, 112 IBLA 281 (Jan. 5, 1990)

When a single mining claim has been recorded with BLM pursuant to 43 U.S.C. § 1744 (1982), on two occasions and given two mining recordation serial numbers, the files should be merged and one of the serial numbers canceled. If between the two serial numbers all requisite filings have been made, the claim should not be deemed abandoned pursuant to 43 U.S.C. § 1744(c) (1982).

The BLM manual requires the issuance of a receipt for affidavit of assessment work. Thus, where BLM date stamps and returns a cover letter which lists the affidavits of assessment submitted for filing without noting thereon or in the case file that any of the documents referred to in the letter were not enclosed, it is presumed that the return of the cover letter was intended to acknowledge receipt of all the documents listed therein.

International Metals & Energy, 114 IBLA 221 (Apr. 25, 1990)

MINING CLAIMS--Continued

ASSESSMENT WORK--Continued

A petition for the deferment of assessment work may only be granted pursuant to 30 U.S.C. § 28b (1982), where "legal impediments" exist which affect the right of the mining claimant to enter upon the land or gain access to the boundaries thereof. A court injunction which precludes a claimant from any mining activities in a wilderness area without the approval of the Forest Service does not constitute a legal impediment, even if it were applicable to the claims for which deferment were sought, since such an order is not a legal impediment to entry upon the claims; rather, it imposes a condition precedent to undertaking mining activities.

Under 30 U.S.C. § 28b (1982), the annual assessment work requirement imposed by 30 U.S.C. § 28 (1982), may be deferred by the Secretary of the Interior as to any mining claim or group of claims upon the necessary showing being made. The deferment statute is inapplicable to tunnel sites because they are not mining claims and because no annual assessment work for tunnel sites is dictated by 30 U.S.C. § 28 (1982).

David Doremus, 115 IBLA 336 (Aug. 9, 1990)

To be entitled to a deferment from the requirement to perform annual assessment work on mining claims, a petitioner must comply with 43 CFR Subpart 3852. Failure to conform to requirements established by 43 CFR 3852.2, that a petition for deferment be filed with the state official where mining claim locations are required to be filed, state the requested term of deferment, be accompanied by a $25 filing fee, and describe in detail the reasons why the deferment is sought, subjects a petition to denial.

Sunrise Mining & Exploration Co., 117 IBLA 377 (Feb. 12, 1991)

When a mining claimant failed to show that the United States Forest Service denied him access to perform annual assessment work, his petition for deferment was properly denied. To be entitled to a deferment from the requirement to perform annual assessment work on mining claims, he was required to show that a legal

MINING CLAIMS--Continued

ASSESSMENT WORK--Continued

impediment prevented performance of the work by denying access to the claims. 30 U.S.C. § 28(b) (1988).

Michael Greninger, 119 IBLA 383 (July 3, 1991)

BLM properly denies a petition for deferment of performance of annual assessment work where closure by the Forest Service of an area of a national forest due to a fire did not preclude access to the affected mining claims for the purpose of performing assessment work because the closure was not applicable to persons with permits and there was no evidence in the record that appellant sought a permit from the Forest Service and was denied one.

Horace S. Wilson, 120 IBLA 395 (Oct. 3, 1991)

In accordance with 43 CFR 3852.2(a), a petition for deferment of assessment work must be signed by at least one of the owners of each claim involved. Where BLM records do not show the petitioners as the owners of the claims, BLM may not approve a petition for deferment of assessment work even though the petitioners claim to be the owners of the mining claims. Jurisdiction over disputes between rival mining claimants is reserved to the courts.

A petition for the deferment of assessment work may only be granted pursuant to 30 U.S.C. § 28b (1988), where "legal impediments" exist which affect the right of the mining claimant to enter upon the land or gain access to the boundaries thereof. Pending litigation to establish ownership of mining claims is not, in itself, such a legal impediment to access.

Beryl J. & Beatrice M. Strong, 121 IBLA 309 (Dec. 3, 1991)

MINING CLAIMS--Continued

ASSESSMENT WORK--Continued

Where, in the absence of an approved plan of operations, a mining claimant cuts live trees in the course of road improvement activities on his mining claims, which are situated within a WSA, the impact of such activities exceeds in manner and degree the activities on the claims on Oct. 21, 1976, or temporarily suspended on that date, and impairs the suitability of the land for preservation as wilderness, BLM properly requires him to immediately rehabilitate the impact of those activities.

Richard C. Behnke, 122 IBLA 131 (Jan. 27, 1992)

To be entitled to a stay of a BLM decision denying exemption from payment of rental fees on mining claims, the claimant was required to show there was a likelihood he would succeed on the merits of his appeal. Because his exemption from payment of rental fees imposed by the Act of Oct. 5, 1992, depended on a showing that he was a small miner holding 10 claims or less, his ownership of 13 claims foreclosed the possibility of success on appeal.

A miner claiming entitlement to exemption from payment of rental fees required by the Act of Oct. 5, 1992, for a group of 13 mining claims because access to the claims in order to perform assessment work had allegedly been denied was not entitled to exemption from such payment when the record showed he was not a small miner as that term is defined by regulations implementing the Act.

Clay Worst, 128 IBLA 165 (Jan. 21, 1994)

30 U.S.C. § 28 (1988), calls for the expenditure of $100 in assessment work on or for the benefit of a mining claim each year until patent. Before patent can be obtained the claimant must have made improvements valued at $500 or more (30 U.S.C. § 29 (1988)), but the expenditure of $500 does not terminate the ongoing requirement in 30 U.S.C. § 28 (1988), for expenditure of $100 each assessment year.

The United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1988), and

MINING CLAIMS--Continued

ASSESSMENT WORK--Continued

the Department has jurisdiction to challenge the validity of a mining claim for failure to substantially comply with the assessment work requirement. The forfeiture of a mining claim for failure to do annual labor must be established by clear and convincing proof that the owner has failed to have performed the required work or made the necessary improvements.

The purposes of the assessment work requirement are to assure that a claimant undertakes a diligent good faith effort to develop the mining claim, and to prevent the location of mining claims for speculative purposes. The requirement that the claimant expend $100 in annual labor each assessment year is not absolute in the same sense as the requirement that a claimant file a notice of intent to hold or affidavit of assessment work pursuant to 43 U.S.C. § 1744 (1988), but the claimant's compliance with the assessment work requirement must be sufficiently substantial to demonstrate a diligent good faith effort to develop the mining claim.

Assessment work may be performed by a party other than the claimant, and when there is privity between the party doing the assessment work and the claimant, the assessment work will inure to the benefit of the claims.

The cost of road construction can qualify as assessment work. If the construction of an access road qualifies as assessment work, improvement of the access road will as well. In turn, a road improvement which reduces the frequency or cost of maintenance is as legitimate as an improvement making the road more accessible.

Evidence of a bona fide intent to develop a claim and use the mineral resources is paramount when determining whether the claimant has made a good faith attempt to comply with 30 U.S.C. § 28 (1988). Evidence that the claimant had no knowledge of the nature or amount of the assessment work allegedly performed; testimony that the claimant relied on representations made by third parties; admissions that the claimant did nothing to confirm those representations for a period of several years; and the absence of any testimony or other evidence from the parties filing affidavits on behalf of the claimant regarding the work allegedly performed will support a conclusion that the claimant was attempting to

MINING CLAIMS--Continued

ASSESSMENT WORK--Continued

assert a continuous right to a mining claim for speculative purposes. There is no evidence of a diligent good faith effort to develop the claims.

If a claimant fails to do necessary annual labor, but resumes work before the rights of a third party intervene, nothing is lost by allowing the claimant to revive the claim with his labor rather than relocating the claim. However, if a third party right attaches during the period of inactivity, the third party intervention deprives the claimant of the ability to regain the claim by resuming work. The United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1988), and the resumption doctrine is no longer applicable to oil shale claims.

United States v. John J. Herr et al., 130 IBLA 349
(Sept. 15, 1994) 101 I.D. 311

COMMON VARIETIES OF MINERALS

Generally

A mining claim for a common variety of sand is properly declared invalid where the claimant fails to overcome by a preponderance of the evidence the Government's prima facie case that the sand was not marketable at a profit prior to July 23, 1955.

United States v. Robert D. Fisher, 115 IBLA 277
(July 26, 1990)

During the period preceding the date Congress enacted sec. 3 of the Act of July 23, 1955, pumice was locatable under the Mining Law of 1872. When Congress enacted the Common Varieties Act, it removed previously locatable mineral from the purview of the Mining Law of 1872 and made them subject to the provisions of the Materials Act of July 31, 1947. To determine if pumice is locatable, one must look to the intrinsic qualities of the mineralization. To be locatable, the mineral material must have some intrinsic quality that differentiates it from ordinary deposits of pumice. A showing that the deposit is of commercial value does not, in and of itself, make the pumice contained in the deposit an uncommon variety. The pumice contained in

MINING CLAIMS--Continued

COMMON VARIETIES OF MINERALS--Continued

Generally--Continued

the deposit must hold a unique property which gives it a competitive edge over other pumice.

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented, the claimant must present sufficient evidence to overcome the Government's case by a preponderance of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a major distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing

MINING CLAIMS--Continued

COMMON VARIETIES OF MINERALS--Continued

Generally--Continued

the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

When Congress passed the Common Varieties Act, 30 U.S.C. § 611 (1988), it specifically named common varieties of sand, stone, gravel, pumice, pumicite, and cinders as no longer subject to the Mining Law of 1872. If a common variety mineral meets an ASTM standard for a common variety use, that fact does no more than establish the ability to market and use it for that common variety use. Meeting the ASTM standard only establishes its value as a common variety mineral. To use ASTM standards as a basis for a determination that such mineral is an uncommon variety, it would be necessary to show that the qualities of the particular mineral so exceed ASTM standards that the particular mineral commands a high price in the marketplace than similar common variety minerals.

When considering whether any of the mineral material on a mining claim may be considered an uncommon variety because it can be used for a particular use, a claimant need not demonstrate that the mineral material is an uncommon variety for that particular use. The mineral material on the claim is properly compared with other deposits of such mineral generally. Both direct and indirect evidence supporting a conclusion that other deposits of such mineral generally are unsuitable for that use can be used to establish that the mineral on the claim is an uncommon variety. Further, the claimant need only show that the mineral material is an uncommon variety by a preponderance of the evidence.

A common variety deposit does not possess a distinct, special economic value over and above the normal uses of the general run of such deposits. When the preponderance of the evidence supports the conclusion that the use to which the mineral material is being put is a common variety use, the mineral material must carry some special economic value over and above the general run of pumice deposits when applied to that use. If, on the other hand, the mineral material commands a premium over that sold for common variety uses, that fact is in and of itself evidence that the mineral material is of an uncommon variety. If the sales price for the mineral material sold for a particular use far exceeds the average sales price, the price differential

MINING CLAIMS--Continued

COMMON VARIETIES OF MINERALS--Continued

Generally--Continued

advances the argument that the mineral material has some property giving it distinct and special value.

A claimant who bases his discovery on a deposit of mineral material listed in the Common Varieties Act, 30 U.S.C. § 611 (1988), must demonstrate by the preponderance of the evidence that the mineral material is of an uncommon variety. If a claimant demonstrates that the mineral material has some intrinsic quality rendering it suitable for a particular use, and that mineral material suitable for that use sells at a marked premium over mineral material used for common variety purposes, the claimant has met the burden of showing that the mineral material is of an uncommon variety. Unless and until evidence is presented establishing the fact that this use is also a common variety use, a claimant need not show that the product has some unique property rendering it suitable for the use commanding a premium.

If the mineral material supporting the discovery is a common variety mineral material listed in the Common Varieties Act, the claimant must demonstrate either that a discovery of the common variety mineral existed on July 23, 1955, or that the discovery mineral has some unique property giving the deposit a distinct and special economic value. To establish a pre-July 23, 1955, discovery, the claimant must demonstrate by a preponderance of the evidence that the mineral was marketable on July 23, 1955. This can be accomplished by showing the existence of potential buyers and the price they would pay.

On appeal, the Forest Service contends that the Administrative Law Judge erred because the record does not support a finding that the claimant has met the marketability test. To prevail, the Forest Service must either tender evidence that the claimant cannot meet the marketability test, or demonstrate that the evidence submitted by the claimant supports a finding that there is no reasonable prospect that the commercial value of the deposit will exceed the cost of extracting, processing, transporting, and marketing the contained locatable mineral. When, as in this case, the Forest Service presents no evidence or testimony on one or more of these issues, the claimant is not required to do so. However, when a claimant having no duty to present evidence of production cost and sales price does present the evidence, the evidence presented by the claimant

MINING CLAIMS--Continued

COMMON VARIETIES OF MINERALS--Continued

Generally--Continued

should be considered in making a discovery determination.

When there is more than one market for the product from a claim, and the sales in one or more of those markets would be considered as a sale of a common variety mineral, that fact must be taken into consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be valid in an earlier contest is not dispositive of a mining claim contest.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

Special Value

A deposit of sand will be considered a deposit of a common variety of mineral where the claimant fails to overcome by a preponderance of the evidence the Government's prima facie case that the sand does not have a property which gives it a distinct and special value,

MINING CLAIMS--Continued

COMMON VARIETIES OF MINERALS--Continued

Special Value--Continued

as reflected in a higher market price or reduced costs of production.

United States v. Robert D. Fisher, 115 IBLA 277 (July 26, 1990)

If a deposit of limestone is to be subject to location as a valuable mineral deposit under the mining laws, it must be shown to have some property giving it distinct and special value. Suitability of the deposit for production of agricultural lime does not establish that the stone is subject to location, without proof that the limestone has distinct and special properties giving it special value for that purpose.

Marketability is not the sole test of the validity of a mining claim for limestone. Unless it is shown to have some special property that excludes it from the operation of the Common Varieties Act, limestone cannot be located as a valuable mineral under the mining laws.

If a deposit of limestone is to be subject to location under the mining laws as building stone, it must be shown to have some distinct and special property giving it special value for that purpose. Although price is a factor in showing that stone has such a property, a showing that the stone can be marketed at a profit does not alone establish the existence of a special property in the stone.

United States v. Sherman C. Smith & Lynda K. Sellers Smith, 115 IBLA 398 (Aug. 22, 1990)

During the period preceding the date Congress enacted sec. 3 of the Act of July 23, 1955, pumice was locatable under the Mining Law of 1872. When Congress enacted the Common Varieties Act, it removed previously locatable mineral from the purview of the Mining Law of 1872 and made them subject to the provisions of the Materials Act of July 31, 1947. To determine if pumice is locatable, one must look to the intrinsic qualities of the mineralization. To be locatable, the mineral material must have some intrinsic quality that differentiates it from ordinary deposits of pumice. A showing that the deposit is of commercial value does

MINING CLAIMS--Continued

COMMON VARIETIES OF MINERALS--Continued

Special Value--Continued

not, in and of itself, make the pumice contained in the deposit an uncommon variety. The pumice contained in the deposit must hold a unique property which gives it a competitive edge over other pumice.

When Congress passed the Common Varieties Act, 30 U.S.C. § 611 (1988), it specifically named common varieties of sand, stone, gravel, pumice, pumicite, and cinders as no longer subject to the Mining Law of 1872. If a common variety mineral meets an ASTM standard for a common variety use, that fact does no more than establish the ability to market and use it for that common variety use. Meeting the ASTM standard only establishes its value as a common variety mineral. To use ASTM standards as a basis for a determination that such mineral is an uncommon variety, it would be necessary to show that the qualities of the particular mineral so exceed ASTM standards that the particular mineral commands a high price in the marketplace than similar common variety minerals.

When considering whether any of the mineral material on a mining claim may be considered an uncommon variety because it can be used for a particular use, a claimant need not demonstrate that the mineral material is an uncommon variety for that particular use. The mineral material on the claim is properly compared with other deposits of such mineral generally. Both direct and indirect evidence supporting a conclusion that other deposits of such mineral generally are unsuitable for that use can be used to establish that the mineral on the claim is an uncommon variety. Further, the claimant need only show that the mineral material is an uncommon variety by a preponderance of the evidence.

A common variety deposit does not possess a distinct, special economic value over and above the normal uses of the general run of such deposits. When the preponderance of the evidence supports the conclusion that the use to which the mineral material is being put is a common variety use, the mineral material must carry some special economic value over and above the general run of pumice deposits when applied to that use. If, on the other hand, the mineral material commands a premium over that sold for common variety uses, that fact is in and of itself evidence that the mineral material is of an uncommon variety. If the sales price for the mineral material sold for a particular use far exceeds the average sales price, the price differential

advances the argument that the mineral material has some property giving it distinct and special value.

A claimant who bases his discovery on a deposit of mineral material listed in the Common Varieties Act, 30 U.S.C. § 611 (1988), must demonstrate by the preponderance of the evidence that the mineral material is of an uncommon variety. If a claimant demonstrates that the mineral material has some intrinsic quality rendering it suitable for a particular use, and that mineral material suitable for that use sells at a marked premium over mineral material used for common variety purposes, the claimant has met the burden of showing that the mineral material is of an uncommon variety. Unless and until evidence is presented establishing the fact that this use is also a common variety use, a claimant need not show that the product has some unique property rendering it suitable for the use commanding a premium.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

Unique Property

During the period preceding the date Congress enacted sec. 3 of the Act of July 23, 1955, pumice was locatable under the Mining Law of 1872. When Congress enacted the Common Varieties Act, it removed previously locatable mineral from the purview of the Mining Law of 1872 and made them subject to the provisions of the Materials Act of July 31, 1947. To determine if pumice is locatable, one must look to the intrinsic qualities of the mineralization. To be locatable, the mineral material must have some intrinsic quality that differentiates it from ordinary deposits of pumice. A showing that the deposit is of commercial value does not, in and of itself, make the pumice contained in the deposit an uncommon variety. The pumice contained in the deposit must hold a unique property which gives it a competitive edge over other pumice.

When Congress passed the Common Varieties Act, 30 U.S.C. § 611 (1988), it specifically named common

varieties of sand, stone, gravel, pumice, pumicite, and cinders as no longer subject to the Mining Law of 1872. If a common variety mineral meets an ASTM standard for a common variety use, that fact does no more than establish the ability to market and use it for that common variety use. Meeting the ASTM standard only establishes its value as a common variety mineral. To use ASTM standards as a basis for a determination that such mineral is an uncommon variety, it would be necessary to show that the qualities of the particular mineral so exceed ASTM standards that the particular mineral commands a high price in the marketplace than similar common variety minerals.

When considering whether any of the mineral material on a mining claim may be considered an uncommon variety because it can be used for a particular use, a claimant need not demonstrate that the mineral material is an uncommon variety for that particular use. The mineral material on the claim is properly compared with other deposits of such mineral generally. Both direct and indirect evidence supporting a conclusion that other deposits of such mineral generally are unsuitable for that use can be used to establish that the mineral on the claim is an uncommon variety. Further, the claimant need only show that the mineral material is an uncommon variety by a preponderance of the evidence.

A common variety deposit does not possess a distinct, special economic value over and above the normal uses of the general run of such deposits. When the preponderance of the evidence supports the conclusion that the use to which the mineral material is being put is a common variety use, the mineral material must carry some special economic value over and above the general run of pumice deposits when applied to that use. If, on the other hand, the mineral material commands a premium over that sold for common variety uses, that fact is in and of itself evidence that the mineral material is of an uncommon variety. If the sales price for the mineral material sold for a particular use far exceeds the average sales price, the price differential advances the argument that the mineral material has some property giving it distinct and special value.

A claimant who bases his discovery on a deposit of mineral material listed in the Common Varieties Act, 30 U.S.C. § 611 (1988), must demonstrate by the preponderance of the evidence that the mineral material is of

MINING CLAIMS--Continued

COMMON VARIETIES OF MINERALS--Continued

Unique Property--Continued

an uncommon variety. If a claimant demonstrates that the mineral material has some intrinsic quality rendering it suitable for a particular use, and that mineral material suitable for that use sells at a marked premium over mineral material used for common variety purposes, the claimant has met the burden of showing that the mineral material is of an uncommon variety. Unless and until evidence is presented establishing the fact that this use is also a common variety use, a claimant need not show that the product has some unique property rendering it suitable for the use commanding a premium.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

CONTESTS

When the Government contests a mining claim alleging lack of discovery of a valuable mineral deposit it has the burden of going forward with sufficient evidence to establish a prima facie case. When a Government mineral examiner testifies that he has examined a mining claim and found the quantity and quality of the minerals insufficient to support a finding of discovery, a prima facie case is established.

Absent a patent application, in a mining claim contest hearing there is no requirement that a mining claimant show that a contested claim is valid. Rather, the claimant's burden is to preponderate on the issues raised by the evidence.

United States v. Michael R. Ware, 113 IBLA 1 (Jan. 25, 1990)

A contest complaint is required to contain a statement in clear and concise language of the facts constituting the grounds of the contest. A party seeking a hearing as to the mineral character of land which has been subject to a prior Departmental hearing must make a distinct showing of development made since the prior hearing, such as, if supported by the evidence at the hearing applied for, would clearly demonstrate that since such prior hearing mineral has been discovered in such quantities, and by such

MINING CLAIMS--Continued

CONTESTS--Continued

thorough work on the premises, as to overcome the effect of the previous judgment as to the character of the land.

An affidavit by a contest complainant is not a substitute for an affidavit of a witness corroborating the factual allegations of the complaint as required by 43 CFR 4.450-4(c). In the absence of an affidavit of a corroborating witness, a private contest complaint is properly dismissed.

Although 30 U.S.C. §§ 29, 30 (1982), do not authorize the Department to rule on the merits of an adverse claim, it is within the Department's authority to determine whether a document presents an adverse claim within the meaning of the statutes. The issue whether land is mineral or nonmineral in character is within the exclusive jurisdiction of the Department of the Interior and for this reason a conflict between mineral and nonmineral claimants does not raise an "adverse claim" within the meaning of the term in the statutes.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

Where a Government contest complaint against a mining claim contains charges which, if proved, would render the claim invalid, and the contestee fails to timely file an answer to the complaint in accordance with Departmental regulations, the allegations of the complaint will be taken as admitted by the contestee and the claim is properly declared null and void.

When the Government issues a mining claim contest complaint to more than one contestee and subsequently issues a decision declaring the interests in the claim of those contestees null and void for failure to file a timely answer to the complaint, a contestee appealing that decision has no standing to challenge it on the basis of failure to properly serve another contestee, where the appealing contestee has affirmatively alleged that he does not represent the other contestee.

Robert D. McGoldrick et al., 115 IBLA 242 (July 18, 1990)

A deposit of sand will be considered a deposit of a common variety of mineral where the claimant fails to overcome by a preponderance of the evidence the Government's prima facie case that the sand does not have a property which gives it a distinct and special value, as reflected in a higher market price or reduced costs of production.

A mining claim for a common variety of sand is properly declared invalid where the claimant fails to overcome by a preponderance of the evidence the Government's prima facie case that the sand was not marketable at a profit prior to July 23, 1955.

United States v. Robert D. Fisher, 115 IBLA 277 (July 26, 1990)

A valuable mineral sample does not equate to a valuable mineral deposit. An earlier report finding the existence of valuable minerals on a mining claim without analysis of the quality and quantity of the mineral deposit may be insufficient to overcome a prima facie case based on analysis of later detailed samples which lead a qualified mineral examiner to conclude at the hearing in a mining contest that there has been no discovery of a valuable mineral deposit.

Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's explored workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such a case an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit will not overcome a prima facie case that there is no mineral discovery.

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and

void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented the claimant must present sufficient evidence to overcome the Government's case by a preponderence of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a minor distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill"

deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

When considering whether any of the mineral material on a mining claim may be considered an uncommon variety because it can be used for a particular use, a claimant need not demonstrate that the mineral material is an uncommon variety for that particular use. The mineral material on the claim is properly compared with other deposits of such mineral generally. Both direct and indirect evidence supporting a conclusion that other deposits of such mineral generally are unsuitable for that use can be used to establish that the mineral on the claim is an uncommon variety. Further, the claimant need only show that the mineral material is an uncommon variety by a preponderance of the evidence.

If the mineral material supporting the discovery is a common variety mineral material listed in the Common Varieties Act, the claimant must demonstrate either that a discovery of the common variety mineral existed on July 23, 1955, or that the discovery mineral has some unique property giving the deposit a distinct and special economic value. To establish a pre-July 23, 1955, discovery, the claimant must demonstrate by a preponderance of the evidence that the mineral was marketable on July 23, 1955. This can be accomplished by showing the existence of potential buyers and the price they would pay.

On appeal, the Forest Service contends that the Administrative Law Judge erred because the record does not support a finding that the claimant has met the marketability test. To prevail, the Forest Service must either tender evidence that the claimant cannot meet the marketability test, or demonstrate that the evidence submitted by the claimant supports a finding that there is no reasonable prospect that the commercial value of the deposit will exceed the cost of extracting, processing, transporting, and marketing the contained locatable mineral. When, as in this case, the Forest Service presents no evidence or testimony on one or more of these issues, the claimant is not required to do so. However, when a claimant having no duty to present evidence of production cost and sales price does present the evidence, the evidence presented by the claimant should be considered in making a discovery determination.

When there is more than one market for the product from a claim, and the sales in one or more of

those markets would be considered as a sale of a common variety mineral, that fact must be taken into consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

On appeal, the Forest Service urges a finding that too much weight was given to claimant's evidence. It does not, however, allege that there is any contrary evidence or tender any proof that it possesses evidence which would lead to a different result if another hearing were held. If an appellant seeks another hearing it must tender sufficient evidence indicating a discovery (or lack thereof) to convince this Board that such a further hearing is warranted. Without such offer, no hearing will be ordered.

In a contest not involving a patent application, when the Government raises an issue not set out in the complaint during the hearing or in its posthearing brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the doctrine of res judicata, that issue should be addressed if an adverse ruling on the issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be

valid in an earlier contest is not dispositive of a mining claim contest.

Until patent has issued, the rights of the mining claimant are limited by the statutes and regulations under which those rights are acquired and maintained. The title to the lands subject to unpatented mining claims remains in the United States. As the title owner, the United States may regulate mining activities in national forests in order to protect the surface resources. Therefore, the motivation of the managing Government agency in initiating a contest against a mining claim is irrelevant.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

A contestee overcomes the presumption that his answer to a contest complaint was not filed within 30 days from the date of receipt of the complaint by establishing that 14 days before the end of the 30-day period his answer was received by a DOI employee at the street address at which the answer was to be filed. It is proper to assume that the Department employee signing the return receipt card forwarded the answer to the addressee identified on the face of the answer, and it is reasonable to expect that it would take less than 14 days to deliver a letter to that addressee.

George M. Reedy et al., 120 IBLA 274 (Aug. 28, 1991)

A Government contest of a millsite claim is not subject to dismissal for failure to name all interested parties.

United States v. Loyall Fraker, 122 IBLA 24 (Jan. 3, 1992)

An agency is bound to adhere to criteria previously published by the agency to control future conduct. Where it is alleged that there has been a breach of this duty to be consistent in dealings with affected persons, there must be shown to be previously published criteria or pattern of conduct from which there has been a deviation. Where there is no such showing, there is no foundation for a finding of estoppel on this ground.

The allegation that a mining claimant refrained from opening a collapsed portal on a lode claim in reliance on a conversation with a FS employee was insufficient to establish grounds for estoppel of the Government to contest the validity of the claim where the portal was found.

Without calculations estimating tonnage of ore on a mining claim there was nothing to demonstrate that the claim might be part of a projected low-grade mining operation, and it was therefore null and void.

Proof that claims were potentially profitable as part of a low-grade mining operation established the existence of a discovery thereon.

Where the low value of silver at hearing indicated that a claim could not be operated at a profit, but there was evidence that at the time the claim was included in a wilderness area 4 years previously a prevailing higher value would have allowed a profitable operation, the issue of the profitability of the claim is properly remanded for consideration of historic silver values as they might affect the question of discovery.

United States v. American Independence Mines & Minerals, 122 IBLA 177 (Feb. 10, 1992)

Expert testimony by a Government mineral examiner that he traversed all of the claims, sampled evident exposures, estimated the value of the contained mineral, and based his conclusion that there was no valuable mineral deposit on any of the claims on his finding that the values indicated by the highest assay would not cover his estimate of the mining cost establishes a prima facie case that the claims are invalid.

Drilling to obtain samples in support of a discovery will be allowed if the purpose of the drilling is to

MINING CLAIMS--Continued

CONTESTS--Continued

establish the quantity and continuous quality of exposed mineralization that would support a discovery if quantity and continuous quality of the exposed minerals continued for a reasonably projectable distance. In order to drill on withdrawn land to confirm a discovery, the claimant must show that he has disclosed valuable mineral on the claims and that a discovery would be confirmed by drilling.

United States v. Arthur Mavros et al., 122 IBLA 297 (Mar. 9, 1992)

An ALJ properly declared lode mining claims null and void where the claimants failed to overcome a Government prima facie case that the claims were not supported by discovery of a valuable deposit of gold and silver when they failed to demonstrate that gold and silver were disclosed either on the surface or in old underground workings in such quality and quantity that they could be extracted, removed, and marketed at a profit. The claimants were properly prevented from drilling or reopening a tunnel where the land was withdrawn from mineral entry and there was no evidence that the proposed work was intended to confirm a preexisting discovery.

United States v. Emery Crowley & Rose Etta Jones Ansotegui, 124 IBLA 374 (Dec. 10, 1992)

Because BLM failed to show that a mining claim was not used or occupied for purposes reasonably incident to mining, it was proper to find that the Government had not demonstrated any impermissible use contrary to provision of 30 U.S.C. § 612(a) (1988), and contest proceedings against the claim were properly dismissed as a result.

United States v. William Doherty, 125 IBLA 296 (Mar. 16, 1993)

MINING CLAIMS--Continued

CONTESTS--Continued

Federal employees charged with the management of Federal lands have the right and authority to challenge the validity of mining claims for any reason.

Evidence that valuable mineral had been successfully produced from the claims is not sufficient to establish a discovery without additional evidence that material of a similar grade remains on the claims. Without a showing that additional mineral material of a similar quality remains on the claims, the logical conclusion is that the mined material was an isolated showing.

Standing alone, the Government's reason for conducting a mineral examination or initiating a contest is not sufficient to establish error in a finding that a mining claim is not supported by a discovery. Without a showing that evidence was deliberately or inadvertently skewed to support a finding that the claims were invalid, it cannot be said that the mineral examiner's motivation has affected the evidence or the presentation at the hearing, or that the Government's motivation ultimately affected the ALJ's conclusion that the claims were not supported by a valuable mineral deposit.

When presenting evidence to overcome a Government's prima facie case that the claim is not supported by a discovery the claimants are not limited to rebutting the evidence submitted by the mineral examiners, and may present evidence of the location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners.

United States v. Estate of Melvin E. Viles, Mary S. Viles, 126 IBLA 162 (May 10, 1993)

Where the U.S. contests a mining claim for lack of discovery, the Government must go forward with sufficient evidence to establish prima facie the invalidity of the contested claims. When the Government's prima facie case has been made, the burden then shifts to the claimant to overcome this showing by a preponderance.

A placer discovery (assuming it exists), will not support a lode location. Exposure of a vein or lode carrying mineral values in place is a necessary precondition to the validity of a lode claim. Government

mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's exposed workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such case an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit on the lode claims will not overcome a prima facie case that there is no discovery.

A continuance of a hearing into the validity of a mining claim will only be granted where the mining claimant presents sufficient reason to justify the grant of an additional opportunity to present his case, i.e., where circumstances have placed a substantial constraint upon his ability to obtain or offer samples or other evidence of a discovery.

As against the U.S., a mining claimant acquires no vested rights by location of a mining claim. Even though a claim may be perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of valuable locatable mineral within the boundaries of the claim, no rights are acquired. As the title owner, the U.S. may regulate mining activities in national forests in order to protect surface resources. Therefore, the motivation of the managing Government agency in initiating a contest against a mining claimant is irrelevant.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties, 127 IBLA 181 (Sept. 7, 1993)

As the mining claim rental fee required by Congress under the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), is in lieu of the statutory requirements to annually perform assessment work and to annually file with the Department, a claimant of an unpatented mining claim who has filed an application for a mineral patent is not excused from complying with the rental fee requirement unless a final certificate has been issued. The pendency of a mining contest against

the claim does not excuse a claimant's lack of compliance.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties (On Recon.), Cyrus L. Colburn, Jr., 130 IBLA 314 (Sept. 8, 1994)

Unless and until patent issues, paramount title to lands embraced by mining claims remains in the United States, and it may inquire into the extent and validity of rights claimed against it. The doctrine of res judicata has no application to a mining claim contest where the previous determinations upon which invocation of the doctrine is premised did not purport to either determine the existence of a valuable mineral deposit or otherwise adjudicate the validity of the mining claims in question.

United States v. Rich Knoblock et al., 131 IBLA 48 (Oct. 18, 1994) 101 I.D. 123

DETERMINATION OF VALIDITY

Placer mining claims partially located on lands patented without a reservation of minerals to the United States are null and void ab initio to the extent they include such lands.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)

The standard of discovery in a contest of a mining claim is whether minerals have been found in sufficient quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. This standard has been supplemented by the marketability text, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

Under the marketability test, a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

When an exposure of locatable mineral in place has been shown to exist within the boundaries of each mining claim, a group of contiguous mining claims can be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a mine. The concept of developing a "mine" can reasonably contemplate operations on a series of contiguous claims.

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

Absent a patent application, in a mining claim contest hearing there is no requirement that a mining claimant show that a contested claim is valid. Rather, the claimant's burden is to preponderate on the issues raised by the evidence.

United States v. Michael R. Ware, 113 IBLA 1 (Jan. 25, 1990)

When a mineral locator has filed a location certificate with BLM within 90 days of the date of the location of the claim as required by 43 U.S.C. § 1744(b) (1982), it is error for BLM to later reject the recordation of the claim. BLM's decision cannot change the fact the locator has complied with the statute. The fact the claim has been recorded with BLM, however, does not establish its validity.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

The Government is not collaterally estopped to determine the validity of an unpatented mining claim even where the Government has previously unsuccessfully contested a neighboring mining claim encompassing an arguably similar mineral deposit.

A deposit of sand will be considered a deposit of a common variety of mineral where the claimant fails to overcome by a preponderance of the evidence the Government's prima facie case that the sand does not have a property which gives it a distinct and special value, as reflected in a higher market price or reduced costs of production.

A mining claim for a common variety of sand is properly declared invalid where the claimant fails to overcome by a preponderance of the evidence the Government's prima facie case that the sand was not marketable at a profit prior to July 23, 1955.

United States v. Robert D. Fisher, 115 IBLA 277 (July 26, 1990)

The requirement that a mining claimant show that the mineral discovered on the claim is presently marketable at a profit simply means that a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success in developing a paying mine.

Under the prudent man test, a discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a paying mine.

There is a clear distinction between "exploration" and "development" as these terms relate to discovery under the mining laws. Prior to the "discovery" of a valuable mineral deposit, mining activities such as attempting to locate a deposit and the subsequent mapping and drilling of the deposit to determine the

extent and grade of the mineralization disclosed constitute exploration work.

Where evidence of record, considered in its entirety, fails to establish the existence of a valuable mineral deposit, as that term is understood in the mining laws, within the limits of any of the claims at issue, those claims are properly declared null and void.

United States v. Willie White et al., 118 IBLA 266 (Mar. 12, 1991) 98 I.D. 129

The Secretary of the Interior has continuing jurisdiction with respect to public lands until patent issues, and he is not estopped by principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors in interest; so long as legal title remains in the Government, the Secretary has the power and duty, upon proper notice and hearing, to determine whether the claim is valid. The existence of older favorable mineral reports will not preclude a later contest of the validity of mining claims based on a subsequent mineral examination disclosing the absence of a valuable mineral deposit.

A discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. This standard has been supplemented by the marketability test which requires a showing that the mineral deposit can be extracted, removed, and marketed at a profit.

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The

mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

A valuable mineral sample does not equate to a valuable mineral deposit. An earlier report finding the existence of valuable minerals on a mining claim without analysis of the quality and quantity of the mineral deposit may be insufficient to overcome a prima facie case based on analysis of later detailed samples which lead a qualified mineral examiner to conclude at the hearing in a mining contest that there has been no discovery of a valuable mineral deposit.

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

As against the United States, a mining claimant acquires no vested rights by location of a mining claim. Even though a claim may have been perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of valuable locatable mineral within the boundaries of the claim, no rights are acquired. A discovery has been made if mineral has been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

To have a reasonable prospect of success in developing a valuable mine, the mine owner must be able to demonstrate, as a present fact, that there is a reasonable probability that the mineral can be extracted and marketed at a profit. A discovery cannot be based on speculation that at some time in the future an economic change or untested technological advance will render the mine valuable.

When a withdrawal or similar event affecting the ability to locate a claim or restricting the type of

mineral material subject to location occurs, the existence of a discovery at the time of the event becomes critical to the validity of a mining claim. If the mining claim is perfected on the date the event transpires, certain rights have vested in the claimant, and those rights cannot be cancelled by the action. On the other hand, if no discovery is made until after the event has transpired, the claim has not been perfected, no rights have been acquired, and nothing is lost by reason of the event.

Once made, a discovery must be maintained. Even though a claimant may have made a discovery and actually mined ore from a claim, until a patent application has been perfected and the equitable title has vested, a claimant runs the risk of losing his discovery if the mineral deposit is exhausted or if there is a material change in market conditions rendering it unreasonable to expect that the mineral can be mined at a profit.

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented the claimant must present sufficient evidence to overcome the Government's case by a preponderence of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government

will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a minor distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

When Congress passed the Common Varieties Act, 30 U.S.C. § 611 (1988), it specifically named common varieties of sand, stone, gravel, pumice, pumicite, and cinders as no longer subject to the Mining Law of 1872. If a common variety mineral meets an ASTM standard for a common variety use, that fact does no more than establish the ability to market and use it for that common variety use. Meeting the ASTM standard only establishes its value as a common variety mineral. To use ASTM standards as a basis for a determination that such mineral is an uncommon variety, it would be necessary to show that the qualities of the particular mineral so exceed ASTM standards that the particular mineral commands a higher price in the marketplace than similar common variety minerals.

If the mineral material supporting the discovery is a common variety mineral material listed in the Common Varieties Act, the claimant must demonstrate either that a discovery of the common variety mineral existed on July 23, 1955, or that the discovery mineral has some unique property giving the deposit a distinct and special economic value. To establish a pre-July 23, 1955, discovery, the claimant must demonstrate by a preponderance of the evidence that the mineral was marketable on July 23, 1955. This can be accomplished by showing the existence of potential buyers and the price they would pay.

Under 30 U.S.C. § 35 (1988), no placer claim shall include more than 20 acres for each individual claimant. However, claimants may locate a claim of up to 160 acres in size. In order to hold a 160-acre claim the association must have no fewer than eight members. A corporation is considered to be an individual claimant within the meaning of the law, and, as an individual claimant,

a corporation cannot locate a mining claim containing more than 20 acres. If a validly located 160-acre association placer claim has been perfected and contains a valid discovery on the date of conveyance to a corporate entity, all 160 acres can be conveyed. If, on the other hand, there was no discovery on the claim on the date of conveyance, the claim was not valid on that date, and a subsequent discovery by the corporation would only validate a 20-acre claim.

On appeal, the Forest Service contends that the Administrative Law Judge erred because the record does not support a finding that the claimant has met the marketability test. To prevail, the Forest Service must either tender evidence that the claimant cannot meet the marketability test, or demonstrate that the evidence submitted by the claimant supports a finding that there is no reasonable prospect that the commercial value of the deposit will exceed the cost of extracting, processing, transporting, and marketing the contained locatable mineral. When, as in this case, the Forest Service presents no evidence or testimony on one or more of these issues, the claimant is not required to do so. However, when a claimant having no duty to present evidence of production cost and sales price does present the evidence, the evidence presented by the claimant should be considered in making a discovery determination.

When there is more than one market for the product from a claim, and the sales in one or more of those markets would be considered as a sale of a common variety mineral, that fact must be taken into consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

On appeal, the Forest Service urges a finding that too much weight was given to claimant's evidence. It does not, however, allege that there is any contrary evidence or tender any proof that it possesses evidence which would lead to a different result if another hearing were held. If an appellant seeks another hearing it must tender sufficient evidence indicating a discovery (or lack thereof) to convince this Board that such a

further hearing is warranted. Without such offer, no hearing will be ordered.

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

A placer claim larger than 10 acres in size must have a discovery within its boundaries <u>and</u> each 10-acre tract within the claim must be shown to be mineral in character.

In a contest not involving a patent application, when the Government raises an issue not set out in the complaint during the hearing or in its posthearing brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the doctrine of res judicata, that issue should be addressed if an adverse ruling on the issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be valid in an earlier contest is not dispositive of a mining claim contest.

The unrebutted evidence in a mining claim contest involving a claim subject to a patent application is that, as of the date of the hearing, there had been only one shipment of the mined product under an oral purchase and sales agreement. Being an oral contract, it was terminable at will, and a single shipment may have represented an isolated sale rather than the potential for continued sales of the mine product. Thus, the evidence was not sufficient to support a conclusion that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

Until patent has issued, the rights of the mining claimant are limited by the statutes and regulations under which those rights are acquired and maintained. The title to the lands subject to unpatented mining claims remains in the United States. As the title owner, the United States may regulate mining activities in national forests in order to protect the surface resources. Therefore, the motivation of the managing Government agency in initiating a contest against a mining claim is irrelevant.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

Because exposure of a vein or lode carrying mineral values is a necessary precondition to the validity of a lode claim, a claim where no mineral values were exposed was properly found to be invalid.

Without calculations estimating tonnage of ore on a mining claim there was nothing to demonstrate that the claim might be part of a projected low-grade mining operation, and it was therefore null and void.

Proof that claims were potentially profitable as part of a low-grade mining operation established the existence of a discovery thereon.

Where the low value of silver at hearing indicated that a claim could not be operated at a profit, but there was evidence that at the time the claim was included in a wilderness area 4 years previously a prevailing higher value would have allowed a profitable operation, the issue of the profitability of the claim is properly remanded for consideration of historic silver values as they might affect the question of discovery.

United States v. American Independence Mines & Minerals, 122 IBLA 177 (Feb. 10, 1992)

Expert testimony by a Government mineral examiner that he traversed all of the claims, sampled evident exposures, estimated the value of the contained mineral, and based his conclusion that there was no valuable mineral deposit on any of the claims on his finding that the values indicated by the highest assay would not cover his estimate of the mining cost establishes a prima facie case that the claims are invalid.

Drilling to obtain samples in support of a discovery will be allowed if the purpose of the drilling is to establish the quantity and continuous quality of exposed mineralization that would support a discovery if quantity and continuous quality of the exposed minerals continued for a reasonably projectable distance. In order to drill on withdrawn land to confirm a discovery, the claimant must show that he has disclosed valuable

mineral on the claims and that a discovery would be confirmed by drilling.

United States v. Arthur Mavros et al., 122 IBLA 297 (Mar. 9, 1992)

An ALJ properly declared lode mining claims null and void where the claimants failed to overcome a Government prima facie case that the claims were not supported by discovery of a valuable deposit of gold and silver when they failed to demonstrate that gold and silver were disclosed either on the surface or in old underground workings in such quality and quantity that they could be extracted, removed, and marketed at a profit. The claimants were properly prevented from drilling or reopening a tunnel where the land was withdrawn from mineral entry and there was no evidence that the proposed work was intended to confirm a preexisting discovery.

United States v. Emery Crowley & Rose Etta Jones Ansotegui, 124 IBLA 374 (Dec. 10, 1992)

Federal employees charged with the management of Federal lands have the right and authority to challenge the validity of mining claims for any reason.

Evidence that valuable mineral had been successfully produced from the claims is not sufficient to establish a discovery without additional evidence that material of a similar grade remains on the claims. Without a showing that additional mineral material of a similar quality remains on the claims, the logical conclusion is that the mined material was an isolated showing.

Standing alone, the Government's reason for conducting a mineral examination or initiating a contest is not sufficient to establish error in a finding that a mining claim is not supported by a discovery. Without a showing that evidence was deliberately or inadvertently skewed to support a finding that the claims were invalid, it cannot be said that the mineral examiner's

motivation has affected the evidence or the presentation at the hearing, or that the Government's motivation ultimately affected the ALJ's conclusion that the claims were not supported by a valuable mineral deposit.

When presenting evidence to overcome a Government's prima facie case that the claim is not supported by a discovery the claimants are not limited to rebutting the evidence submitted by the mineral examiners, and may present evidence of the location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners.

United States v. Estate of Melvin E. Viles, Mary S. Viles, 126 IBLA 162 (May 10, 1993)

Under the prudent man test, a discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a paying mine.

Where the U.S. contests a mining claim for lack of discovery, the Government must go forward with sufficient evidence to establish prima facie the invalidity of the contested claims. When the Government's prima facie case has been made, the burden then shifts to the claimant to overcome this showing by a preponderance.

A placer discovery (assuming it exists), will not support a lode location. Exposure of a vein or lode carrying mineral values in place is a necessary precondition to the validity of a lode claim. Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's exposed workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such case an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit on the lode claims will not overcome a prima facie case that there is no discovery.

As against the U.S., a mining claimant acquires no vested rights by location of a mining claim. Even

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

though a claim may be perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of valuable locatable mineral within the boundaries of the claim, no rights are acquired. As the title owner, the U.S. may regulate mining activities in national forests in order to protect surface resources. Therefore, the motivation of the managing Government agency in initiating a contest against a mining claimant is irrelevant.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties, 127 IBLA 181 (Sept. 7, 1993)

A lode mining claim contains a valuable mineral deposit if it has an exposure in a surface vein of a mineralized zone of relatively consistent high mineral values, that when justifiably projected to a depth of one-half its strike length, contains ore of sufficient quality and quantity that it can be extracted, removed, and marketed at a profit, taking into account the costs of setting up a mine and mill.

Mineral deposits exposed on adjoining lode mining claims may be aggregated in order to determine whether a valuable mineral deposit is present on each claim. To be considered valuable, each deposit must contain ore of sufficient quality and quantity that a profit would be made after the costs of extracting, removing, and marketing are paid, to include a proportionate share of the expense of setting up a mine and mill.

Use of a millsite claim as a base of operations for prospecting and assessment work on an unpatented lode mining claim and for storage of building materials to be used in connection with future mining and milling operations does not constitute compliance with the statutory requirement that a claimant use or occupy the claim for mining or milling purposes.

United States v. James Collord & Marjorie Collord, 128 IBLA 266 (Mar. 10, 1994)

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

A discovery within the meaning of the mining law exists where the evidence is such that a person of ordinary prudence would be justified in the further expenditure of labor and means, with a reasonable prospect of a success in developing a paying mine. Determining that a prudent individual would be justified in attempting to develop a paying mine necessarily involves consideration of whether or not a mineral deposit has been exposed within the limits of a claim and, if so, whether the evidence is such that an individual would be justified in concluding that the mineral exposed exists in sufficient quantity and quality so as to make expectations of its profitable extraction reasonable under the facts of record.

Once the Government has presented a prima facie case as to the invalidity of a challenged mining claim, the burden of overcoming this showing, by a preponderance of the evidence, devolves upon the claimant as the proponent of the claim's validity. A claimant may be deemed to have preponderated even in the face of directly conflicting evidence where the factfinder determines that evidence presented by the claimant is more credible than that submitted by the Government.

A discovery exists only where the evidence establishes that mineralization is present in sufficient quantity and quality so as to render its profitable extraction reasonably likely. Where the evidence fails to establish sufficient quantity of adequate quality mineralization in an exposure, such an exposure does not constitute a valuable mineral deposit within the meaning of the mining laws.

There is a clear distinction between "exploration" and "development" as these terms relate to discovery under the mining laws. Prior to the "discovery" of a valuable mineral deposit, mining activities such as attempting to locate a deposit and the subsequent mapping and drilling of the deposit to determine the extent and grade of the mineralization disclosed constitute acts of exploration. Evidence which is sufficient to justify further exploration expenditures does not necessarily constitute evidence which would justify embarking upon the development of a claim.

Where no evidence is presented to establish that a mineral deposit present on one claim extends into an adjacent claim, the latter claim cannot be deemed valid even if the evidence establishes that the mineral

deposit located on the first claim is a valuable mineral deposit under the mining laws.

The standard for determining whether a discovery of a valuable mineral deposit has been made is not whether expenditures for further exploration or for further analysis might be justified. Rather, a finding of discovery requires that the evidence be sufficient to justify, as a present matter, the expenditures necessary to develop a paying mine with a reasonable prospect of success.

Where the Board, in the course of a de novo review of the record of a mining contest, determines that various cost factors in an economic analysis of a proposed development plan have either been ignored or significantly understated with the result that the claimant's assertion that there is a reasonable prospect of success in developing the deposit is no longer sustainable on the record developed, the claims embracing such deposit are properly declared null and void.

United States v. J. Gary Feezor et al., 130 IBLA 146 (Aug. 4, 1994)

The United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1988), and the Department has jurisdiction to challenge the validity of a mining claim for failure to substantially comply with the assessment work requirement. The forfeiture of a mining claim for failure to do annual labor must be established by clear and convincing proof that the owner has failed to have performed the required work or made the necessary improvements.

The purposes of the assessment work requirement are to assure that a claimant undertakes a diligent good faith effort to develop the mining claim, and to prevent the location of mining claims for speculative purposes. The requirement that the claimant expend $100 in annual labor each assessment year is not absolute in the same sense as the requirement that a claimant file a notice of intent to hold or affidavit of assessment work pursuant to 43 U.S.C. § 1744 (1988), but the claimant's

compliance with the assessment work requirement must be sufficiently substantial to demonstrate a diligent good faith effort to develop the mining claim.

The cost of road construction can qualify as assessment work. If the construction of an access road qualifies as assessment work, improvement of the access road will as well. In turn, a road improvement which reduces the frequency or cost of maintenance is as legitimate as an improvement making the road more accessible.

Evidence of a bona fide intent to develop a claim and use the mineral resources is paramount when determining whether the claimant has made a good faith attempt to comply with 30 U.S.C. § 28 (1988). Evidence that the claimant had no knowledge of the nature or amount of the assessment work allegedly performed; testimony that the claimant relied on representations made by third parties; admissions that the claimant did nothing to confirm those representations for a period of several years; and the absence of any testimony or other evidence from the parties filing affidavits on behalf of the claimant regarding the work allegedly performed will support a conclusion that the claimant was attempting to assert a continuous right to a mining claim for speculative purposes. There is no evidence of a diligent good faith effort to develop the claims.

If a claimant fails to do necessary annual labor, but resumes work before the rights of a third party intervene, nothing is lost by allowing the claimant to revive the claim with his labor rather than relocating the claim. However, if a third party right attaches during the period of inactivity, the third party intervention deprives the claimant of the ability to regain the claim by resuming work. The United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1988), and the resumption doctrine is no longer applicable to oil shale claims.

United States v. John J. Herr et al., 130 IBLA 349 (Sept. 15, 1994) 101 I.D. 311

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

A decision declaring a mining claim abandoned and void must be mailed to each claim owner at his last address of record. Where BLM fails to serve each claim owner with a copy of a decision, the decision is not effective to adjudicate the rights and interests in the claims of those owners who were not served. A copy of the decision must be mailed even though previous correspondence has been returned to BLM. Without attempted delivery of a decision and its return to BLM, there cannot be constructive service under 43 CFR 1810.2(b).

Lanny Perry, 131 IBLA 1 (Sept. 16, 1994)

Unless and until patent issues, paramount title to lands embraced by mining claims remains in the United States, and it may inquire into the extent and validity of rights claimed against it. The doctrine of res judicata has no application to a mining claim contest where the previous determinations upon which invocation of the doctrine is premised did not purport to either determine the existence of a valuable mineral deposit or otherwise adjudicate the validity of the mining claims in question.

A discovery within the meaning of the mining laws exists where the evidence is such that a person of ordinary prudence would be justified in the further expenditure of labor and means, with a reasonable prospect of success in developing a paying mine. Determining that a prudent individual would be justified in attempting to develop a paying mine necessarily involves consideration of whether or not a mineral deposit has been exposed within the limits of a claim and, if so, whether the evidence is such that an individual would be justified in concluding that the exposed mineral exists in sufficient quantity and quality so as to make expectations of its profitable extraction reasonable under the facts of record.

There is a clear distinction between the quantum of evidence which would be sufficient to justify a prudent individual in the continuation of an active search for a mineral deposit of sufficient quantity and value to warrant development and that evidence which is, itself,

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

adequate to justify the commencement of actual development of a productive mine with a reasonable prospect of success. Only the latter showing is sufficient to warrant a finding that a discovery under the mining laws exists.

Where the evidence submitted with respect to certain claims indicates the lack of any exposure of a mineral deposit on some of the claims and that, while an exposure of mineral deposit might be deemed to exist on the other claims, the values disclosed are insufficient to establish that the mineral deposit is valuable within the meaning of the mining laws, the claims are properly deemed to be null and void as lacking a discovery of a valuable mineral deposit.

The fact that a market existed for euxenite in the 1950's does not preclude a finding that no market existed for euxenite in 1972, where it can be shown that the earlier production of euxenite was pursuant to a Government contract which paid for the contained columbium/tantalum pentoxides at rates far in excess of the existing market price, that all production of euxenite ceased upon completion of the Government contract and the termination of its stockpiling program, and that there has been no market for euxenite since 1959.

The standard for determining whether a discovery of a valuable mineral deposit has been made is not whether expenditures for further exploration or for further analysis might be justified. Rather, a finding of discovery requires that the evidence be sufficient to justify, as a present matter, the expenditures necessary to develop a paying mine with a reasonable prospect of success.

United States v. Rich Knoblock et al., 131 IBLA 48 (Oct. 18, 1994) 101 I.D. 123

MINING CLAIMS--Continued

DISCOVERY

Generally

The standard of discovery in a contest of a mining claim is whether minerals have been found in sufficient quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. This standard has been supplemented by the marketability text, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

When an exposure of locatable mineral in place has been shown to exist within the boundaries of each mining claim, a group of contiguous mining claims can be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a mine. The concept of developing a "mine" can reasonably contemplate operations on a series of contiguous claims.

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

Under the prudent man test, a discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a paying mine.

There is a clear distinction between "exploration" and "development" as these terms relate to discovery under the mining laws. Prior to the "discovery" of a valuable mineral deposit, mining activities such as attempting to locate a deposit and the subsequent mapping and drilling of the deposit to determine the extent and grade of the mineralization disclosed constitute exploration work.

Where evidence of record, considered in its entirety, fails to establish the existence of a valuable mineral deposit, as that term is understood in the mining

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

laws, within the limits of any of the claims at issue, those claims are properly declared null and void.

United States v. Willie White et al., 118 IBLA 266 (Mar. 12, 1991) 98 I.D. 129

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

A valuable mineral sample does not equate to a valuable mineral deposit. An earlier report finding the existence of valuable minerals on a mining claim without analysis of the quality and quantity of the mineral deposit may be insufficient to overcome a prima facie case based on analysis of later detailed samples which lead a qualified mineral examiner to conclude at the hearing in a mining contest that there has been no discovery of a valuable mineral deposit.

Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's explored workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such a case an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit will not overcome a prima facie case that there is no mineral discovery.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

As against the United States, a mining claimant acquires no vested rights by location of a mining claim. Even though a claim may have been perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of valuable locatable minerals within the boundaries of the claim, no rights are acquired. A discovery has been made if mineral has been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

To have a reasonable prospect of success in developing a valuable mine, the mine owner must be able to demonstrate, as a present fact, that there is a reasonable probability that the mineral can be extracted and marketed at a profit. A discovery cannot be based on speculation that at some time in the future an economic change or untested technological advance will render the mine valuable.

When a withdrawal or similar event affecting the ability to locate a claim or restricting the type of mineral material subject to location occurs, the existence of a discovery at the time of the event becomes critical to the validity of a mining claim. If the mining claim is perfected on the date the event transpires, certain rights have been vested in the claimant, and those rights cannot be cancelled by the action. On the other hand, if no discovery is made until after the event has transpired, the claim has not been perfected, no rights have been acquired, and nothing is lost by reason of the event.

Once made, a discovery must be maintained. Even though a claimant may have made a discovery and actually mined ore from a claim, until a patent application has been perfected and the equitable title has vested, a claimant runs the risk of losing his discovery if the mineral deposit is exhausted or if there is a material change in market conditions rendering it unreasonable to expect that the mineral can be mined at a profit.

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented the claimant must present sufficient evidence to overcome the Government's case by a preponderance of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a major distinction between the evidence and case law applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

If the mineral material supporting the discovery is a common variety mineral material listed in the Common Varieties Act, the claimant must demonstrate either that a discovery of the common variety mineral existed on July 23, 1955, or that the discovery mineral has some unique property giving the deposit a distinct and special economic value. To establish a

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

pre-July 23, 1955, discovery, the claimant must demonstrate by a preponderance of the evidence that the mineral was marketable on July 23, 1955. This can be accomplished by showing the existence of potential buyers and the price they would pay.

Under 30 U.S.C. § 35 (1988), no placer claim shall include more than 20 acres for each individual claimant. However, 30 U.S.C. § 36 (1988), also provides that an association of claimants may locate a claim of up to 160 acres in size. In order to hold a 160-acre claim the association must have no fewer than eight members. A corporation is considered to be an individual claimant within the meaning of the law, and, as an individual claimant, a corporation cannot locate a mining claim containing more than 20 acres. If a validly located 160-acre association placer claim has been perfected and contains a valid discovery on the date of conveyance to a corporate entity, all 160 acres can be conveyed. If, on the other hand, there was no discovery on the claim on the date of conveyance, the claim was not valid on that date, and a subsequent discovery by the corporation would only validate a 20-acre claim.

On appeal, the Forest Service contends that the Administrative Law Judge erred because the record does not support a finding that the claimant has met the marketability test. To prevail, the Forest Service must either tender evidence that the claimant cannot meet the marketability test, or demonstrate that the evidence submitted by the claimant supports a finding that there is no reasonable prospect that the commercial value of the deposit will exceed the cost of extracting, processing, transporting, and marketing the contained locatable mineral. When, as in this case, the Forest Service presents no evidence or testimony on one or more of these issues, the claimant is not required to do so. However, when a claimant having no duty to present evidence of production cost and sales price does present the evidence, the evidence presented by the claimant should be considered in making a discovery determination.

When there is more than one market for the product from a claim, and the sales in one or more of those markets would be considered as a sale of a common variety mineral, that fact must be taken into

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

A placer claim larger than 10 acres in size must have a discovery within its boundaries <u>and</u> each 10-acre tract within the claim must be shown to be mineral in character.

In a contest not involving a patent application, when the Government raises an issue not set out in the complaint during the hearing or in its posthearing brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the doctrine of res judicata, that issue should be

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

addressed if an adverse ruling on that issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be valid in an earlier contest is not dispositive of a mining claim contest.

The unrebutted evidence in a mining claim contest involving a claim subject to a patent application is that, as of the date of the hearing there had been only one shipment of the mined product under an oral purchase and sales agreement. Being an oral contract, it was terminable at will, and a single shipment may have represented an isolated sale rather than the potential for continued sales of the mine product. Thus, the evidence was not sufficient to support a conclusion that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

Expert testimony by a Government mineral examiner that he traversed all of the claims, sampled evident exposures, estimated the value of the contained mineral, and based his conclusion that there was no valuable mineral deposit on any of the claims on his finding that the values indicated by the highest assay would not cover his estimate of the mining cost establishes a prima facie case that the claims are invalid.

Drilling to obtain samples in support of a discovery will be allowed if the purpose of the drilling is to establish the quantity and continuous quality of exposed mineralization that would support a discovery if quantity and continuous quality of the exposed minerals continued for a reasonably projectable distance. In order to drill on withdrawn land to confirm a discovery, the claimant must show that he has disclosed valuable mineral on the claims and that a discovery would be confirmed by drilling.

United States v. Arthur Mavros et al., 122 IBLA 297 (Mar. 9, 1992)

An ALJ properly declared lode mining claims null and void where the claimants failed to overcome a Government prima facie case that the claims were not supported by discovery of a valuable deposit of gold and silver when they failed to demonstrate that gold and silver were disclosed either on the surface or in old underground workings in such quality and quantity that they could be extracted, removed, and marketed at a profit. The claimants were properly prevented from drilling or reopening a tunnel where the land was withdrawn from mineral entry and there was no evidence that the proposed work was intended to confirm a preexisting discovery.

United States v. Emery Crowley & Rose Etta Jones Ansotegui, 124 IBLA 374 (Dec. 10, 1992)

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

Evidence that valuable mineral had been successfully produced from the claims is not sufficient to establish a discovery without additional evidence that material of a similar grade remains on the claims. Without a showing that additional mineral material of a similar quality remains on the claims, the logical conclusion is that the mined material was an isolated showing.

Standing alone, the Government's reason for conducting a mineral examination or initiating a contest is not sufficient to establish error in a finding that a mining claim is not supported by a discovery. Without a showing that evidence was deliberately or inadvertently skewed to support a finding that the claims were invalid, it cannot be said that the mineral examiner's motivation has affected the evidence or the presentation at the hearing, or that the Government's motivation ultimately affected the ALJ's conclusion that the claims were not supported by a valuable mineral deposit.

When presenting evidence to overcome a Government's prima facie case that the claim is not supported by a discovery the claimants are not limited to rebutting the evidence submitted by the mineral examiners, and may present evidence of the location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners.

United States v. Estate of Melvin E. Viles, Mary S. Viles, 126 IBLA 162 (May 10, 1993)

Under the prudent man test, a discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a paying mine.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties, 127 IBLA 181 (Sept. 7, 1993)

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

A lode mining claim contains a valuable mineral deposit if it has an exposure in a surface vein of a mineralized zone of relatively consistent high mineral values, that when justifiably projected to a depth of one-half its strike length, contains ore of sufficient quality and quantity that it can be extracted, removed, and marketed at a profit, taking into account the costs of setting up a mine and mill.

Mineral deposits exposed on adjoining lode mining claims may be aggregated in order to determine whether a valuable mineral deposit is present on each claim. To be considered valuable, each deposit must contain ore of sufficient quality and quantity that a profit would be made after the costs of extracting, removing, and marketing are paid, to include a proportionate share of the expense of setting up a mine and mill.

United States v. James Collord & Marjorie Collord, 128 IBLA 266 (Mar. 10, 1994)

A discovery within the meaning of the mining law exists where the evidence is such that a person of ordinary prudence would be justified in the further expenditure of labor and means, with a reasonable prospect of a success in developing a paying mine. Determining that a prudent individual would be justified in attempting to develop a paying mine necessarily involves consideration of whether or not a mineral deposit has been exposed within the limits of a claim and, if so, whether the evidence is such that an individual would be justified in concluding that the mineral exposed exists in sufficient quantity and quality so as to make expectations of its profitable extraction reasonable under the facts of record.

A discovery exists only where the evidence establishes that mineralization is present in sufficient quantity and quality so as to render its profitable extraction reasonably likely. Where the evidence fails to establish sufficient quantity of adequate quality mineralization in an exposure, such an exposure does not constitute a valuable mineral deposit within the meaning of the mining laws.

There is a clear distinction between "exploration" and "development" as these terms relate to discovery

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

under the mining laws. Prior to the "discovery" of a valuable mineral deposit, mining activities such as attempting to locate a deposit and the subsequent mapping and drilling of the deposit to determine the extent and grade of the mineralization disclosed constitute acts of exploration. Evidence which is sufficient to justify further exploration expenditures does not necessarily constitute evidence which would justify embarking upon the development of a claim.

Where no evidence is presented to establish that a mineral deposit present on one claim extends into an adjacent claim, the latter claim cannot be deemed valid even if the evidence establishes that the mineral deposit located on the first claim is a valuable mineral deposit under the mining laws.

The standard for determining whether a discovery of a valuable mineral deposit has been made is not whether expenditures for further exploration or for further analysis might be justified. Rather, a finding of discovery requires that the evidence be sufficient to justify, as a present matter, the expenditures necessary to develop a paying mine with a reasonable prospect of success.

Where the Board, in the course of a de novo review of the record of a mining contest, determines that various cost factors in an economic analysis of a proposed development plan have either been ignored or significantly understated with the result that the claimant's assertion that there is a reasonable prospect of success in developing the deposit is no longer sustainable on the record developed, the claims embracing such deposit are properly declared null and void.

United States v. J. Gary Feezor et al., 130 IBLA 146
(Aug. 4, 1994)

Unless and until patent issues, paramount title to lands embraced by mining claims remains in the United States, and it may inquire into the extent and validity of rights claimed against it. The doctrine of res judicata has no application to a mining claim contest where the previous determinations upon which invocation of the doctrine is premised did not purport to either determine the existence of a valuable mineral deposit or otherwise

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

adjudicate the validity of the mining claims in question.

There is a clear distinction between the quantum of evidence which would be sufficient to justify a prudent individual in the continuation of an active search for a mineral deposit of sufficient quantity and value to warrant development and that evidence which is, itself, adequate to justify the commencement of actual development of a productive mine with a reasonable prospect of success. Only the latter showing is sufficient to warrant a finding that a discovery under the mining laws exists.

United States v. Rich Knoblock et al., 131 IBLA 48
(Oct. 18, 1994) 101 I.D. 123

Geologic Inference

Where an exposure exists which shows high and relatively consistent values, geologic inference may be used to infer sufficient quantity of similar quality mineralization beyond the actual exposed area, such that the prudent man test of discovery might be met. However, geologic inference may not be used as a substitute for the actual exposure of the deposit within the limits of each claim at issue. Absent such exposure, there can be no discovery.

United States v. Willie White et al., 118 IBLA 266
(Mar. 12, 1991) 98 I.D. 129

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in

MINING CLAIMS--Continued

DISCOVERY--Continued

Geologic Inference--Continued

character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

A lode mining claim contains a valuable mineral deposit if it has an exposure in a surface vein of a mineralized zone of relatively consistent high mineral values, that when justifiably projected to a depth of one-half its strike length, contains ore of sufficient quality and quantity that it can be extracted, removed, and marketed at a profit, taking into account the costs of setting up a mine and mill.

United States v. James Collord & Marjorie Collord, 128 IBLA 266 (Mar. 10, 1994)

Assuming that an exposure of a mineral deposit has been shown to exist, recourse to geologic inference to show the continuation of values beyond the area of the physical exposure is dependent upon a determination that the demonstrated values have been relatively consistent and are likely to continue given the geologic nature of the deposition.

Recourse to geologic inference to project values beyond the area of surface exposures may not be permitted where the evidence fails to establish that the surface sampling has derived results which are "basically equivalent" with results derived from drilling and where geologic mapping does not independently establish

MINING CLAIMS--Continued

DISCOVERY--Continued

Geologic Inference--Continued

the basic equivalency of surface and subsurface mineralization.

United States v. J. Gary Feezor et al., 130 IBLA 146 (Aug. 4, 1994)

While recourse to geologic inference to show the continuation of values beyond the area of a physical exposure of a mineral deposit may be made upon a showing that the demonstrated values have been relatively consistent and are likely to continue given the geologic nature of the deposition, geologic inference alone will be deemed insufficient to project high values into areas containing exposures which, themselves, fail to exhibit similar high values.

United States v. Rich Knoblock et al., 131 IBLA 48 (Oct. 18, 1994) 101 I.D. 123

Marketability

The standard of discovery in a contest of a mining claim is whether minerals have been found in sufficient quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. This standard has been supplemented by the marketability text, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

Under the marketability test, a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

A mining claim for a common variety of sand is properly declared invalid where the claimant fails to overcome by a preponderance of the evidence the Government's prima facie case that the sand was not marketable at a profit prior to July 23, 1955.

United States v. Robert D. Fisher, 115 IBLA 277 (July 26, 1990)

The requirement that a mining claimant show that the mineral discovered on the claim is presently marketable at a profit simply means that a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success in developing a paying mine.

United States v. Willie White et al., 118 IBLA 266 (Mar. 12, 1991) 98 I.D. 129

A discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. This standard has been supplemented by the marketability test which requires a showing that the mineral deposit can be extracted, removed, and marketed at a profit.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

To have a reasonable prospect of success in developing a valuable mine, the mine owner must be able to demonstrate, as a present fact, that there is a reasonable probability that the mineral can be extracted and marketed at a profit. A discovery cannot be based on speculation that at some time in the future an economic

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

change or untested technological advance will render the mine valuable.

On appeal, the Forest Service contends that the Administrative Law Judge erred because the record does not support a finding that the claimant has met the marketability test. To prevail, the Forest Service must either tender evidence that the claimant cannot meet the marketability test, or demonstrate that the evidence submitted by the claimant supports a finding that there is no reasonable prospect that the commercial value of the deposit will exceed the cost of extracting, processing, transporting, and marketing the contained locatable mineral. When, as in this case, the Forest Service presents no evidence or testimony on one or more of these issues, the claimant is not required to do so. However, when a claimant having no duty to present evidence of production cost and sales price does present the evidence, the evidence presented by the claimant should be considered in making a discovery determination.

When there is more than one market for the product from a claim, and the sales in one or more of those markets would be considered as a sale of a common variety mineral, that fact must be taken into consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be valid in an earlier contest is not dispositive of a mining claim contest.

The unrebutted evidence in a mining claim contest involving a claim subject to a patent application is that, as of the date of the hearing, there had been only one shipment of the mined product under an oral purchase and sales agreement. Being an oral contract, it was terminable at will, and a single shipment may have represented an isolated sale rather than the potential for continued sales of the mine product. Thus, the evidence was not sufficient to support a conclusion that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

Without calculations estimating tonnage of ore on a mining claim there was nothing to demonstrate that the claim might be part of a projected low-grade mining operation, and it was therefore null and void.

Proof that claims were potentially profitable as part of a low-grade mining operation established the existence of a discovery thereon.

Where the low value of silver at hearing indicated that a claim could not be operated at a profit, but there was evidence that at the time the claim was included in a wilderness area 4 years previously a prevailing higher value would have allowed a profitable operation, the issue of the profitability of the claim is properly remanded for consideration of historic silver values as they might affect the question of discovery.

United States v. American Independence Mines & Minerals, 122 IBLA 177 (Feb. 10, 1992)

An ALJ properly declared lode mining claims null and void where the claimants failed to overcome a Government prima facie case that the claims were not supported by discovery of a valuable deposit of gold and silver when they failed to demonstrate that gold and silver were disclosed either on the surface or in old underground workings in such quality and quantity that they could be extracted, removed, and marketed at a profit. The claimants were properly prevented from drilling or reopening a tunnel where the land was withdrawn from mineral entry and there was no evidence that the proposed work was intended to confirm a preexisting discovery.

United States v. Emery Crowley & Rose Etta Jones Ansotegui, 124 IBLA 374 (Dec. 10, 1992)

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

A lode mining claim contains a valuable mineral deposit if it has an exposure in a surface vein of a mineralized zone of relatively consistent high mineral values, that when justifiably projected to a depth of one-half its strike length, contains ore of sufficient quality and quantity that it can be extracted, removed, and marketed at a profit, taking into account the costs of setting up a mine and mill.

Mineral deposits exposed on adjoining lode mining claims may be aggregated in order to determine whether a valuable mineral deposit is present on each claim. To be considered valuable, each deposit must contain ore of sufficient quality and quantity that a profit would be made after the costs of extracting, removing, and marketing are paid, to include a proportionate share of the expense of setting up a mine and mill.

United States v. James Collord & Marjorie Collord, 128 IBLA 266 (Mar. 10, 1994)

A discovery within the meaning of the mining laws exists where the evidence is such that a person of ordinary prudence would be justified in the further expenditure of labor and means, with a reasonable prospect of success in developing a paying mine. Determining that a prudent individual would be justified in attempting to develop a paying mine necessarily involves consideration of whether or not a mineral deposit has been exposed within the limits of a claim and, if so, whether the evidence is such that an individual would be justified in concluding that the exposed mineral exists in sufficient quantity and quality so as to make expectations of its profitable extraction reasonable under the facts of record.

Where the evidence submitted with respect to certain claims indicates the lack of any exposure of a mineral deposit on some of the claims and that, while an exposure of mineral deposit might be deemed to exist on the other claims, the values disclosed are insufficient to establish that the mineral deposit is valuable within the meaning of the mining laws, the claims are properly

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

deemed to be null and void as lacking a discovery of a valuable mineral deposit.

The fact that a market existed for euxenite in the 1950's does not preclude a finding that no market existed for euxenite in 1972, where it can be shown that the earlier production of euxenite was pursuant to a Government contract which paid for the contained columbium/tantalum pentoxides at rates far in excess of the existing market price, that all production of euxenite ceased upon completion of the Government contract and the termination of its stockpiling program, and that there has been no market for euxenite since 1959.

The standard for determining whether a discovery of a valuable mineral deposit has been made is not whether expenditures for further exploration or for further analysis might be justified. Rather, a finding of discovery requires that the evidence be sufficient to justify, as a present matter, the expenditures necessary to develop a paying mine with a reasonable prospect of success.

United States v. Rich Knoblock et al., 131 IBLA 48 (Oct. 18, 1994) 101 I.D. 123

ENVIRONMENT

Approval of a mining plan of operations providing for surface occupancy of mining claims by the claimant was inconsistent with a decision requiring that he remove structures and personal property from the claims by June 1989. To support a finding that surface occupancy of the claims exceeded the manner and degree of use to which the claims were put prior to Oct. 21, 1976, within the meaning of 43 U.S.C. § 1782(c) (1988), the record must indicate whether there was surface occupancy of the claims on or before that date.

Edmund Key, 117 IBLA 274 (Jan. 16, 1991)

MINING CLAIMS--Continued

ENVIRONMENT--Continued

A mining plan of operations limited in duration to operations on land in a wild and scenic river study area in 1989 was not shown to continue in effect after Dec. 31, 1989.

A mining plan of operations was properly required for dredging operations in a wild and scenic river study area pursuant to Departmental regulation 43 CFR 3809.1-4 when claimants failed to show that their operations were excepted from the general rule that mining in such a study area required submission of a plan of operations.

Pierre J. Ott, Jim D. Wills, 122 IBLA 371 (Apr. 2, 1992)

When an EA of a proposed mining plan of operations for exploration does not include the analysis of whether potential mining is sufficiently specific to adequately analyze it at the exploration stage and of the details of the exploration process, the mining process, and other allegedly connected activities in the area that is necessary for BLM's decision to withstand judicial review, BLM's decision will be set aside and the matter remanded so the EA may be supplemented.

Concerned Citizens for Responsible Mining et al., 124 IBLA 191 (Oct. 15, 1992)

"Cumulative impact" is the impact on the environment that results from the incremental impact of an action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or persons undertake such other actions. An EA examining the cyanide retention qualities of a heap leach operation need not include a discussion of an exploration plan that, during the pendency of the appeal, is withdrawn by the operator.

Red Thunder, Inc., et al., 124 IBLA 267 (Nov. 3, 1992)

MINING CLAIMS--Continued

ENVIRONMENT--Continued

A determination by an authorized officer that dredging operations capable of moving over 2,400 yards of earth annually within the meaning of 43 CFR 3809.0-5 from the Merced River did not constitute "casual use" was not overcome by an allegation that less than 5 acres of land would be disturbed by such activity.

A reclamation bond was properly required for operations conducted within a wild and scenic river study area pursuant to a plan of operations. 43 CFR 3809.1-9(b).

Lloyd L. Jones, 125 IBLA 94 (Jan. 8, 1993)

NEPA does not require that BLM examine the environmental impacts of mine development when it approves a plan for exploration of a mineral property. Exploration and development are not connected actions as defined at 40 CFR 1508.25(a)(1). Mine development is not a reasonably foreseeable result of exploration and need not be examined as a cumulative impact of exploration.

Concerned Citizens for Responsible Mining (On Reconsideration), 131 IBLA 257 (Nov. 23, 1994)

A party challenging BLM's FONSI bears the burden of proving error, and a mere disagreement with BLM's finding is insufficient. On appeal, an appellant must demonstrate that BLM's FONSI is premised on a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial environmental question of material significance to the action.

Sierra Club, Toiyabe Chapter, 131 IBLA 342 (Dec. 27, 1994)

EXCESS RESERVES

In a contest not involving a patent application, when the Government raises an issue not set out in the complaint during the hearing or in its posthearing

MINING CLAIMS--Continued

EXCESS RESERVES--Continued

brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the doctrine of res judicata, that issue should be addressed if an adverse ruling on the issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

HEARINGS

Absent a patent application, in a mining claim contest hearing there is no requirement that a mining claimant show that a contested claim is valid. Rather, the claimant's burden is to preponderate on the issues raised by the evidence.

United States v. Michael R. Ware, 113 IBLA 1 (Jan. 25, 1990)

Mining claims located on lands closed to mineral entry are null and void ab initio and no property rights are created. Therefore, no deprivation of property rights occurs when such claims are declared null and void ab initio.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

A stipulation by counsel for the Forest Service and a mineral claimant that there was some limestone "of sufficient carbonate content to be located under the 1872 Mining Law" does not prevent review of the record on appeal to determine if there was a valid location of a mineral on the claim under the mining law.

A prima facie case showing invalidity of a limestone mining claim located after July 23, 1955, for use

MINING CLAIMS--Continued

HEARINGS--Continued

as decorative stone is established by proof that the stone is a common variety lacking any property giving it distinct and special value.

New evidence offered in support of an application for a rehearing must tend to show that the party seeking rehearing has some likelihood of success if the application is to be allowed. The applicant for a rehearing must also explain why the evidence offered on appeal was not presented at the original hearing, if the evidence could have been available then.

United States v. Sherman C. Smith & Lynda K. Sellers Smith, 115 IBLA 398 (Aug. 22, 1990)

A continuance of a hearing into the validity of a mining claim will only be granted where the mining claimant presents sufficient reason to justify the grant of an additional opportunity to present his case, i.e., where circumstances have placed a substantial constraint upon his ability to obtain or offer samples or other evidence of a discovery.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties, 127 IBLA 181 (Sept. 7, 1993)

LANDS SUBJECT TO

Placer mining claims partially located on lands patented without a reservation of minerals to the United States are null and void ab initio to the extent they include such lands.

Where BLM declares a mining claim null and void ab initio to the extent that it overlaps a prior powersite withdrawal and BLM has not considered the effect of 30 U.S.C. § 621 (1982), on the powersite withdrawal, the Board will set aside BLM's decision and remand the case for further action.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Those portions of mining claims located on land subject to a valid, ongoing, and pre-existing highway right-of-way granted to the State of California pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982), are null and void ab initio.

William Peterson et al., 113 IBLA 19 (Jan. 26, 1990)

Mining claims located on lands closed to mineral entry are null and void ab initio and no property rights are created. Therefore, no deprivation of property rights occurs when such claims are declared null and void ab initio.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

Title to the bed of navigable rivers is held in trust for future states and passes to them upon admission to the Union. A placer mining claim is properly declared null and void to the extent that it includes the bed of a navigable river.

A placer mining claim is properly declared null and void to the extent that it includes land patented without a reservation of minerals to the United States.

To establish that a location of a mining claim made after withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of this claim subject to the withdrawal; that the person making the amended location had an unbroken chain of title with the original locators; and that the location predating the withdrawal was properly made.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened certain powersites to entry under the mining laws. Mining claims located after the enactment of that legislation are properly made subject to its restrictions.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

BLM properly declares a placer mining claim null and void ab initio where, at the time it was located, the affected land was segregated from mineral entry by the filing of an application for a public airport lease, even though such application had later been relinquished.

Boyad Tanner et al., 113 IBLA 387 (Mar. 28, 1990)

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Duane L. & Wyoma I. Pearson et al., 113 IBLA 393 (Mar. 28, 1990)

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)

Where a Secretarial order withdrawing land from the location of mining claims is amended by a subsequent public land order deleting certain land from the withdrawal and BLM has administered the land as unwithdrawn, a decision declaring mining claims located thereafter on land deleted from the withdrawal to be null and void ab initio will be reversed.

William M. Stokes, William L. Stokes, Jeffery B. Hulen, 115 IBLA 28 (June 5, 1990)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

The Federal District Court injunction issued in National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), cert. granted sub nom., Lujan v. National Wildlife Federation, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990) (No. 89-640), is without effect as to land for which BLM issued a purported Oct. 29, 1981, termination of classification, when the classification had in fact automatically terminated pursuant to sec. 4 of the Classification and Multiple Use Act of 1964 prior to the effective date of the injunction.

Pursuant to the Classification and Multiple Use Act of 1964 the segregative effect of a disposal classification for a tract of land larger than 2,500 acres terminated automatically 2 years after publication of the notice of proposed classification, unless a continuance was obtained. This Board will not apply the "notation" or "tract book" rule in a manner which thwarts this clear congressional intent.

Phelps Dodge Corp., 115 IBLA 214 (July 3, 1990)

A mining claim located on land withdrawn under a first-form reclamation withdrawal pursuant to the Act of June 17, 1902, is null and void ab initio. A first-form reclamation withdrawal effective before Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the 1902 Act. The Mining Claims Rights Restoration Act of 1955 does not confer a right to enter and locate mining claims on lands withdrawn under a first-form reclamation withdrawal.

Glenn Freeman, Judith L. D. Freeman, 116 IBLA 105 (Sept. 17, 1990)

Mining claims located on land which has been patented without a reservation of minerals to the United States are null and void ab initio.

Estate of Steve Pederson, 118 IBLA 210 (Mar. 7, 1991)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

BLM properly declared a group of unpatented mining claims null and void ab initio because official land status records of the Department noted that the land was, when the claims were located, encompassed by a State selection, valid on its face, which thereby segregated the land from mineral entry even though the selection was void or voidable, since the land was within a national forest.

Hyak Mining Co., 119 IBLA 1 (Mar. 15, 1991)

Mining claims located on land described by a townsite patent are properly declared null and void where the claimants, after being offered the opportunity to present evidence to show that their mining claims embrace lands within mining claims that were valid on the date of the townsite patent, fail to present proof that there was a valid discovery of a valuable mineral deposit on any such claims on the date of the townsite patent.

Norman R. Blake, Mildred L. Blake, 119 IBLA 141 (Apr. 25, 1991)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a withdrawal or segregation of lands pursuant to a first-form reclamation withdrawal, thereby reinstating the terms of the withdrawal, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

A mining claim located on lands previously statutorily withdrawn by the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (1988), is null and void ab initio.

David R. Clark, 119 IBLA 367 (June 21, 1991)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Where the official records of BLM show that land upon which a mining claim has been located was patented by the United States without a mineral reservation, the mining claim is properly declared void ab initio.

MM Holdings, Inc., 121 IBLA 26 (Oct. 7, 1991)

A BLM decision declaring lode mining claims null and void ab initio because they were located on land withdrawn by the President on Oct. 12, 1910, pursuant to sec. 1 of the Act of June 25, 1910, ch. 421, 36 Stat. 847, will be reversed if it cannot be shown that the claims were located solely for nonmetalliferous minerals.

A BLM decision declaring lode mining claims null and void ab initio because they were located on land subject to a Nov. 23, 1910, GLO coal-land classification order will be set aside if BLM has not afforded the claimant an opportunity to dispute the coal-land classification.

Jonathan Z. Herod et al., 121 IBLA 339 (Dec. 13, 1991)

It is proper for BLM to declare a lode mining claim null and void ab initio if it was located on land segregated from mineral entry by a valid land classification at the time of location.

Mike & Sandra Sprunger, 123 IBLA 330 (July 10, 1992)

BLM properly declared placer mining claims partially null and void ab initio that included land which, at the time of location, was subject to a license for a power project under a powersite withdrawal and was therefore closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, as amended, 30 U.S.C. § 621(a) (1988).

Bob & Kayla Alejandre, 125 IBLA 104 (Jan. 12, 1993)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

A mining claim located upon lands withdrawn from mineral entry is properly declared null and void.

Where lands are withdrawn from location under the mining law, "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described by the withdrawal, including the lands covered by unpatented mining claims. The withdrawal is not effective against the claimant's possessory right, but, if the withdrawal is still in existence at the time the claims are abandoned, the withdrawal becomes effective, eo instanti, as to the land covered by such claims, and future mining claim locations are precluded.

Cotter Corp., 127 IBLA 18 (July 13, 1993)

A decision declaring a mining claim null and void ab initio will be affirmed where the lands embraced in the claim were conveyed to the U.S. in a State land exchange pursuant to sec. 8 of the Taylor Grazing Act subject to a reservation of the mineral estate.

UOP, 127 IBLA 105 (Aug. 9, 1993)

Mining claims located on lands closed to mineral entry are null and void ab initio. Because such claims create no property rights, no rights were infringed when BLM found three claims located on lands closed to mineral entry to be null and void.

Barbara J. Cole, 127 IBLA 120 (Aug. 18, 1993)

That portion of a mining claim located on land subject to a pre-existing highway right-of-way granted to the State of California pursuant to the Federal Highway Act of Nov. 9, 1921, 42 Stat. 212, now the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), is null and void ab initio.

Jesse R. Collins et al., 127 IBLA 122 (Aug. 23, 1993)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

A placer mining claim was properly declared null and void because it was located on land withdrawn from mining when the claimants failed to show that they had an unbroken chain of title to locators of a claim located prior to withdrawal.

Placer mining claimants who rely on the provisions of 30 U.S.C. § 38 (1988), to prove location and posting of a mining claim at a time when the land embraced by the location was open to location must comply with the recordation requirements of sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988). Where such a claim has not been recorded, it is a nullity.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

Land which has been conveyed to a state without a reservtion of minerals to the U.S. is not available for the location of mining claims, and a mining claim located on such land after it is so conveyed is null and void ab initio. The locator of a lode mining claim partly located on school grant lands acquires no surface or mineral rights for that portion of the claims.

David A. Smith, 128 IBLA 249 (Mar. 2, 1994)

Mining claims were properly declared null and void ab initio when located on land subject to a small tract classification that had been terminated but was, at the time of location, revived by the Feb. 1986 injunction issued in NWF v. Burford, 676 F. Supp. 280 (D.D.C. 1986).

Anna Essayian, 129 IBLA 91 (Apr. 4, 1994)

A BLM decision declaring millsites null and void ab initio because they were located on land not open to mineral entry will be reversed where the record shows that a 1982 BLM order opened the land to operation of the mining laws before the millsites were located.

Donald R. Roe, 129 IBLA 267 (May 16, 1994)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Those portions of placer mining claims located on lands subject to a right-of-way grant issued pursuant to sec. 317 of the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), are properly declared null and void ab initio.

Association placer mining claim locations made pursuant to 30 U.S.C. § 36 (1988), may not contain noncontiguous tracts of land within a single location.

Robert J. Collins et al., 129 IBLA 341 (May 31, 1994)

Publication of notice of proposed classification of lands for multiple use management pursuant to the Act of Sept. 19, 1964, in the Federal Register on Jan. 1, 1970, segregated those lands from operation of the General Mining Laws. Mining claims located on lands at a time when the lands are so segregated are properly declared null and void ab initio. A subsequent modification of the classification order did not retroactively validate locations made while the lands were segregated from mineral entry.

An amended mining claim location is a location made in furtherance of an earlier valid location and related back to the date of the original location as long as no adverse rights have intervened. The burden is on the claimant to establish that a mining claim location on land segregated from mineral entry, made after the segregation, is actually an amendment of a prior location made while the land was open to mineral location. To satisfy the burden, the claimant must show that the original location was properly made, that the amended location embraces lands included in the original location, and that the claimant has an unbroken chain of title from the original location. Where claimants fail to meet that burden, BLM's decision invalidating their claims is properly affirmed.

William H. and Claudene Nordeen, 129 IBLA 369 (June 7, 1994)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

BLM properly declared an association placer mining claim null and void ab initio in part to the extent the claim was located on lands subject to a highway right-of-way granted pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1988).

A PLO, issued in 1963 pursuant to the authority of the Act of June 25, 1910, ch. 421, 36 Stat. 847 (1910), did not withdraw the land described therein from location for gold because sec. 2 of that Act provided that lands withdrawn under its authority were to remain open under the mining laws for metalliferous minerals.

James Aubert et al., 130 IBLA 50 (July 13, 1994)

To the extent that placer mining claims are located on land that has been patented without a reservation of minerals to the United States, they are properly declared null and void ab initio.

Lois J. Armstrong, Elizabeth Hillmann, 130 IBLA 228 (Aug. 5, 1994)

Yellow Aster Mining & Milling Co., 130 IBLA 234 (Aug. 5, 1994)

A mining claim located on land within an outstanding preliminary permit issued pursuant to the Federal Power Act is properly declared null and void ab initio.

Charles Q. Cassella et al., 130 IBLA 338 (Sept. 13, 1994)

Unless there is specific direction to the contrary, lands acquired by the United States under the Taylor Grazing Act are not open for location of mining claims under 30 U.S.C. § 22 (1988).

Phillip A. Davis, 131 IBLA 14 (Sept. 22, 1994)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

A placer mining claim was properly declared null and void because it was located within a licensed power project withdrawn from mineral entry and the claimant failed to show it was connected by an unbroken chain of title to a claim located prior to withdrawal.

Ernest Smart, 131 IBLA 44 (Oct. 12, 1994)

The validity of a lode mining claim located partially on school grant lands depends on whether the discovery point is on land open to mineral location.

Where, on appeal from a decision declaring mining claims abandoned and void ab initio on the basis that they were located on school lands, the claimant tenders persuasive evidence in support of its contention that the lands in question were known mineral in character on the date of acceptance of the survey, but there is no evidence in the record regarding the position of the state and/or its successors-in-interest on the issue, we will decline to make a definitive determination on that issue and set aside BLM's decision and refer the case to the Hearings Division.

Butte Lode Mining Co., 131 IBLA 284 (Nov. 30, 1994)

LOCATABILITY OF MINERAL

Generally

During the period preceding the date Congress enacted sec. 3 of the Act of July 23, 1955, pumice was locatable under the Mining Law of 1872. When Congress enacted the Common Varieties Act, it removed previously locatable mineral from the purview of the Mining Law of 1872 and made them subject to the provisions of the Materials Act of July 31, 1947. To determine if pumice is locatable, one must look to the intrinsic qualities of the mineralization. To be locatable, the mineral material must have some intrinsic quality that differentiates it from ordinary deposits of pumice, A showing that the deposit is of commercial value does not, in and of itself, make the pumice contained in the

MINING CLAIMS--Continued

LOCATABILITY OF MINERAL--Continued

Generally--Continued

deposit an uncommon variety. The pumice contained in the deposit must hold a unique property which gives it a competitive edge over other pumice.

When a withdrawal or similar event affecting the ability to locate a claim or restricting the type of mineral material subject to location occurs, the existence of a discovery at the time of the event becomes critical to the validity of a mining claim. If the mining claim is perfected on the date the event transpires, certain rights have vested in the claimant, and those rights cannot be cancelled by the action. On the other hand, if no discovery is made until after the event has transpired, the claim has not been perfected, no rights have been acquired, and nothing is lost by reason of the event.

Once made, a discovery must be maintained. Even though a claimant may have made a discovery and actually mined ore from a claim, until a patent application has been perfected and the equitable title has vested, a claimant runs the risk of losing his discovery if the mineral deposit is exhausted or if there is a material change in market conditions rendering it unreasonable to expect that the mineral can be mined at a profit.

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a

MINING CLAIMS--Continued

LOCATABILITY OF MINERAL--Continued

Generally--Continued

contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented, the claimant must present sufficient evidence to overcome the Government's case by a preponderance of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a major distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

When Congress passed the Common Varieties Act, 30 U.S.C. § 611 (1988), it specifically named common varieties of sand, stone, gravel, pumice, pumicite, and cinders as no longer subject to the Mining Law of 1872. If a common variety mineral meets an ASTM standard for a common variety use, that fact does no more than establish the ability to market and use it for that common variety use. Meeting the ASTM standard only establishes its value as a common variety mineral. To use ASTM standards as a basis for a determination that such mineral is an uncommon variety, it would be necessary to show that the qualities of the particular mineral so exceed ASTM standards that the particular mineral commands a high price in the marketplace than similar common variety minerals.

When considering whether any of the mineral material on a mining claim may be considered an uncommon variety because it can be used for a particular use, a claimant need not demonstrate that the mineral material is an uncommon variety for that particular use. The mineral material on the claim is properly compared with other deposits of such mineral generally. Both direct and indirect evidence supporting a conclusion that other deposits of such mineral generally are unsuitable for

MINING CLAIMS--Continued

LOCATABILITY OF MINERAL--Continued

Generally--Continued

that use can be used to establish that the mineral on the claim is an uncommon variety. Further, the claimant need only show that the mineral material is an uncommon variety by a preponderance of the evidence.

A common variety deposit does not possess a distinct, special economic value over and above the normal uses of the general run of such deposits. When the preponderance of the evidence supports the conclusion that the use to which the mineral material is being put is a common variety use, the mineral material must carry some special economic value over and above the general run of pumice deposits when applied to that use. If, on the other hand, the mineral material commands a premium over that sold for common variety uses, that fact is in and of itself evidence that the mineral material is of an uncommon variety. If the sales price for the mineral material sold for a particular use far exceeds the average sales price, the price differential advances the argument that the mineral material has some property giving it distinct and special value.

A claimant who bases his discovery on a deposit of mineral material listed in the Common Varieties Act, 30 U.S.C. § 611 (1988), must demonstrate by the preponderance of the evidence that the mineral material is of an uncommon variety. If a claimant demonstrates that the mineral material has some intrinsic quality rendering it suitable for a particular use, and that mineral material suitable for that use sells at a marked premium over mineral material used for common variety purposes, the claimant has met the burden of showing that the mineral material is of an uncommon variety. Unless and until evidence is presented establishing the fact that this use is also a common variety use, a claimant need not show that the product has some unique property rendering it suitable for the use commanding a premium.

If the mineral material supporting the discovery is a common variety mineral material listed in the Common Varieties Act, the claimant must demonstrate either that a discovery of the common variety mineral existed on July 23, 1955, or that the discovery mineral has some unique property giving the deposit a distinct and special economic value. To establish a pre-July 23, 1955, discovery, the claimant must demonstrate by a preponderance of the evidence that the mineral was marketable on July 23, 1955. This can be accomplished by

MINING CLAIMS--Continued

LOCATABILITY OF MINERAL--Continued

Generally--Continued

showing the existence of potential buyers and the price they would pay.

On appeal, the Forest Service contends that the Administrative Law Judge erred because the record does not support a finding that the claimant has met the marketability test. To prevail, the Forest Service must either tender evidence that the claimant cannot meet the marketability test, or demonstrate that the evidence submitted by the claimant supports a finding that there is no reasonable prospect that the commercial value of the deposit will exceed the cost of extracting, processing, transporting, and marketing the contained locatable mineral. When, as in this case, the Forest Service presents no evidence or testimony on one or more of these issues, the claimant is not required to do so. However, when a claimant having no duty to present evidence of production cost and sales price does present the evidence, the evidence presented by the claimant should be considered in making a discovery determination.

When there is more than one market for the product from a claim, and the sales in one or more of those markets would be considered as a sale of a common variety mineral, that fact must be taken into consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be

MINING CLAIMS--Continued

LOCATABILITY OF MINERAL--Continued

Generally--Continued

valid in an earlier contest is not dispositive of a mining claim contest.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

LOCATION

The boundaries of a placer claim many not be extended over patented land or land otherwise not open to location for the purpose of claiming unappropriated portions of land within the boundaries.

Under 30 U.S.C. § 36 (1982), joint entry of a placer claim comprised of up to 160 acres may be made by two or more persons, or associates of persons, having contiguous claims of any size, although such claims may be less than 10 acres each. Because parcels of land within a placer claim must be contiguous, the owners of a placer mining claim which includes noncontiguous parcels must select which tract they wish to preserve under each claim.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)

A decision rejecting a desert land entry application on the ground that the land is within an unpatented mining claim will be reversed and remanded where no final certificate of mineral entry was in effect at the time the desert land entry application was filed and where BLM records strongly suggest that the unpatented mining claims are invalid and, therefore, have no segregative effect.

Nancy M. Swallow, A. Dean Martineau, 112 IBLA 321 (Jan. 12, 1990)

MINING CLAIMS--Continued

LOCATION--Continued

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under California law, it is the date of posting location notice on the claim. Where the notice of location expressly states the date of location as a date after the land was segregated from location by the filing and notation of a forest exchange application, the mining claim is properly held to be null and void.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)

A stipulation by counsel for the Forest Service and a mineral claimant that there was some limestone "of sufficient carbonate content to be located under the 1872 Mining Law" does not prevent review of the record on appeal to determine if there was a valid location of a mineral on the claim under the mining law.

If a deposit of limestone is to be subject to location as a valuable mineral deposit under the mining laws, it must be shown to have some property giving it distinct and special value. Suitability of the deposit for production of agricultural lime does not establish that the stone is subject to location, without proof that the limestone has distinct and special properties giving it special value for that purpose.

Marketability is not the sole test of the validity of a mining claim for limestone. Unless it is shown to have some special property that excludes it from the

MINING CLAIMS--Continued

LOCATION--Continued

operation of the Common Varieties Act, limestone cannot be located as a valuable mineral under the mining laws.

If a deposit of limestone is to be subject to location under the mining laws as building stone, it must be shown to have some distinct and special property giving it special value for that purpose. Although price is a factor in showing that stone has such a property, a showing that the stone can be marketed at a profit does not alone establish the existence of a special property in the stone.

United States v. Sherman C. Smith & Lynda K. Sellers Smith, 115 IBLA 398 (Aug. 22, 1990)

A decision rejecting a desert land entry application on the ground that the land is appropriated by unpatented mining claims will be reversed where a final certificate of mineral entry has not been issued for the land at the time the desert land entry application was filed.

Bobby L. Franklin, 116 IBLA 29 (Aug. 27, 1990)

An amended mining claim location is a location made in furtherance of an earlier valid location and relates back to the date of the original location as long as no adverse rights have intervened. The burden is on the claimant to establish that a mining claim location on land segregated from mineral entry, made after the segregation, is actually an amendment of a prior location made while the land was open to mineral location. To satisfy the burden, the claimant must show that the original location was properly made, that the amended location embraces lands included in original location, and that the claimant has an unbroken chain of title to the original locator. Such an amendment, however, preserves only that part of the original described land that is common to the original location and the amendment.

A mining claimant who asserts that a notice of location misstates the beginning point of a claim has

MINING CLAIMS--Continued

LOCATION--Continued

the burden of proving that the claim was properly located on the ground in the position asserted.

A mining claim located at a time when the land is segregated from appropriation under the mining law by a small tract classification is properly declared null and void ab initio.

Patsy A. Brings, 119 IBLA 319 (June 18, 1991)

Under 30 U.S.C. § 35 (1988), no placer claim shall include more than 20 acres for each individual claimant. However, claimants may locate a claim of up to 160 acres in size. In order to hold a 160-acre claim the association must have no fewer than eight members. A corporation is considered to be an individual claimant within the meaning of the law, and, as an individual claimant, a corporation cannot locate a mining claim containing more than 20 acres. If a validly located 160-acre association placer claim has been perfected and contains a valid discovery on the date of conveyance to a corporate entity, all 160 acres can be conveyed. If, on the other hand, there was no discovery on the claim on the date of conveyance, the claim was not valid on that date, and a subsequent discovery by the corporation would only validate a 20-acre claim.

A placer claim larger than 10 acres in size must have a discovery within its boundaries and each 10-acre tract within the claim must be shown to be mineral in character.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

Where the official records of BLM show that land upon which a mining claim has been located was patented by the United States without a mineral reservation, the mining claim is properly declared void ab initio.

MM Holdings, Inc., 121 IBLA 26 (Oct. 7, 1991)

MINING CLAIMS--Continued

LOCATION--Continued

BLM properly dismissed a protest challenging a mineral patent application for the reason that the mining claim was not properly located because it was staked on land withdrawn from mining where the record established as a fact that the claim was staked after revocation of the withdrawal.

Scott Burnham, 124 IBLA 97 (Sept. 16, 1992)

Where lands are withdrawn from location under the mining law, "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described by the withdrawal, including the lands covered by unpatented mining claims. The withdrawal is not effective against the claimant's possessory right, but, if the withdrawal is still in existence at the time the claims are abandoned, the withdrawal becomes effective, eo instanti, as to the land covered by such claims, and future mining claim locations are precluded.

Cotter Corp., 127 IBLA 18 (July 13, 1993)

A decision declaring a mining claim null and void ab initio will be affirmed where the lands embraced in the claim were conveyed to the U.S. in a State land exchange pursuant to sec. 8 of the Taylor Grazing Act subject to a reservation of the mineral estate.

UOP, 127 IBLA 105 (Aug. 9, 1993)

Mining claims located on lands closed to mineral entry are null and void ab initio. Because such claims create no property rights, no rights were infringed when BLM found three claims located on lands closed to mineral entry to be null and void.

Barbara J. Cole, 127 IBLA 120 (Aug. 18, 1993)

MINING CLAIMS--Continued

LOCATION--Continued

Placer mining claimants who rely on the provisions of 30 U.S.C. § 38 (1988), to prove location and posting of a mining claim at a time when the land embraced by the location was open to location must comply with the recordation requirements of sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988). Where such a claim has not been recorded, it is a nullity.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

Mining claims located on land segregated from appropriation under the mining law by a proposed classification decision made pursuant to 43 CFR 2741.4(h) (1985) are null and void ab initio.

Edgar Sebastian Roberts, 127 IBLA 217 (Sept. 21, 1993)

LODE CLAIMS

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)

To constitute a discovery upon a lode mining claim, there must be exposed within the limits of the claim a vein or lode of quartz or other rock in place bearing gold or some other mineral deposit in such quality and quantity as would warrant a prudent man in the expenditure of his time and money with a reasonable prospect of success in developing a paying mine. Absent such an exposure, there can be no valid lode claim.

United States v. Willie White et al., 118 IBLA 266 (Mar. 12, 1991) 98 I.D. 129

MINING CLAIMS--Continued

LODE CLAIMS--Continued

A placer discovery (assuming it exists), will not support a lode location. Exposure of a vein or lode carrying mineral values in place is a necessary precondition to the validity of a lode claim. Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's exposed workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such case an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit on the lode claims will not overcome a prima facie case that there is no discovery.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties, 127 IBLA 181 (Sept. 7, 1993)

MARKETABILITY

The standard of discovery in a contest of a mining claim is whether minerals have been found in sufficient quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. This standard has been supplemented by the marketability text, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

Under the marketability test, a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

MINING CLAIMS--Continued

MARKETABILITY--Continued

Without calculations estimating tonnage of ore on a mining claim there was nothing to demonstrate that the claim might be part of a projected low-grade mining operation, and it was therefore null and void.

Proof that claims were potentially profitable as part of a low-grade mining operation established the existence of a discovery thereon.

Where the low value of silver at hearing indicated that a claim could not be operated at a profit, but there was evidence that at the time the claim was included in a wilderness area 4 years previously a prevailing higher value would have allowed a profitable operation, the issue of the profitability of the claim is properly remanded for consideration of historic silver values as they might affect the question of discovery.

United States v. American Independence Mines & Minerals, 122 IBLA 177 (Feb. 10, 1992)

An ALJ properly declared lode mining claims null and void where the claimants failed to overcome a Government prima facie case that the claims were not supported by discovery of a valuable deposit of gold and silver when they failed to demonstrate that gold and silver were disclosed either on the surface or in old underground workings in such quality and quantity that they could be extracted, removed, and marketed at a profit. The claimants were properly prevented from drilling or reopening a tunnel where the land was withdrawn from mineral entry and there was no evidence that the proposed work was intended to confirm a preexisting discovery.

United States v. Emery Crowley & Rose Etta Jones Ansotegui, 124 IBLA 374 (Dec. 10, 1992)

A lode mining claim contains a valuable mineral deposit if it has an exposure in a surface vein of a mineralized zone of relatively consistent high mineral values, that when justifiably projected to a depth of

MINING CLAIMS--Continued

MARKETABILITY--Continued

one-half its strike length, contains ore of sufficient quality and quantity that it can be extracted, removed, and marketed at a profit, taking into account the costs of setting up a mine and mill.

Mineral deposits exposed on adjoining lode mining claims may be aggregated in order to determine whether a valuable mineral deposit is present on each claim. To be considered valuable, each deposit must contain ore of sufficient quality and quantity that a profit would be made after the costs of extracting, removing, and marketing are paid, to include a proportionate share of the expense of setting up a mine and mill.

United States v. James Collord & Marjorie Collord, 128 IBLA 266 (Mar. 10, 1994)

MILLSITES

Where the Government has presented evidence that various dependent millsites are not being used or occupied for mining or milling purposes, the Government has established a prima facie case of invalidity because such use or occupancy is a prerequisite to the validity of a millsite claim under 30 U.S.C. § 42 (1982). Upon presentation of such evidence, the burden shifts to the millsite claimant to affirmatively establish that the claim is used or occupied for mining and milling purposes.

Where a millsite claim is located in conjunction with lode mining claims, an applicant for mineral patent must show that the millsite claim is located on nonmineral land and is used or occupied for mining operations. 30 U.S.C. § 42(a) (1982).

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

Under 30 U.S.C. § 42 (1982), the proprietor of a mining claim may appropriate nonmineral ground as a millsite for mining, milling, or other operations in connection with such claim. Occupancy of a millsite

MINING CLAIMS--Continued

MILLSITES--Continued

claim for purposes not related to mining operations constitutes a trespass.

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

A decision finding a dependent placer millsite valid will be affirmed on appeal when the evidence demonstrates that the millsite was needed by the proprietor of a placer claim for fuel storage, equipment repair, and a sawmill and millsite, and was used or occupied by the proprietor of the claim for mining, milling, processing, beneficiation, or other operations in connection with the placer claim.

United States v. Donald L. & Dorothy E. Clark, 121 IBLA 260 (Nov. 15, 1991)

When the Government has presented evidence that a quartz mill or reduction works is not present on a millsite, and the claimant fails to refute that evidence, the millsite does not qualify as an independent millsite pursuant to 30 U.S.C. § 42 (1988).

When the Government has presented evidence that a millsite is not being used or occupied for mining and milling purposes, and the claimant fails to refute that evidence, the millsite does not qualify as a dependent millsite pursuant to 30 U.S.C. § 42 (1988).

United States v. Loyall Fraker, 122 IBLA 24 (Jan. 3, 1992)

MINING CLAIMS--Continued

MILLSITES--Continued

The failure of the owner of a millsite to file an annual notice of intention to hold the millsite is a curable defect and before BLM declares a millsite abandoned and void for failure to make such a filing, it must provide the owner notice and an opportunity to cure the defect.

Where BLM declares a millsite abandoned and void following a failure by the owner of the millsite to respond to a notice of an annual filing deficiency, and later vacates that decision, concluding that the annual filing had been made, it may not subsequently retroactively reinstate the abandoned and void decision. Notice and an opportunity to cure must be given, and, if no filing is made in response thereto, a new decision must be issued. The effective date of abandonment will run from the date of that new decision.

Libra Mining & Mineral Corp., Floyd Robertson, 128 IBLA 84 (Dec. 10, 1993)

Use of a millsite claim as a base of operations for prospecting and assessment work on an unpatented lode mining claim and for storage of building materials to be used in connection with future mining and milling operations does not constitute compliance with the statutory requirement that a claimant use or occupy the claim for mining or milling purposes.

United States v. James Collord & Marjorie Collord, 128 IBLA 266 (Mar. 10, 1994)

A BLM decision declaring millsites null and void ab initio because they were located on land not open to mineral entry will be reversed where the record shows that a 1982 BLM order opened the land to operation of the mining laws before the millsites were located.

Donald R. Roe, 129 IBLA 267 (May 16, 1994)

MINING CLAIMS--Continued

MINERAL LANDS

A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude further consideration of the character of the land based on subsequent exploration and development.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

PATENT

A patent may be issued to a corporation organized under the laws of the United States or any state or territory irrespective of the ownership of the stock

MINING CLAIMS--Continued

PATENT--Continued

of the corporation by persons, corporations, or associations who are not citizens of the United States.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

"Holding for rejection." A decision properly "holds an application for rejection" only when BLM does not actually reject the application as of the date of the decision, but indicates that it will do so if specified defects are not cured as directed. Under this procedure, the decision is rejected only after the end of the period allowed for compliance, and the appeal period does not commence until after the compliance period has run. Where BLM mischaracterizes its decision as one holding for rejection an application for mineral patent, it is properly modified on appeal.

Where a 10-day deadline for filing a mineral patent application has irrevocably passed so that the applicant can do nothing to prevent rejection of his untimely application, it is not proper for BLM to "hold the application for rejection" by providing a compliance period to allow the applicant to conform his application to specified requirements, since compliance with the time limit is impossible, and since there is no longer any application pending before BLM to be cured. In these circumstances, BLM should reject the application as untimely (subject to an immediate appeal), and advise the applicant what it would require if and when he re-executes his application or files an amended application. BLM can then adjudicate whether any new or re-executed application complies with its filing requirements.

Under 43 CFR 1821.2-2(a), BLM properly rejects an application for a mineral patent executed more than 10 days prior to filing.

In the absence of an appeal directly presenting the propriety of BLM's demands for additional information in the context of a pending mineral patent application (such as an appeal from a decison rejecting a mineral patent application as containing information sufficient to confirm compliance with governing law),

MINING CLAIMS--Continued

PATENT--Continued

the Board of Land Appeals lacks authority to consider them.

G. Donald Massey, 114 IBLA 209 (Apr. 25, 1990)

Upon issuance of a mineral patent for a mining claim in a wilderness area in a National Forest, fee simple title to the land described in the patent passes to the patentee. The land is private land, no longer subject to the mining laws, and the Bureau of Land Management has no authority to entertain challenges to regulation of surface uses of other land under Forest Service jurisdiction.

Virgil Horn, Marcella Horn, 117 IBLA 10 (Nov. 21, 1990)

An amended mining claim location is a location made in furtherance of an earlier valid location and relates back to the date of the original location as long as no adverse rights have intervened. The burden is on the claimant to establish that a mining claim location on land segregated from mineral entry, made after the segregation, is actually an amendment of a prior location made while the land was open to mineral location. To satisfy the burden, the claimant must show that the original location was properly made, that the amended location embraces lands included in original location, and that the claimant has an unbroken chain of title to the original locator. Such an amendment, however, preserves only that part of the original described land that is common to the original location and the amendment.

A mining claimant who asserts that a notice of location misstates the beginning point of a claim has the burden of proving that the claim was properly located on the ground in the position asserted.

Patsy A. Brings, 119 IBLA 319 (June 18, 1991)

MINING CLAIMS--Continued

PATENT--Continued

BLM properly dismissed a protest challenging a mineral patent application for the reason that the mining claim was not properly located because it was staked on land withdrawn from mining where the record established as a fact that the claim was staked after revocation of the withdrawal.

Scott Burnham, 124 IBLA 97 (Sept. 16, 1992)

Where BLM determines that an application for mineral patent is deficient in information required by 43 CFR 3862.1, and notifies the applicant that the information must be submitted or the application will be rejected, BLM may properly reject the mineral patent application where the applicant fails to file the requested information within the time provided.

Karen Lynne Smith Harper, 126 IBLA 301 (Juen 14, 1993)

As the mining claim rental fee required by Congress under the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), is in lieu of the statutory requirements to annually perform assessment work and to annually file with the Department, a claimant of an unpatented mining claim who has filed an application for a mineral patent is not excused from complying with the rental fee requirement unless a final certificate has been issued. The pendency of a mining contest against the claim does not excuse a claimant's lack of compliance.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties (On Recon.); Cyrus L. Colburn, Jr., 130 IBLA 314 (Sept. 8, 1994)

PLACER CLAIMS

The boundaries of a placer claim many not be extended over patented land or land otherwise not open

MINING CLAIMS--Continued

PLACER CLAIMS--Continued

to location for the purpose of claiming unappropriated portions of land within the boundaries.

Under 30 U.S.C. § 36 (1982), joint entry of a placer claim comprised of up to 160 acres may be made by two or more persons, or associates of persons, having contiguous claims of any size, although such claims may be less than 10 acres each. Because parcels of land within a placer claim must be contiguous, the owners of a placer mining claim which includes noncontiguous parcels must select which tract they wish to preserve under each claim.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)

Pursuant to 30 U.S.C. § 36 (1982), and 43 CFR 3842.1-3, placer mine locations may not contain noncontiguous tracts of land.

William Peterson et al., 113 IBLA 19 (Jan. 26, 1990)

An amended mining claim location is a location made in furtherance of an earlier valid location and relates back to the date of the original location as long as no adverse rights have intervened. The burden is on the claimant to establish that a mining claim location on land segregated from mineral entry, made after the segregation, is actually an amendment of a prior location made while the land was open to mineral location. To satisfy the burden, the claimant must show that the original location was properly made, that the amended location embraces lands included in original location, and that the claimant has an unbroken chain of title to the original locator. Such an amendment, however, preserves only that part of the original described land that is common to the original location and the amendment.

A mining claimant who asserts that a notice of location misstates the beginning point of a claim has the burden of proving that the claim was properly located on the ground in the position asserted.

Patsy A. Brings, 119 IBLA 319 (June 18, 1991)

MINING CLAIMS--Continued

PLACER CLAIMS--Continued

Under 30 U.S.C. § 35 (1988), no placer claim shall include more than 20 acres for each individual claimant. However, claimants may locate a claim of up to 160 acres in size. In order to hold a 160-acre claim the association must have no fewer than eight members. A corporation is considered to be an individual claimant within the meaning of the law, and, as an individual claimant, a corporation cannot locate a mining claim containing more than 20 acres. If a validly located 160-acre association placer claim has been perfected and contains a valid discovery on the date of conveyance to a corporate entity, all 160 acres can be conveyed. If, on the other hand, there was no discovery on the claim on the date of conveyance, the claim was not valid on that date, and a subsequent discovery by the corporation would only validate a 20-acre claim.

A placer claim larger than 10 acres in size must have a discovery within its boundaries and each 10-acre tract within the claim must be shown to be mineral in character.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

BLM properly declared placer mining claims partially null and void ab initio that included land which, at the time of location, was subject to a license for a power project under a powersite withdrawal and was therefore closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, as amended, 30 U.S.C. § 621(a) (1988).

Bob & Kayla Alejandre, 125 IBLA 104 (Jan. 12, 1993)

Pursuant to 30 U.S.C. § 36 (1988), and 43 CFR 3842.1-3, placer mining claim locations may not contain noncontiguous tracts of land.

Jesse R. Collins et al., 127 IBLA 122 (Aug. 23, 1993)

MINING CLAIMS--Continued

PLACER CLAIMS--Continued

Those portions of placer mining claims located on lands subject to a right-of-way grant issued pursuant to sec. 317 of the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), are properly declared null and void ab initio.

Association placer mining claim locations made pursuant to 30 U.S.C. § 36 (1988), may not contain noncontiguous tracts of land within a single location.

Robert J. Collins et al., 129 IBLA 341 (May 31, 1994)

BLM properly declared an association placer mining claim null and void ab initio in part to the extent the claim was located on lands subject to a highway right-of-way granted pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1988).

Association placer mining claim locations made pursuant to 30 U.S.C. § 36 (1988), may not contain noncontiguous tracts of land within a single location.

James Aubert et al., 130 IBLA 50 (July 13, 1994)

A mining claim located on land within an outstanding preliminary permit issued pursuant to the Federal Power Act is properly declared null and void ab initio.

Charles Q. Cassella et al., 130 IBLA 338 (Sept. 13, 1994)

PLAN OF OPERATIONS

An appellant bears the burden of showing error in a BLM decision denying approval of a mining plan of operations. Unsubstantiated allegations of error do not satisfy this burden.

The fact that BLM does not intend to propose a WSA for inclusion in the wilderness system does not alter BLM's obligation to manage lands within the WSA in a manner that will not impair the land's suitability for

preservation as wilderness. BLM must continue to manage the land under the nonimpairment standard established by statute until the lands are removed from the WSA.

A BLM determination that a proposed plan of operations for mining activities on unpatented mining claims located within a WSA would impair the area's suitability for inclusion in the wilderness system is sufficient reason for denying approval of the proposed mining plan.

Robert L. Baldwin, Sr., & E. Rose Baldwin, 116 IBLA 84 (Sept. 17, 1990)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1988), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of their suitability for inclusion in the wilderness system. However, operations that impair wilderness suitability may be allowed if they are conducted in the same manner or degree as on Oct. 21, 1976, or if denial of exercise of valid existing rights will preclude the claimant's development of the claim.

BLM may properly reject a proposal in a mining plan of operations to construct a road within a wilderness study area if the record supports a conclusion that the road would impair the suitability of the area for preservation of wilderness. BLM's decision will be affirmed where BLM's judgment has not been shown to be in error.

A claimant may proceed, pursuant to 43 CFR 3802.1-5(e), with activities proposed in a plan of operations before agency approval is obtained. Nonetheless, BLM may later properly determine that the action taken impairs wilderness suitability of affected lands and take action to modify or terminate the offending activity.

Murray Perkins, Internat'l Silica Corp., 116 IBLA 288 (Oct. 23, 1990)

BLM's FONSI with respect to a proposed expansion of a mining operation will be affirmed if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. The record must establish that the FONSI was based on reasoned decisionmaking. Thus, one challenging such a finding must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal.

Although an EA for a proposed expansion of a mining operation to build a new cyanide heap leaching pad may be "tiered" to an earlier EIS, the earlier document must contain adequate information to address the alternatives. Where the EIS does not address the full extent of cumulative impacts of retention of cyanide in abandoned heaps, and where BLM is actively reviewing this question prior to allowing leaching of ore to begin on the new pad, BLM's decision to allow the permit amendment will be modified to make clear that BLM must consider whether to prepare a supplemental EIS considering cumulative impacts before allowing leaching operations to begin.

Sec. 2 of the AIRFA does not prohibit BLM from adopting a land use that conflicts with traditional Indian religious beliefs or practices. BLM complies with AIRFA if, in the decisionmaking process, it obtains and considers the views of the Indians, and if, in project implementation, it avoids unnecessary interference with Indian religious practices.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)
97 I.D. 263

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and

MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

Where, in the absence of an approved plan of operations, a mining claimant cuts live trees in the course of road improvement activities on his mining claims, which are situated within a WSA, the impact of such activities exceeds in manner and degree the activities on the claims on Oct. 21, 1976, or temporarily suspended on that date, and impairs the suitability of the land for preservation as wilderness, BLM properly requires him to immediately rehabilitate the impact of those activities.

Richard C. Behnke, 122 IBLA 131 (Jan. 27, 1992)

A notice that there was noncompliance with a mining plan of operations is affirmed where the record establishes that construction materials were stored contrary to a provision of the plan that prohibited outside storage.

An appeal from an order establishing a reclamation bond for a mining operation becomes moot if, during appeal, the plan expires or is modified.

Jim D. Wills, Reggie N. Wills, 123 IBLA 74 (May 11, 1992)

Under 43 CFR 3809.1-4(b)(2), an approved plan of operations is required prior to commencing any operation except casual use in areas designated as a potential addition or an actual component of the national wild and scenic rivers system.

Because Departmental regulation 43 CFR 3809.1-4(b)(2) requires approval of a plan of operations prior to commencing any operation except casual use in areas designated as a potential addition to the national wild and scenic rivers system as well as actual components thereof, any operation within the boundaries on a map identified as a river area under 16 U.S.C. § 1274(b) (1988), have been completed, even though the map

MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

includes land in addition to the area indicated when the river was listed as a potential addition under 16 U.S.C. § 1276 (1988).

Joe Trow, 123 IBLA 96 (May 12, 1992)

A mining claimant who constructs a road and clears land in a WSA in connection with a post-FLPMA mining claim violates 43 CFR 3802.1-1 by failing to file a plan of operations and receive approval prior to beginning work. Such unauthorized actions constitute a trespass under 43 CFR 2801.3.

A mining claimant who constructs a road across public lands in connection with a mining claim without filing a notice of such action with BLM violates 43 CFR 3809.1-3(a). Such construction is unauthorized and constitutes a trespass under 43 CFR 2801.3.

A mining claimant who violates 43 CFR 3802.1 by constructing a road in a WSA in conjunction with a mining claim without filing and receiving approval of a plan of operations or who violates 43 CFR 3809.1-3(a) by contructing an access road across public lands to a mining claim without filing a notice of such action with BLM is liable for the costs of rehabilitating and stabilizing such lands and for costs incurred by the United States in the investigation and termination of such trespass.

Karry K. Klump, 123 IBLA 377 (July 23, 1992)

The Secretary of the Interior is required by sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), to manage lands under review for wilderness suitability so as to prevent impairment of their wilderness characteristics, subject to grandfathered uses and valid existing rights. Under this standard, a plan of operations for a mining claim located after 1976 is properly rejected if it entails impacts which cannot be reclaimed to the point of being substantially unnoticeable by the time the Secretary is to make his recommendation regarding wilderness designation.

MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

Enactment of sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), had the effect of amending the Mining Law of 1872 to the extent of precluding mining-related activities on lands within a WSA which would impair the wilderness characteristics of the area except for valid existing rights and the continuation of pre-FLPMA mining activities in the same manner and degree as conducted on Oct. 21, 1976.

Under the regulations at 43 CFR Subpart 3802 governing mining operations within a WSA, a failure of BLM to adjudicate the plan of operations within the time allowed does not constitute approval of the plan. Although a claimant may proceed, pursuant to 43 CFR 3802.1-5(e), with activities proposed in a plan of operations before agency approval is obtained, if BLM later determines that the action taken impairs wilderness suitability of affected lands it may properly take action to modify or terminate the offending activity.

A mineral entry final certificate is prepared by BLM for a mining claim after it has determined on the basis of the documents submitted that the claim is apparently valid in that: the land was available at the time of location; acts necessary to keep it in force including annual assessment work have been done; no adverse claim exists; and the applicant has paid the purchase price. However, a mineral examination to establish the discovery of a locatable valuable mineral deposit on the claim is still required to support a patent and, as long as title remains in the United States, mining activities are properly regulated pursuant to relevant statutes and regulations to protect the surface resources.

Internat'l Silica Corp., 124 IBLA 155 (Sept. 30, 1992)

When an EA of a proposed mining plan of operations for exploration does not include the analysis of whether potential mining is sufficiently specific to adequately analyze it at the exploration stage and of the details of the exploration process, the mining process, and other allegedly connected activities in the area that is necessary for BLM's decision to withstand judicial

MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

review, BLM's decision will be set aside and the matter remanded so the EA may be supplemented.

Concerned Citizens for Responsible Mining et al., 124 IBLA 191 (Oct. 15, 1992)

BLM's decision to approve a mining plan amendment (1) to allow cyanide leaching operations at a gold mine to proceed and (2) to allow leach pads to be abandoned, and its accompanying FONSI will be affirmed where the record (including an extensive report demonstrating that abandonment of leach pads will not result in discharge of harmful levels of cyanide into the environment) reveals no unnecessary or undue degradation of the lands, and BLM's decision is not convincingly challenged on appeal.

The Board will affirm a FONSI with respect to a proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination that the impact is insignificant is reasonable in light of the environmental analysis. When mitigating measures are imposed to reduce impacts of the environmental effects of the proposed action that might otherwise be significant, a FONSI is properly affirmed.

Where the Montana State Historic Preservation Office is aware that an area may possess traditional cultural values, owing to the presence of Native American fasting and vision questing sites there, but nevertheless concludes that no properties eligible for inclusion on the National Register of Historic Places were identified in the area, BLM is not required to comply with sec. 106 of the National Historic Preservation Act. Rather, it is adequate for BLM to address effects of gold mining on cultural values through its compliance with the American Indian Religious Freedom Act. BLM complies with the latter Act where it actively solicits the opinions of Native Americans, both individually and in tribal groups, and considers reasonable mitigating measures.

Red Thunder, Inc., et al., 124 IBLA 267 (Nov. 3, 1992)

MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

A determination by an authorized officer that dredging operations capable of moving over 2,400 yards of earth annually within the meaning of 43 CFR 3809.0-5 from the Merced River did not constitute "casual use" was not overcome by an allegation that less than 5 acres of land would be disturbed by such activity.

Lloyd L. Jones, 125 IBLA 94 (Jan. 8, 1993)

BLM properly required the operator of a placer mining claim to conform suction dredging operations in a river designated for potential addition to the national wild and scenic rivers system and related occupancy to a modified plan of operations because such operations do not constitute casual use under 43 CFR 3809.0-5 (1991).

Pierre J. Ott, 125 IBLA 250 (Feb. 11, 1993)

Approval of a mining plan of operations will be set aside and remanded where the record indicates that BLM analyzed the plan of operations and reviewed environmental impacts, but conditioned approval of the plan on the performance of measures which may be inadequate to mitigate or prevent any unnecessary or undue environmental degradation.

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

When a mining claim is located partially within a WSA, the regulations in 43 CFR Part 3802 apply, and BLM may properly issue a notice of noncompliance requiring a mining claimant to remove unauthorized structures for a WSA, reclaim disturbed lands, and submit a plan of operations and reclamation bond.

Paul M. Shock, 126 IBLA 232 (May 27, 1993)

MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

A road constructed to provide motor vehicle access to a mining claim located in a WSA without first obtaining an approved plan of operations permitting such activity pursuant to provision of 43 CFR 3802.1-1(a) was properly required to be reclaimed.

Lloyd L. Jones, 127 IBLA 270 (Oct. 1, 1993)

A petition for stay of a decision denying a mining plan of operations in a WSA, if granted, would not authorize the activities set forth in that plan. The granting of a stay would merely mean that the denial would not be effective during the pendency of the stay; it would not constitute approval of the pending plan of operations.

Robert E. Oriskovich, 128 IBLA 69 (Dec. 6, 1993)

A plan of operations is properly required under 43 CFR Part 3809 where BLM determines that unreclaimed surface disturbance from previous years together with proposed operations will cause a cumulative surface disturbance of more than 5 acres.

A person who is not the owner of a claim but performs assessment work is an "operator" as defined by 43 CFR 3809.0-5(g) and is properly issued a notice of noncompliance for failure to complete the reclamation required under an approved plan of operations.

Del M. Ackels dba Gold Dust Mines, 128 IBLA 72 (Dec. 7, 1993)

FLPMA, 43 U.S.C. § 1782(c) (1988), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of the suitability of these areas for potential inclusion in the wilderness system. A claim located after enactment of FLPMA that includes both WSA lands and lands that contain pre-FLPMA mining operations situated outside the WSA does not qualify as a mining operation on WSA lands

MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

that may continue if its operations are occurring in the same manner and degree as on Oct. 21, 1976.

Although an operator is free under 43 CFR 3802.1-5(e) to regrade an existing access road if BLM does not notify the operator of any action on a plan of operations, the operator assumes the risk that BLM will later find the action impaired the suitability of the land for wilderness and require necessary changes. BLM is required under 43 CFR 3802.4-1(b) to issue a notice of noncompliance when it determines an operator is failing to comply with the provisions of the regulations in 43 CFR Subpart 3802 and the noncompliance is causing impairment of wilderness suitability.

When the boundary of a WSA excluding mining operations conducted before Oct. 21, 1976, is uncertain, it is appropriate to set aside the portion of a BLM decision requiring reclamation of slopes in the mined area and remand the matter for a delineation of the boundary.

Ceminex, Ltd., 129 IBLA 64 (Mar. 25, 1994)

A finding by BLM that a proposal in a mining plan of operations for construction of a road and other mechanized surface-disturbing activity on unpatented post-FLPMA mining claims located within a WSA would impair the area's suitability for inclusion in the wilderness system provided sufficient reason to deny approval of the proposed mining plan.

Dave Paquin, 129 IBLA 76 (Mar. 25, 1994)

When the record supports the State Director's determination under 43 CFR 3809.1-7(c)(2) and (c)(3) that a proposed modification of a mine plan of operations must be submitted and his determination under 43 CFR 3809.1-7(c)(4) that measures are needed to avoid unnecessary or undue degradation, the decision will be affirmed on appeal.

Red Thunder, Inc., 129 IBLA 219 (Apr. 29, 1994)
101 I.D. 52

MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

Revised 43 CFR 4.21(a) governs the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." The regulations governing mining plans of operation contain a "pertinent regulation" within the exception of 43 CFR 4.21(a). Under 43 CFR 3809.4(f), the filing of an appeal shall not stop the authorized officer's decision from being effective.

Western Shoshone Nat'l Council, 130 IBLA 69 (July 26, 1994)

A written statement admitting that construction work had been performed on a road across Federal land providing access to mining claims was not the prior notice to BLM required by 43 CFR 3809.1-3(a), but instead supported issuance of a notice of noncompliance pursuant to 43 CFR 3809.3-2(a).

Wayne D. Klump, 130 IBLA 98 (Aug. 2, 1994)

Under sec. 603(c) of FLPMA, lands within a WSA must be managed in a manner so as not to impair the suitability of such areas for preservation as wilderness. Impairment of suitability for inclusion in the Wilderness System is defined as causing such impacts that cannot be reclaimed to the point of being substantially unnoticeable. The Secretary is not charged with maintaining the existing wilderness character of every parcel and FLPMA did not prohibit mining activity within a WSA if it does not create an impairment.

The Board will affirm a FONSI for proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination that the impact is significant is reasonable in light of the environmental analysis.

When making its determination that proposed mining activity would not impair the suitability of the area for preservation as wilderness, BLM was required to make subjective judgment decisions. Those decisions are entitled to considerable deference, even though reasonable men might differ in making such assessments. When BLM's subjective decisions are challenged on appeal

MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

there must be a showing of clear error of law or demonstrable error of fact.

Committee for Idaho's High Desert, 130 IBLA 327 (Sept. 12, 1994)

NEPA does not require that BLM examine the environmental impacts of mine development when it approves a plan for exploration of a mineral property. Exploration and development are not connected actions as defined at 40 CFR 1508.25(a)(1). Mine development is not a reasonably foreseeable result of exploration and need not be examined as a cumulative impact of exploration.

Concerned Citizens for Responsible Mining (On Reconsideration), 131 IBLA 257 (Nov. 23, 1994)

Under 43 CFR 3833.1-7(d), a claimant seeking a small miner exemption must provide BLM with information concerning notices or plans of operations; when required information is unintentionally omitted from a timely filed certification of exemption from payment of rental, BLM shall notify the claimant of the deficiency and allow him 30 days to file the requested information, pursuant to 43 CFR 3833.4(b).

Leber Mining Co., 131 IBLA 275 (Nov. 28, 1994)

A BLM decision notifying a claimant that continued occupancy of mining claims is unauthorized, requiring reclamation of the site, and demanding the removal of a mobile home, generators, and other personal property from mining claims because the property is located within a WSA is properly affirmed where the IMP provides that any temporary impacts must be removed and reclaimed by June 30, 1989, the date the Secretary was scheduled to send his recommendation on that WSA to the President.

Virgil Schuette, 131 IBLA 332 (Dec. 22, 1994)

MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

A party challenging BLM's FONSI bears the burden of proving error, and a mere disagreement with BLM's finding is insufficient. On appeal, an appellant must demonstrate that BLM's FONSI is premised on a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial environmental question of material significance to the action.

Sierra Club, Toiyabe Chapter, 131 IBLA 342 (Dec. 27, 1994)

POSSESSORY RIGHT

In light of the adoption of sec. 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1988), the provisions of 30 U.S.C. § 38 (1988), may not be used to establish rights under the mining laws of the U.S. for claims which have not been duly recorded with BLM under sec. 314(b).

Robert L. Mendenhall et al., 127 IBLA 73 (July 20, 1993)

Placer mining claimants who rely on the provisions of 30 U.S.C. § 38 (1988), to prove location and posting of a mining claim at a time when the land embraced by the location was open to location must comply with the recordation requirements of sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988). Where such a claim has not been recorded, it is a nullity.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

POWERSITE LANDS

Where BLM declares a mining claim null and void ab initio to the extent that it overlaps a prior powersite withdrawal and BLM has not considered the effect of 30 U.S.C. § 621 (1982), on the powersite withdrawal, the Board will set aside BLM's decision and remand the case for further action.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened certain powersites to entry under the mining laws. Mining claims located after the enactment of that legislation are properly made subject to its restrictions.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

Locators of claims on land opened under 30 U.S.C. § 621(a) (1988), have been required by 30 U.S.C. § 623 (1988), to file copies of their location notices with BLM within 1 year after Aug. 11, 1955, for all locations previously made, or within 60 days of location for locations thereafter made.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1988), authorizes the location and patent of mining claims on public lands withdrawn for power purposes. However, the Department may hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land and may issue an order providing for one of the following three alternatives: (1) a complete prohibition on placer mining; (2) permission to engage in placer mining upon the condition that the locator shall restore the surface of the claim; or (3) a general permission to engage in placer mining.

Where a copy of the notice of location of a mining claim on land withdrawn for powersite purposes was not recorded with BLM within the time prescribed by 30 U.S.C. § 623 (1988), a notice of intent from BLM to conduct a hearing under sec. 621(b) will not be considered untimely if the notice of intent was issued within 60 days after receipt of some affirmative acknowledgement by the owner of the claim that the claim was subject to that provision of the Act.

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1988), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the

benefits of mining outweigh the benefits from other uses.

In making a determination whether placer mining operations would substantially interfere with other uses of powersite lands, the party who seeks to restrict or prohibit placer mining bears the initial burden of presenting a prima facie case. The burden then shifts to the mining claimant to overcome the case so proved by a preponderance of the evidence.

United States v. Phyrne Brown, 124 IBLA 247 (Nov. 2, 1992)

Evidence produced at a hearing held pursuant to the MCRRA, 30 U.S.C. § 621 (1988), established that placer mining on land subject to a powersite withdrawal would interfere with recreational use of the land and that the benefits of mining were outweighed by the benefits derived from recreational use; an order prohibiting placer mining on the claim was therefore properly entered.

United States v. Robert G. McEwen, 129 IBLA 99 (Apr. 7, 1994)

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on or before Oct. 21, 1976, was required to file with the proper office of BLM a copy of the official record of the notice or certificate of location and a copy of the evidence of assessment work on or before Oct. 22, 1979. Failure to make the required filings constitutes an abandonment of the claim by the owner.

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments

within the prescribed time period conclusively constitutes an abandonment of the claim.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened certain powersites to entry under the mining laws. Mining claims located after the enactment of that legislation are properly made subject to its restrictions.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

If a mining claimant files an affidavit of assessment work or notice of intention to hold without sufficient service charges as required by 43 CFR 3833.1-3, regulation 43 CFR 3833.1-4 provides for a 30-day compliance period during which this deficiency may be corrected prior to rejection. Because rejection of annual filings does not occur, if at all, until expiration of the compliance period pursuant to 43 CFR 3833.1-4, a decision notifying the claimant of the deficiency is interlocutory, i.e., not final for purposes of appeal. A notice of appeal filed by the claimant during the compliance period may be dismissed as premature and, in such case, the substance of the "appeal" should be treated as a protest.

Bennie Sinerius, 115 IBLA 312 (Aug. 7, 1990)

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim located on or after Oct. 21, 1976, is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office on or before Dec. 30 of each year following the calendar year of location of the claim. Failure to file one of the instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

James R. Tucker, 116 IBLA 222 (Oct. 4, 1990)

Departmental regulation 43 CFR 3833.1-3(c) requires that annual filings made pursuant to 43 CFR 3833.2 regarding evidence of assessment work and/or notice of intention to hold be accompanied by a nonrefundable service charge of $5 for each mining claim, millsite, or tunnel site. This requirement became effective on Jan. 3, 1989, the first business day of that year, and applies to any filing made on or after that date. The fact that a mining claimant may have performed his assessment work and executed the documents prior to that date does not relieve him of the obligation to comply with this requirement.

Amada Mineral Corp., 116 IBLA 257 (Oct. 17, 1990)

Failure to file in the proper BLM office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1988), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim.

Silver King Mining Co., 122 IBLA 357 (Mar. 19, 1992)

In accordance with 43 CFR 3833.1-3, annual filings for mining claims must be accompanied by a nonrefundable service charge of $5 for each claim. Annual filings received by BLM on or after Jan. 1, 1991, which are not accompanied by the proper service charges are, according to 43 CFR 3833.1-4(b), not to be accepted and are to be returned to the claimant/owner without further action. Thus, there can be no timely annual filing without the accompanying service charge and if the filing deadline passes without proper payment, the claims may be properly declared abandoned and void.

Where a mining claimant timely files evidence of annual assessment work for 15 claims, but only timely tenders sufficient service charges to cover the filing of eight of those claims, and the record contains no evidence of how the service fee is to be applied, BLM shall require the claimant to select the eight claims to which the money tendered should be applied. The

remaining seven claims may be properly declared abandoned and void.

Norman Filip, 124 IBLA 122 (Sept. 24, 1992)

The Board will apply the doctrine of estoppel in reversing a 1991 decision of BLM declaring mining claims situated in the Death Valley National Monument abandoned and void for failure to file a notice of intent to hold the claims in 1979, where confusion existed regarding recordation and filing requirements under the Mining in the Parks Act and FLPMA and the claimants inquired of BLM in 1979 whether they were required to make additional filings for their claims during 1979, and in response BLM not only provided inaccurate information about the proper place of filing but also concealed a material fact from claimants.

Carl Dresselhaus et al., 128 IBLA 26 (Nov. 16, 1993)

In accordance with 43 CFR 3833.1-3, annual filings for mining claims must be accompanied by a nonrefundable service charge of $5.00 for each claim. Annual filings received by BLM on or after Jan. 1, 1991, which are not accompanied by the proper service charges are, according to 43 CFR 3833.1-4(b), not to be accepted and are to be returned to the claimant/owner without further action. Thus, there can be no timely annual filing without the accompanying service charge and if the filing deadline passes without proper payment, the claims may be properly declared abandoned and void.

Where a mining claimant makes a timely filing of a notice of intention to hold during the filing year, but the check accompanying the notice, tendered in payment of the service charges, is correctly returned, after the filing deadline, as uncollectible by the bank upon which it is drawn, subsequent payment of the service fee could not cure what had become, because of the dishonored check, an untimely filing, and the claims are properly declared abandoned and void.

N.T.M., Inc., 128 IBLA 77 (Dec. 7, 1993)

The failure of the owner of a millsite to file an annual notice of intention to hold the millsite is a curable defect and before BLM declares a millsite abandoned and void for failure to make such a filing, it must provide the owner notice and an opportunity to cure the defect.

Where BLM declares a millsite abandoned and void following a failure by the owner of the millsite to respond to a notice of an annual filing deficiency, and later vacates that decision, concluding that the annual filing had been made, it may not subsequently retroactively reinstate the abandoned and void decision. Notice and an opportunity to cure must be given, and, if no filing is made in response thereto, a new decision must be issued. The effective date of abandonment will run from the date of that new decision.

Libra Mining & Mineral Corp., Floyd Robertson, 128 IBLA 84 (Dec. 10, 1993)

Where a mining claimant makes a timely filing of an affidavit of assessment work during the filing year, but the check accompanying that affidavit, tendered in payment of the service charges, is correctly returned after the filing deadline as uncollectible by the bank upon which it is drawn, the filing must be considered untimely and the mining claims declared abandoned and void. However, by initially processing the timely filing, BLM earned the service charges and a subsequent payment will be retained and not returned to the claimant.

M & A Mining, Inc., 130 IBLA 333 (Sept. 12, 1994)

It is not improper for BLM to return the affidavit of assessment work which was submitted to satisfy the requirements of 43 U.S.C. § 1744(a)(2) (1988), where it retains a datestamped copy in the case file as evidence that the document was in fact received. Compliance with filing requirements of 43 U.S.C. § 1744(a)(2) (1988), does not affect the requirement to pay an annual rental fee which Congress imposed in the Department of the

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD--Continued

Interior and Related Agencies Appropriations Act for FY 1993.

Lanny Perry, 131 IBLA 1 (Sept. 16, 1994)

RECORDATION OF CERTIFICATE OR NOTICE OF LOCATION

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under California law, it is the date of posting location notice on the claim. Where the notice of location expressly states the date of location as a date after the land was segregated from location by the filing and notation of a forest exchange application, the mining claim is properly held to be null and void.

The owner of mining claims located after Oct. 21, 1976, must file copies of the notices of location of the claims with BLM within 90 days of the location of the claims, failing which the claims are properly declared abandoned and void.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

A mining claimant may correct the misidentification of a township on a map filed pursuant to the regulations implementing 43 U.S.C. § 1744 (1982).

The Carrow Co., 115 IBLA 102 (June 26, 1990)

Regulation 43 CFR 3833.1-3(b), which increased the service charge to $10 for recording a notice of location with BLM, was effective Jan. 3, 1989. Notices of location mailed on Dec. 31, 1988, received by BLM on Jan. 4, 1989, and accompanied by a $5 service charge per claim are properly rejected by BLM upon expiration of a 30-day compliance period authorized by 43 CFR 3833.1-4(a) without payment of a $5 balance per claim. At the conclusion of the 30-day compliance period, an appeals period of 30 days commences.

Instruction Memorandum No. 89-222 (Jan. 18, 1989) directs BLM to indicate, in its interlocutory decisions

RECORDATION OF CERTIFICATE OR NOTICE OF LOCATION--Continue

giving notice of deficient fees, that the agency will apply the submitted fees to process the claims in the order listed on the document submitted by the owner.

Herbert M. Cole et al., 115 IBLA 272 (July 26, 1990)

The Federal Land Policy and Management Act of 1976 requires the owner of a mining claim located on public land to file with the proper BLM office a copy of the official record of the notice or certificate of location within 90 days after the date of location. 43 U.S.C. § 1744(b) (1988). The "date of location" of a mining claim is the date determined under state law in the jurisdiction in which the mining claim is situated. 43 CFR 3833.0-5(h). Under Nevada law the date a mining claim is located is the date which is stated in the notice of location posted on the claim and repeated in the certificate of location filed with the county recorder. Upon a failure to timely file a copy of the notice of location with BLM, a claim is conclusively deemed abandoned and void.

Richard Bargen, 117 IBLA 239 (Jan. 3, 1991)

Under 43 U.S.C. § 1744 (1988), the owner of an unpatented mining claim located on or before Oct. 21, 1976, was required to file a copy of the official record of the notice or certificate of location with BLM on or before Oct. 22, 1979, and failure to do so constituted an abandonment of the claim by the owner.

A BLM decision notifying the occupant of public land of the initiation of trespass proceedings and requiring the removal of unauthorized property, based on the fact that the holder of a life estate occupancy lease for the land in question had relinquished the lease, will be set aside where the record shows that the land was the subject of a mining claim properly recorded with BLM in 1982 and questions exist regarding present ownership of the claim and whether occupancy of the claim is reasonably incident to mining.

Mr. & Mrs. Michael Bosch, 119 IBLA 370 (June 26, 1991)

MINING CLAIMS--Continued

RECORDATION OF CERTIFICATE OR NOTICE OF LOCATION--Continue

It is proper for BLM to reject location notices for placer mining claims submitted for recordation under 43 CFR 3833.1-4(a) because the claimants failed to tender the proper service charge within 30 days from the date claimants were deemed to have constructively received a deficiency notice requiring such payment. The record establishes that the deficiency notice was addressed to and the post office properly attempted delivery to the claimants' last address of record.

Gerhard W. Befeld, Marie D. Befeld, 123 IBLA 118 (May 19, 1992)

Under 43 CFR 3833.1-4(a), where a mining claimant submitted affidavits of assessment work and the accompanying check for service charges was not honored by his bank, it was improper for BLM to reject the affidavits without first providing him with a deficiency notice informing him that he had 30 days from receipt of the notice in which to submit the required service fee.

R. Keith Barrett, 123 IBLA 240 (June 12, 1992)

The "proper office of BLM" for purposes of recording mining claims is defined in 43 CFR 3833.0-5(g) as the BLM office listed in 43 CFR 1821.1-2(d) as having jurisdiction over the area in which the claims are located.

The Board will apply the doctrine of estoppel to a situation where certificates of location are filed for recordation with a BLM State Office and that office informs the claimant by letter, which constitutes an official decision, of its refusal to accept them due to a postdated check for the recordation fees, but fails to inform him that the office is not the "proper office of BLM" in which to file the certificates. Where the claimant in reliance thereon refiles the certificates with the same State Office and they are rejected, such failure constitutes the affirmative concealment of a material fact.

Leitmotif Mining Co., Inc., 124 IBLA 344 (Dec. 1, 1992)

MINING CLAIMS--Continued

RECORDATION OF CERTIFICATE OR NOTICE OF LOCATION--Continue

In light of the adoption of sec. 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1988), the provisions of 30 U.S.C. § 38 (1988), may not be used to establish rights under the mining laws of the U.S. for claims which have not been duly recorded with BLM under sec. 314(b).

Robert L. Mendenhall et al., 127 IBLA 73 (July 20, 1993)

Placer mining claimants who rely on the provisions of 30 U.S.C. § 38 (1988), to prove location and posting of a mining claim at a time when the land embraced by the location was open to location must comply with the recordation requirements of sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988). Where such a claim has not been recorded, it is a nullity.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

The Interior Department and Related Agencies Appropriations Act of 1993, P.L. 102-381, 106 Stat. 1374, and the regulations in 43 CFR 3833 (58 FR 38186 (July 15, 1993)), require payment of a $100 per claim or site rental fee for assessment years 1992-93 and 1993-94. In the alternative, a claimant holding 10 or fewer claims and meeting the other requirements set out in the Act and regulations may file a certificate of exemption with BLM on or before Aug. 31, 1993. It is proper for BLM to deny exemption when BLM records indicate the claimant holds more than 10 claims. When there is evidence on appeal that 10 or fewer claims had actually been perfected, rendering the balance of the claims abandoned, it is proper to set BLM's decision aside and remand the case to BLM for a determination of whether the claimant has met the rental fee exemption requirements for the perfected claims.

Edna Jarvis, 128 IBLA 143 (Jan. 11, 1994)

MINING CLAIMS--Continued

RELOCATION

To establish that a location of a mining claim made after withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of this claim subject to the withdrawal; that the person making the amended location had an unbroken chain of title with the original locators; and that the location predating the withdrawal was properly made.

Rights acquired under a relocation of a mining claim abandoned pursuant to 43 U.S.C. § 1744 (1982), will not relate back to the date of location of the original claim but only to the date of the relocation.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

An amended mining claim location is a location made in furtherance of an earlier valid location and relates back to the date of the original location as long as no adverse rights have intervened. The burden is on the claimant to establish that a mining claim location on land segregated from mineral entry, made after the segregation, is actually an amendment of a prior location made while the land was open to mineral location. To satisfy the burden, the claimant must show that the original location was properly made, that the amended location embraces lands included in original location, and that the claimant has an unbroken chain of title to the original locator. Such an amendment, however, preserves only that part of the original described land that is common to the original location and the amendment.

Patsy A. Brings, 119 IBLA 319 (June 18, 1991)

A placer mining claim was properly declared null and void because it was located on land withdrawn from mining when the claimants failed to show that they had an unbroken chain of title to locators of a claim located prior to withdrawal.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES

Generally

In order to qualify for a small miner exemption under the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), and 43 CFR 3833.1-6(a) (58 FR 38199 (July 15, 1993)), a claimant must hold 10 or fewer mining claims, millsites, and tunnel sites on Federal lands. Where BLM records disclosed that on Aug. 31, 1993, a mining claimant seeking a small miner exemption held in excess of 10 mining claims on such lands, and where on appeal the claimant failed to provide any evidence to show otherwise, BLM's decision denying the exemption was properly affirmed.

Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual payment of the claim rental fee as required by the Act shall conclusively constitute an abandonment of the unpatented mining claim, millsite, or tunnel site by the claimant. In the absence of a small miner exemption, an unpatented mining claim is deemed abandoned and void when there is no evidence of timely payment of the claim rental fee.

The Department is without authority to excuse lack of compliance with the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), to extend the time for compliance, or to afford any relief from the consequences provided in that Act. Congress did not provide for a waiver of the requirement that for each unpatented mining claim, millsite, or tunnel site on Federally owned lands, each claimant shall, except as provided by the Act, pay a claim rental fee on or before Aug. 31, 1993.

Lee H. & Goldie E. Rice, 128 IBLA 137 (Jan. 7, 1994)

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Generally--Continued

The Interior Department and Related Agencies Appropriations Act of 1993, P.L. 102-381, 106 Stat. 1374, and the regulations in 43 CFR 3833 (58 FR 38186 (July 15, 1993)), require payment of a $100 per claim or site rental fee for assessment years 1992-93 and 1993-94. In the alternative, a claimant holding 10 or fewer claims and meeting the other requirements set out in the Act and regulations may file a certificate of exemption with BLM on or before Aug. 31, 1993. It is proper for BLM to deny exemption when BLM records indicate the claimant holds more than 10 claims. When there is evidence on appeal that 10 or fewer claims had actually been perfected, rendering the balance of the claims abandoned, it is proper to set BLM's decision aside and remand the case to BLM for a determination of whether the claimant has met the rental fee exemption requirements for the perfected claims.

Edna Jarvis, 128 IBLA 143 (Jan. 11, 1994)

A conclusive presumption is one in which proof of basic fact renders the existence of the presumed fact conclusive and irrebuttable. Thus, the conclusive presumption of abandonment which attends the failure to pay timely the rental fees required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), and 43 CFR 3833.1-5 (58 FR 38199 (July 15, 1993)), does not arise until BLM has concluded by adjudication that proof of the basic fact exists, i.e., that the claimant has failed to qualify for the exemption or failed to pay the rental fee timely in accordance with the Act and regulations, and the claimant has exhausted its administrative appeal rights.

Mesa Sand & Rock, Inc., 128 IBLA 243 (Mar. 2, 1994)

Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Act), P.L. 102-381, 106 Stat. 1378-79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual payment of the claim rental fee as required by the Act shall conclusively constitute an

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Generally--Continued

abandonment of the unpatented mining claim, millsite, or tunnel site by the claimant. Excepting only the small miner exemption, there is no basis for BLM to grant a request for exemption from the rental fee requirements of that Act. Where a mining claimant fails to qualify for a small miner exemption from the rental fee requirement, failure to pay the fee in accordance with the Act and regulations results in a conclusive presumption of abandonment.

William B. Wray, 129 IBLA 173 (Apr. 22, 1994)

In the Department of the Interior and Related Agencies Appropriations Act for FY 1993, Congress mandated that failure to make the annual payment of claim rental fees as required by the Act shall conclusively constitute an abandonment of unpatented mining claims, mill, or tunnel sites. Where a mining claimant tenders payment of the fees via a check that is later dishonored by her bank, the effect is the same as if the rental fees are not paid. The claims are properly declared abandoned and void if the mining claimant did not apply for a small miner exemption from the rental fees requirement.

Elinor D. O'Rourke, 130 IBLA 87 (July 29, 1994)

A claimant seeking a small miner exemption must timely file a certified statement including the information required by 43 CFR 3833.1-7(d). Where a timely certified statement is filed, but there is an unintentional failure to file all of the information required by that regulation, BLM is required to notify the claimant of the deficiency and provide 30 days from receipt of the notice within which to file the requested information. Failure to file the information within the time allowed results in a conclusive presumption of abandonment of the mining claims, millsites, or tunnel sites.

William C. Harrison, 130 IBLA 225 (Aug. 5, 1994)

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Generally--Continued

The Department is without authority to excuse lack of compliance with the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), to extend the time for compliance, or to afford any relief from the consequences provided in that Act. Failure to pay the claim rental fee on or before Aug. 31, 1993, shall conclusively constitute an abandonment of the unpatented mining claim by the claimant.

As the mining claim rental fee required by Congress under the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), is in lieu of the statutory requirements to annually perform assessment work and to annually file with the Department, a claimant of an unpatented mining claim who has filed an application for a mineral patent is not excused from complying with the rental fee requirement unless a final certificate has been issued. The pendency of a mining contest against the claim does not excuse a claimant's lack of compliance.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties (On Recon.), Cyrus L. Colburn, Jr., 130 IBLA 314 (Sept. 8, 1994)

The Department is without authority to excuse lack of compliance with the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, to extend the time for compliance, or to afford any relief from the statutory consequences.

Keith Lindsey, 130 IBLA 346 (Sept. 14, 1994)

It is not improper for BLM to return the affidavit of assessment work which was submitted to satisfy the requirements of 43 U.S.C. § 1744(a)(2) (1988), where it retains a datestamped copy in the case file as evidence that the document was in fact received. Compliance with filing requirements of 43 U.S.C. § 1744(a)(2) (1988), does not affect the requirement to pay an annual rental fee which Congress imposed in the Department of the

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Generally--Continued

Interior and Related Agencies Appropriations Act for FY 1993.

Lanny Perry, 131 IBLA 1 (Sept. 16, 1994)

A decision declaring an unpatented mining claim abandoned and void for failure to file the annual rental fee as required by statute will be upheld notwithstanding claimant's lack of actual advance knowledge of the requirement. When the statute has been published, implementing regulations have been published, and notices have been published in newspapers of general circulation, the decision will be sustained even though the BLM has not provided claimant with personal advance notice of the requirement by certified mail.

Dee W. Alexander Estate et al., 131 IBLA 39 (Oct. 12, 1994)

Failure to pay the $100 claim maintenance fee required by sec. 10101 of the Omnibus Budget Reconciliation Act of Aug. 10, 1993, P.L. 103-66, 107 Stat. 312, 405-06, and 43 CFR 3833.1-5, 59 FR 44846, 44860 (Aug. 30, 1994), conclusively constitutes a forfeiture of an unpatented mining claim, millsite, or tunnel site.

William Jenkins et al., 131 IBLA 166 (Nov. 2, 1994)

Under secs. 10101-10106 of the Omnibus Budget Reconciliation Act of Aug. 10, 1993, P.L. 103-66, 107 Stat. 312, 405-06, and 43 CFR 3833.1-5, 3833.1-6, and 3383.1-7, 59 FR 44846, 44860-61 (Aug. 30, 1994), a person who held an unpatented mining claim was required to file a $100-per-claim maintenance fee or a small miner waiver certification on or before Aug. 31, 1994, for the 1995 assessment year.

Under 43 CFR 3833.0-5(m), 59 FR 44846, 44858 (Aug. 30, 1994), a claim maintenance fee will be considered timely if it is received within the time period prescribed by law, or, if mailed to the proper BLM office, is contained in an envelope clearly postmarked by a bona fide mail delivery service within the period prescribed

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Generally--Continued

by law and received by the proper BLM State Office by 15 calendar days subsequent to such period. An envelope containing a maintenance fee, which bears only a Pitney-Bowes postage meter postmark, cannot be considered timely filed under 43 CFR 3833.0-5(m), because such a postmark is not the postmark of a "bona fide mail delivery service." The Department has stated that a bona fide mail delivery service must be independent of the claimant.

A maintenance fee for the 1995 assessment year is timely filed if the envelop containing the fee is mailed to the proper BLM office, bears a postmark of Aug. 31, 1994, or earlier, affixed by a bona fide mail delivery service, and is received by BLM on or before Sept. 15, 1994. The attempted filing of a maintenance fee in an envelope bearing a Pitney-Bowes postage meter postmark of Aug. 23, 1994, which is properly rejected as untimely, even assuming the U.S. Postal Service improperly returned the envelope to the claimant.

Paul W. Tobeler, 131 IBLA 245 (Nov. 21, 1994)

Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1374, 1378-79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual payment of the claim rental fee as required by the Act shall conclusively constitute an abandonment of the unpatented mining claim, millsite, or tunnel site. Failure to pay the fee in accordance with the Act and implementing regulations results in a conclusive presumption of abandonment. Neither the claimant's lack of actual knowledge of the statutory requirement to pay rental fees nor BLM's failure to advise the claimant of that statutory requirement excuses the claimant's lack of compliance with the rental fee requirement since all persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Lester W. Pullen, 131 IBLA 271 (Nov. 23, 1994)

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Generally--Continued

Under 43 CFR 3833.1-7(d), a claimant seeking a small miner exemption must provide BLM with information concerning notices or plans of operations; when required information is unintentionally omitted from a timely filed certification of exemption from payment of rental, BLM shall notify the claimant of the deficiency and allow him 30 days to file the requested information, pursuant to 43 CFR 3833.4(b).

Leber Mining Co., 131 IBLA 275 (Nov. 28, 1994)

Small Miner Exemption

In order to qualify for a small miner exemption under the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), and 43 CFR 3833.1-6(a) (58 FR 38199 (July 15, 1993)), a claimant must hold 10 or fewer mining claims, millsites, and tunnel sites on Federal lands. Where BLM records disclosed that on Aug. 31, 1993, a mining claimant seeking a small miner exemption held in excess of 10 mining claims on such lands, and where on appeal the claimant failed to provide any evidence to show otherwise, BLM's decision denying the exemption was properly affirmed.

Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual payment of the claim rental fee as required by the Act shall conclusively constitute an abandonment of the unpatented mining claim, millsite, or tunnel site by the claimant. In the absence of a small miner exemption, an unpatented mining claim is deemed abandoned and void when there is no evidence of timely payment of the claim rental fee.

The Department is without authority to excuse lack of compliance with the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), to extend the time for compliance, or to afford any relief from the consequences provided in that Act. Congress did not provide for a waiver of the

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Small Miner Exemption--Continued

requirement that for each unpatented mining claim, millsite, or tunnel site on Federally owned lands, each claimant shall, except as provided by the Act, pay a claim rental fee on or before Aug. 31, 1993.

Lee H. & Goldie E. Rice, 128 IBLA 137 (Jan. 7, 1994)

To be entitled to a stay of a BLM decision denying exemption from payment of rental fees on mining claims, the claimant was required to show there was a likelihood he would succeed on the merits of his appeal. Because his exemption from payment of rental fees imposed by the Act of Oct. 5, 1992, depended on a showing that he was a small miner holding 10 claims or less, his ownership of 13 claims foreclosed the possibility of success on appeal.

A miner claiming entitlement to exemption from payment of rental fees required by the Act of Oct. 5, 1992, for a group of 13 mining claims because access to the claims in order to perform assessment work had allegedly been denied was not entitled to exemption from such payment when the record showed he was not a small miner as that term is defined by regulations implementing the Act.

Clay Worst, 128 IBLA 165 (Jan. 21, 1994)

A conclusive presumption is one in which proof of basic fact renders the existence of the presumed fact conclusive and irrebuttable. Thus, the conclusive presumption of abandonment which attends the failure to pay timely the rental fees required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), and 43 CFR 3833.1-5 (58 FR 38199 (July 15, 1993)), does not arise until BLM has concluded by adjudication that proof of the basic fact exists, i.e., that the claimant has failed to qualify for the exemption or failed to pay the rental fee timely in accordance with the Act and regulations, and the claimant has exhausted its administrative appeal rights.

Mesa Sand & Rock, Inc., 128 IBLA 243 (Mar. 2, 1994)

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Small Miner Exemption--Continued

Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Act), P.L. 102-381, 106 Stat. 1378-79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual payment of the claim rental fee as required by the Act shall conclusively constitute an abandonment of the unpatented mining claim, millsite, or tunnel site by the claimant. Excepting only the small miner exemption, there is no basis for BLM to grant a request for exemption from the rental fee requirements of that Act. Where a mining claimant fails to qualify for a small miner exemption from the rental fee requirement, failure to pay the fee in accordance with the Act and regulations results in a conclusive presumption of abandonment.

William B. Wray, 129 IBLA 173 (Apr. 22, 1994)

No grace period is allowed by Departmental regulation 43 CFR 3833.0-5(m) in which to file the certificate required by 43 CFR 3833.1-7 of persons seeking the small miner's exemption from payment of the annual claim rental fee. Since the rental fee for the claims at issue was not paid, and the claimant seeking exemption from payment did not timely file qualifying documentation of entitlement to exemption on or before the due date for such filing, her claims affected by the failure to pay or file were extinquished automatically by operation of law albeit she did not intend to relinquish them.

Nannie Edwards, 130 IBLA 59 (July 19, 1994)

In the Department of the Interior and Related Agencies Appropriations Act for FY 1993, Congress mandated that failure to make the annual payment of claim rental fees as required by the Act shall conclusively constitute an abandonment of unpatented mining claims, mill, or tunnel sites. Where a mining claimant tenders payment of the fees via a check that is later dishonored by her bank, the effect is the same as if the rental fees are not paid. The claims are properly declared abandoned and void if the mining claimant did not apply

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Small Miner Exemption--Continued

for a small miner exemption from the rental fees requirement.

Elinor D. O'Rourke, 130 IBLA 87 (July 29, 1994)

No grace period is allowed by Departmental regulation 43 CFR 3833.0-5(m) in which to file the certificate required by 43 CFR 3833.1-7(b) of persons seeking the small miners exemption from payment of the annual claim rental fee. The claims at issue were extinguished automatically by operation of law by failure to timely file documentation establishing qualification for exemption from payment or pay the annual fee.

William Harding et al., 130 IBLA 90 (Aug. 1, 1994)

Since no grace period is allowed by Departmental regulation 43 CFR 3833.0-5(m) in which to file the small miners annual rental fee exemption certificate required by 43 CFR 3833.1-5, an extension of time to file was not available to claimants seeking to correct their failure to file the required certificates.

Jack S. Brooks et al., 130 IBLA 116 (Aug. 2, 1994)

A claimant seeking a small miner exemption must timely file a certified statement including the information required by 43 CFR 3833.1-7(d). Where a timely certified statement is filed, but there is an unintentional failure to file all of the information required by that regulation, BLM is required to notify the claimant of the deficiency and provide 30 days from receipt of the notice within which to file the requested information. Failure to file the information within the time allowed results in a conclusive presumption of abandonment of the mining claims, millsites, or tunnel sites.

William C. Harrison, 130 IBLA 225 (Aug. 5, 1994)

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Small Miner Exemption--Continued

The Department is without authority to excuse lack of compliance with the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), to extend the time for compliance, or to afford any relief from the consequences provided in that Act. Failure to pay the claim rental fee on or before Aug. 31, 1993, shall conclusively constitute an abandonment of the unpatented mining claim by the claimant.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties (On Recon.), Cyrus L. Colburn, Jr., 130 IBLA 314 (Sept. 8, 1994)

Under 43 CFR 3833.1-7(d), a claimant seeking a small miner exemption must provide BLM with information concerning notices or plans of operations; when required information is unintentionally omitted from a timely filed certification of exemption from payment of rental, BLM shall notify the claimant of the deficiency and allow him 30 days to file the requested information, pursuant to 43 CFR 3833.4(b).

Leber Mining Co., 131 IBLA 275 (Nov. 28, 1994)

A mining claimant seeking the small miner exemption from payment of mining claim rental for the 1994 assessment year must have filed an exemption certificate for that year on or before Aug. 31, 1993.

Jesse L. Cleary, 131 IBLA 296 (Dec. 1, 1994)

SPECIAL ACTS

Locators of claims on land opened under 30 U.S.C. § 621(a) (1988), have been required by 30 U.S.C. § 623 (1988), to file copies of their location notices with BLM within 1 year after Aug. 11, 1955, for all locations

previously made, or within 60 days of location for locations thereafter made.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1988), authorizes the location and patent of mining claims on public lands withdrawn for power purposes. However, the Department may hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land and may issue an order providing for one of the following three alternatives: (1) a complete prohibition on placer mining; (2) permission to engage in placer mining upon the condition that the locator shall restore the surface of the claim; or (3) a general permission to engage in placer mining.

Where a copy of the notice of location of a mining claim on land withdrawn for powersite purposes was not recorded with BLM within the time prescribed by 30 U.S.C. § 623 (1988), a notice of intent from BLM to conduct a hearing under sec. 621(b) will not be considered untimely if the notice of intent was issued within 60 days after receipt of some affirmative acknowledgement by the owner of the claim that the claim was subject to that provision of the Act.

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1988), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits from other uses.

In making a determination whether placer mining operations would substantially interfere with other uses of powersite lands, the party who seeks to restrict or prohibit placer mining bears the initial burden of presenting a prima facie case. The burden then shifts to the mining claimant to overcome the case so proved by a preponderance of the evidence.

United States v. Phyrne Brown, 124 IBLA 247 (Nov. 2, 1992)

It is proper to declare mining locations null and void ab initio where the locations were not perfected by performance of the condition precedent set forth in the order opening lands in a reclamation withdrawal to mineral location and entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1988).

American Colloid Co., 128 IBLA 257 (Mar. 4, 1994)

Evidence produced at a hearing held pursuant to the MCRRA, 30 U.S.C. § 621 (1988), established that placer mining on land subject to a powersite withdrawal would interfere with recreational use of the land and that the benefits of mining were outweighed by the benefits derived from recreational use; an order prohibiting placer mining on the claim was therefore properly entered.

United States v. Robert G. McEwen, 129 IBLA 99 (Apr. 7, 1994)

SPECIFIC MINERAL(S) INVOLVED

Pumice

During the period preceding the date Congress enacted sec. 3 of the Act of July 23, 1955, pumice was locatable under the Mining Law of 1872. When Congress enacted the common Varieties Act, it removed previously locatable mineral from the purview of the Mining Law of 1872 and made them subject to the provisions of the Materials Act of July 31, 1947. To determine if pumice is locatable, one must look to the intrinsic qualities of the mineralization. To be locatable, the mineral material must have some intrinsic quality that differentiates it from ordinary deposits of pumice. A showing that the deposit is of commercial value does not, in and of itself, make the pumice contained in the deposit an uncommon variety. The pumice contained in the deposit must hold a unique property which gives it a competitive edge over other pumice.

MINING CLAIMS--Continued

SPECIFIC MINERAL(S) INVOLVED--Continued

Pumice--Continued

When Congress passed the Common Varieties Act, 30 U.S.C. § 611 (1988), it specifically named common varieties of sand, stone, gravel, pumice, pumicite, and cinders as no longer subject to the Mining Law of 1872. If a common variety mineral meets an ASTM standard for a common variety use, that fact does no more than establish the ability to market and use it for that common variety use. Meeting the ASTM standard only establishes its value as a common variety mineral. To use ASTM standards as a basis for a determination that such mineral is an uncommon variety, it would be necessary to show that the qualities of the particular mineral so exceed ASTM standards that the particular mineral commands a higher price in the marketplace than similar common variety minerals.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

SURFACE USES

Pursuant to 43 CFR 3809.3-2(d), a notice of noncompliance properly issues upon a determination that the mining claimants and the operators have failed to operate in such a manner as to prevent undue or unnecessary degradation or to complete reclamation of a millsite to the standards set forth in 43 CFR 3809.1-3.

B. K. Lowndes et al., 113 IBLA 321 (Mar. 14, 1990)

Approval of a mining plan of operations providing for surface occupancy of mining claims by the claimant was inconsistent with a decision requiring that he remove structures and personal property from the claims by June 1989. To support a finding that surface occupancy of the claims exceeded the manner and degree of use to which the claims were put prior to Oct. 21, 1976, within the meaning of 43 U.S.C. § 1782(c) (1988), the record must indicate whether there was surface occupancy of the claims on or before that date.

Edmund Key, 117 IBLA 274 (Jan. 16, 1991)

MINING CLAIMS--Continued

SURFACE USES--Continued

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

A contestee overcomes the presumption that his answer to a contest complaint was not filed within 30 days from the date of receipt of the complaint by establishing that 14 days before the end of the 30-day period his answer was received by a DOI employee at the street address at which the answer was to be filed. It is proper to assume that the Department employee signing the return receipt card forwarded the answer to the addressee identified on the face of the answer, and it is reasonable to expect that it would take less than 14 days to deliver a letter to that addressee.

George M. Reedy et al., 120 IBLA 274 (Aug. 28, 1991)

In determining the appropriate amount of a bond for the protection of the owner of the surface estate of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. §§ 291-301 (1976), BLM properly considers possible damages from projected mining operations within the entirety of the mining claims sought to be re-entered and occupied, relying on the current value of tangible improvements and of the projected lost grazing use of that land from such operations and subsequent reclamation. However, where BLM improperly discounts the value of future lost grazing use, the Board will recompute that value and set the proper bond amount.

William C. Hayes et ux., 122 IBLA 68 (Jan. 10, 1991)

MINING CLAIMS--Continued

SURFACE USES--Continued

A mining plan of operations limited in duration to operations on land in a wild and scenic river study area in 1989 was not shown to continue in effect after Dec. 31, 1989.

A mining plan of operations was properly required for dredging operations in a wild and scenic river study area pursuant to Departmental regulation 43 CFR 3809.1-4 when claimants failed to show that their operations were excepted from the general rule that mining in such a study area required submission of a plan of operations.

Pierre J. Ott, Jim D. Wills, 122 IBLA 371 (Apr. 2, 1992)

Sec. 4(a) of the Surface Resources Act, 30 U.S.C. § 612(a) (1988), bars use of an unpatented mining claim for any purpose other than prospecting, mining, or processing operations and uses "reasonably incident thereto." Residential occupancy may be reasonably incident to mining during the conduct of operations where required to provide feasible access to remote claims and/or to provide security for equipment and material at times when operations are ongoing. These needs are obviated, however, and residential occupancy may not be reasonably incident where the claimant owns fee lands contiguous with the claim which both provide and control vehicular access to the claim and from which claimant operates a tourist shop.

Storage on an unpatented mining claim of numerous inoperable (junk) automobiles and trucks is not reasonably incidental to mining even though some cannibalized parts from those vehicles may potentially have utility. Similarly, storage on the claim of more dump trucks than the record establishes can reasonably be used in claimant's mining operation is not reasonably incidental to mining.

Occupancy of an unpatented mining claim is properly regulated to bar any unnecessary and undue degradation of the public lands as set forth in sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988). The accumulation of an excessive quantity of parts and materials stored in a disorganized manner on the surface of an unpatented mining claim causing a surface disturbance greater than

MINING CLAIMS--Continued

SURFACE USES--Continued

would normally result when mining is performed by a prudent operator in usual, customary, and proficient operations of similar character gives rise to unnecessary and undue degradation of the public lands.

The conduct of operations on an unpatented mining claim under an approved plan of operations may be conditioned upon provision of a bond adequate to cover the costs of reasonable stabilization and reclamation of disturbed areas. However, the basis for establishing the amount of the bond must be clear from the record.

United States v. Lee Jesse Peterson, 125 IBLA 72 (Jan. 6, 1993)

A determination by an authorized officer that dredging operations capable of moving over 2,400 yards of earth annually within the meaning of 43 CFR 3809.0-5 from the Merced River did not constitute "casual use" was not overcome by an allegation that less than 5 acres of land would be disturbed by such activity.

A reclamation bond was properly required for operations conducted within a wild and scenic river study area pursuant to a plan of operations. 43 CFR 3809.1-9(b).

Lloyd L. Jones, 125 IBLA 94 (Jan. 8, 1993)

Because BLM failed to show that a mining claim was not used or occupied for purposes reasonably incident to mining, it was proper to find that the Government had not demonstrated any impermissible use contrary to provision of 30 U.S.C. § 612(a) (1988), and contest proceedings against the claim were properly dismissed as a result.

United States v. William Doherty, 125 IBLA 296 (Mar. 16, 1993)

MINING CLAIMS--Continued

SURFACE USES--Continued

When a mining claim is located partially within a WSA, the regulations in 43 CFR Part 3802 apply, and BLM may properly issue a notice of noncompliance requiring a mining claimant to remove unauthorized structures for a WSA, reclaim disturbed lands, and submit a plan of operations and reclamation bond.

Paul M. Shock, 126 IBLA 232 (May 27, 1993)

A road constructed to provide motor vehicle access to a mining claim located in a WSA without first obtaining an approved plan of operations permitting such activity pursuant to provision of 43 CFR 3802.1-1(a) was properly required to be reclaimed.

Lloyd L. Jones, 127 IBLA 270 (Oct. 1, 1993)

A BLM decision notifying a claimant that continued occupancy of mining claims is unauthorized, requiring reclamation of the site, and demanding the removal of a mobile home, generators, and other personal property from mining claims because the property is located within a WSA is properly affirmed where the IMP provides that any temporary impacts must be removed and reclaimed by June 30, 1989, the date the Secretary was scheduled to send his recommendation on that WSA to the President.

Virgil Schuette, 131 IBLA 332 (Dec. 22, 1994)

TITLE

When unpatented mining claims have been donated to the NPS by quitclaim deed and the record before BLM discloses a dispute regarding the chain of title to the claims or the existence of encumbrances upon title to the claims, neither the regulations applicable to mining claims recordation nor the regulations governing acceptance of donated interests in real property authorizes BLM to adjudicate title to the claims and a decision purporting to do so is properly vacated.

David J. Bartoli, 123 IBLA 27 (Apr. 29, 1992)
99 I.D. 55

MINING CLAIMS--Continued

TUNNEL SITES

Under 30 U.S.C. § 28b (1982), the annual assessment work requirement imposed by 30 U.S.C. § 28 (1982), may be deferred by the Secretary of the Interior as to any mining claim or group of claims upon the necessary showing being made. The deferment statute is inapplicable to tunnel sites because they are not mining claims and because no annual assessment work for tunnel sites is dictated by 30 U.S.C. § 28 (1982).

David Doremus, 115 IBLA 336 (Aug. 9, 1990)

Pursuant to 30 U.S.C. § 27 (1988), failure to prosecute work on a tunnel for 6 months shall be considered an abandonment of the right to all undiscovered veins on the line of such tunnel.

The language of 30 U.S.C. § 27 (1988), clearly distinguishes between the right to undiscovered veins on the line of a tunnel and the right to use the tunnel for development of a mine. Failure to diligently prosecute tunnel work for 6 months does not constitute a statutory abandonment of the right to use the tunnel site for development purposes.

The right to utilize a tunnel site for development of a mine is essentially a right-of-way and can be abandoned. Abandonment of a right-of-way can be predicated upon a showing that the means of enjoyment of it have long been in a state of disrepair.

United States v. Elmer H. Swanson, 119 IBLA 53 (Mar. 29, 1991)
98 I.D. 185

WITHDRAWN LAND

Mining claims located on lands closed to mineral entry are null and void ab initio and no property rights are created. Therefore, no deprivation of property rights occurs when such claims are declared null and void ab initio.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

To establish that a location of a mining claim made after withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of this claim subject to the withdrawal; that the person making the amended location had an unbroken chain of title with the original locators; and that the location predating the withdrawal was properly made.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened certain powersites to entry under the mining laws. Mining claims located after the enactment of that legislation are properly made subject to its restrictions.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)

Where a Secretarial order withdrawing land from the location of mining claims is amended by a subsequent public land order deleting certain land from the withdrawal and BLM has administered the land as unwithdrawn, a decision declaring mining claims located thereafter on land deleted from the withdrawal to be null and void ab initio will be reversed.

William M. Stokes, William L. Stokes, Jeffery B. Hulen, 115 IBLA 28 (June 5, 1990)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

A decision declaring mining claims null and void ab initio will be set aside where BLM's decision relies upon a Secretarial order withdrawing from location all islands in the Snake River and it is unclear from the record whether the lands claimed were ever part of an island included in the withdrawal.

C. A. Braun, 119 IBLA 252 (May 16, 1991)

An amended mining claim location is a location made in furtherance of an earlier valid location and relates back to the date of the original location as long as no adverse rights have intervened. The burden is on the claimant to establish that a mining claim location on land segregated from mineral entry, made after the segregation, is actually an amendment of a prior location made while the land was open to mineral location. To satisfy the burden, the claimant must show that the original location was properly made, that the amended location embraces lands included in original location, and that the claimant has an unbroken chain of title to the original locator. Such an amendment, however, preserves only that part of the original described land that is common to the original location and the amendment.

A mining claimant who asserts that a notice of location misstates the beginning point of a claim has the burden of proving that the claim was properly located on the ground in the position asserted.

A mining claim located at a time when the land is segregated from appropriation under the mining law by a small tract classification is properly declared null and void ab initio.

Patsy A. Brings, 119 IBLA 319 (June 18, 1991)

A mining claim located on lands previously statutorily withdrawn by the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (1988), is null and void ab initio.

David R. Clark, 119 IBLA 367 (June 21, 1991)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

When a withdrawal or similar event affecting the ability to locate a claim or restricting the type of mineral material subject to location occurs, the existence of a discovery at the time of the event becomes critical to the validity of a mining claim. If the mining claim is perfected on the date the event transpires, certain rights have vested in the claimant, and those rights cannot be cancelled by the action. On the other hand, if no discovery is made until after the event has transpired, the claim has not been perfected, no rights have been acquired, and nothing is lost by reason of the event.

Once made, a discovery must be maintained. Even though a claimant may have made a discovery and actually mined ore from a claim, until a patent application has been perfected and the equitable title has vested, a claimant runs the risk of losing his discovery if the mineral deposit is exhausted or if there is a material change in market conditions rendering it unreasonable to expect that the mineral can be mined at a profit.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

A BLM decision declaring lode mining claims null and void ab initio because they were located on land withdrawn by the President on Oct. 12, 1910, pursuant to sec. 1 of the Act of June 25, 1910, ch. 421, 36 Stat. 847, will be reversed if it cannot be shown that the claims were located solely for nonmetalliferous minerals.

A BLM decision declaring lode mining claims null and void ab initio because they were located on land subject to a Nov. 23, 1910, GLO coal-land classification order will be set aside if BLM has not afforded the claimant an opportunity to dispute the coal-land classification.

Jonathan Z. Herod et al., 121 IBLA 339 (Dec. 13, 1991)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

Drilling to obtain samples in support of a discovery will be allowed if the purpose of the drilling is to establish the quantity and continuous quality of exposed mineralization that would support a discovery if quantity and continuous quality of the exposed minerals continued for a reasonably projectable distance. In order to drill on withdrawn land to confirm a discovery, the claimant must show that he has disclosed valuable mineral on the claims and that a discovery would be confirmed by drilling.

United States v. Arthur Mavros et al., 122 IBLA 297 (Mar. 9, 1992)

BLM properly dismissed a protest challenging a mineral patent application for the reason that the mining claim was not properly located because it was staked on land withdrawn from mining where the record established as a fact that the claim was staked after revocation of the withdrawal.

Scott Burnham, 124 IBLA 97 (Sept. 16, 1992)

An ALJ properly declared lode mining claims null and void where the claimants failed to overcome a Government prima facie case that the claims were not supported by discovery of a valuable deposit of gold and silver when they failed to demonstrate that gold and silver were disclosed either on the surface or in old underground workings in such quality and quantity that they could be extracted, removed, and marketed at a profit. The claimants were properly prevented from drilling or reopening a tunnel where the land was withdrawn from mineral entry and there was no evidence that the proposed work was intended to confirm a preexisting discovery.

United States v. Emery Crowley & Rose Etta Jones Ansotegui, 124 IBLA 374 (Dec. 10, 1992)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

BLM properly declared placer mining claims partially null and void ab initio that included land which, at the time of location, was subject to a license for a power project under a powersite withdrawal and was therefore closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, as amended, 30 U.S.C. § 621(a) (1988).

Bob & Kayla Alejandre, 125 IBLA 104 (Jan. 12, 1993)

A mining claim located upon lands withdrawn from mineral entry is properly declared null and void.

Where lands are withdrawn from location under the mining law, "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described by the withdrawal, including the lands covered by unpatented mining claims. The withdrawal is not effective against the claimant's possessory right, but, if the withdrawal is still in existence at the time the claims are abandoned, the withdrawal becomes effective, eo instanti, as to the land covered by such claims, and future mining claim locations are precluded.

Cotter Corp., 127 IBLA 18 (July 13, 1993)

Mining claims located on lands closed to mineral entry are null and void ab initio. Because such claims create no property rights, no rights were infringed when BLM found three claims located on lands closed to mineral entry to be null and void.

Barbara J. Cole, 127 IBLA 120 (Aug. 18, 1993)

A placer mining claim was properly declared null and void because it was located on land withdrawn from mining when the claimants failed to show that they had an unbroken chain of title to locators of a claim located prior to withdrawal.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

Mining claims located on land segregated from appropriation under the mining law by a proposed classification decision made pursuant to 43 CFR 2741.4(h) (1985) are null and void ab initio.

Edgar Sebastian Roberts, 127 IBLA 217 (Sept. 21, 1993)

It is proper to declare mining locations null and void ab initio where the locations were not perfected by performance of the condition precedent set forth in the order opening lands in a reclamation withdrawal to mineral location and entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1988).

American Colloid Co., 128 IBLA 257 (Mar. 4, 1994)

A BLM decision declaring millsites null and void ab initio because they were located on land not open to mineral entry will be reversed where the record shows that a 1982 BLM order opened the land to operation of the mining laws before the millsites were located.

Donald R. Roe, 129 IBLA 267 (May 16, 1994)

Publication of notice of proposed classification of lands for multiple use management pursuant to the Act of Sept. 19, 1964, in the Federal Register on Jan. 1, 1970, segregated those lands from operation of the General Mining Laws. Mining claims located on lands at a time when the lands are so segregated are properly declared null and void ab initio. A subsequent modification of the classification order did not retroactively validate locations made while the lands were segregated from mineral entry.

An amended mining claim location is a location made in furtherance of an earlier valid location and related back to the date of the original location as long as no adverse rights have intervened. The burden is on the claimant to establish that a mining claim location on land segregated from mineral entry, made after the

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

segregation, is actually an amendment of a prior location made while the land was open to mineral location. To satisfy the burden, the claimant must show that the original location was properly made, that the amended location embraces lands included in the original location, and that the claimant has an unbroken chain of title from the original location. Where claimants fail to meet that burden, BLM's decision invalidating their claims is properly affirmed.

William H. and Claudene Nordeen, 129 IBLA 369 (June 7, 1994)

A PLO, issued in 1963 pursuant to the authority of the Act of June 25, 1910, ch. 421, 36 Stat. 847 (1910), did not withdraw the land described therein from location for gold because sec. 2 of that Act provided that lands withdrawn under its authority were to remain open under the mining laws for metalliferous minerals.

James Aubert et al., 130 IBLA 50 (July 13, 1994)

A mining claim located on land within an outstanding preliminary permit issued pursuant to the Federal Power Act is properly declared null and void ab initio.

Charles Q. Cassella et al., 130 IBLA 338 (Sept. 13, 1994)

A placer mining claim was properly declared null and void because it was located within a licensed power project withdrawn from mineral entry and the claimant failed to show it was connected by an unbroken chain of title to a claim located prior to withdrawal.

Ernest Smart, 131 IBLA 44 (Oct. 12, 1994)

MINING CLAIMS RIGHTS RESTORATION ACT

Where BLM declares a mining claim null and void ab initio to the extent that it overlaps a prior powersite withdrawal and BLM has not considered the effect of 30 U.S.C. § 621 (1982), on the powersite withdrawal, the Board will set aside BLM's decision and remand the case for further action.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)

A mining claim located on land withdrawn under a first-form reclamation withdrawal pursuant to the Act of June 17, 1902, is null and void ab initio. A first-form reclamation withdrawal effective before Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the 1902 Act. The Mining Claims Rights Restoration Act of 1955 does not confer a right to enter and locate mining claims on lands withdrawn under a first-form reclamation withdrawal.

Glenn Freeman, Judith L. D. Freeman, 116 IBLA 105 (Sept. 17, 1990)

Locators of claims on land opened under 30 U.S.C. § 621(a) (1988), have been required by 30 U.S.C. § 623 (1988), to file copies of their location notices with BLM within 1 year after Aug. 11, 1955, for all locations previously made, or within 60 days of location for locations thereafter made.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1988), authorizes the location and patent of mining claims on public lands withdrawn for power purposes. However, the Department may hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land and may issue an order providing for one of the following three alternatives: (1) a complete prohibition on placer mining; (2) permission to engage in placer mining upon the condition that the locator shall restore the surface of the claim; or (3) a general permission to engage in placer mining.

Where a copy of the notice of location of a mining claim on land withdrawn for powersite purposes was not recorded with BLM within the time prescribed by 30 U.S.C. § 623 (1988), a notice of intent from BLM to

MINING CLAIMS RIGHTS RESTORATION ACT--Continued

conduct a hearing under sec. 621(b) will not be considered untimely if the notice of intent was issued within 60 days after receipt of some affirmative acknowledgement by the owner of the claim that the claim was subject to that provision of the Act.

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1988), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits from other uses.

In making a determination whether placer mining operations would substantially interfere with other uses of powersite lands, the party who seeks to restrict or prohibit placer mining bears the initial burden of presenting a prima facie case. The burden then shifts to the mining claimant to overcome the case so proved by a preponderance of the evidence.

United States v. Phyrne Brown, 124 IBLA 247 (Nov. 2, 1992)

BLM properly declared placer mining claims partially null and void ab initio that included land which, at the time of location, was subject to a license for a power project under a powersite withdrawal and was therefore closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, as amended, 30 U.S.C. § 621(a) (1988).

Bob & Kayla Alejandre, 125 IBLA 104 (Jan. 12, 1993)

Evidence produced at a hearing held pursuant to the MCRRA, 30 U.S.C. § 621 (1988), established that placer mining on land subject to a powersite withdrawal would interfere with recreational use of the land and that the benefits of mining were outweighed by the benefits derived from recreational use; an order prohibiting placer mining on the claim was therefore properly entered.

United States v. Robert G. McEwen, 129 IBLA 99 (Apr. 7, 1994)

MINING CLAIMS RIGHTS RESTORATION ACT--Continued

A mining claim located on land within an outstanding preliminary permit issued pursuant to the Federal Power Act is properly declared null and void ab initio.

Charles Q. Cassella et al., 130 IBLA 338 (Sept. 13, 1994)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969
(See also Environmental Policy Act)

GENERALLY

The Board is unable to affirm a finding that no significant impact to the environment will result from a proposal for drilling coalbed methane gas wells in a 2,160-acre study area where the environmental analysis upon which the finding is based fails to give appropriate consideration to obvious alternatives, such as staggering development over time, as required by 42 U.S.C. § 4332(2)(E) (1988), 40 CFR 1508.9(b), and 516 DM 3.4(A).

Powder River Basin Resource Council, Montana Dept. of Health & Environmental Sciences, Montana Dept. of Natural Resources & Conservation, 120 IBLA 47 (July 12, 1991)

BLM does not violate sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), by approving APDs before receiving a belated response from the U.S. Fish and Wildlife Service to a request for consultation when it plans to require the lessee to take an action that obviates the need for formal consultation.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991)

BLM does not violate sec. 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1988), and its implementing regulations by issuing a natoice of realty action for an exchange prior to preparation of an EA if the decision

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

GENERALLY--Continued

to proceed with the exchange is not made until after consideration of the EA.

Howard B. Keck, Jr., 124 IBLA 44 (Aug. 26, 1992)

A protest against an exchange of public and private land was properly denied when it was not shown that the proposal was contrary to valuation requirements imposed by FLPMA sec. 206 and applicable regulations, or that it violated operative land-use plans, or that the exchange was contrary to the public interest. The fact that the exchange resolved a trespass did not establish that it was contrary to public policy.

Brent Hansen et al., 128 IBLA 17 (Nov. 4, 1993)

Regulations promulgated under NEPA provide an exception when compliance would be inconsistent with other statutory requirements. NEPA does not apply when there is a clear and fundamental conflict of statutory duty. The time required to prepare an EA to review remedial measures to abate acid rock drainage prior to ordering them implemented would be fundamentally at odds with the need to abate damage to the environment and would be inconsistent with the duty to prevent unnecessary or undue degradation in 43 U.S.C. § 1732(b) (1988).

Red Thunder, Inc., 129 IBLA 219 (Apr. 29, 1994)
101 I.D. 52

A BLM ROD adopting a drilling alternative set out in a FEIS and approving permits to drill coalbed methane wells will not be disturbed by an appeal alleging failure to present an adequate number of alternatives and failure to properly evaluate the impacts on aquifers and groundwater in an EIS when the FEIS addresses a sufficient range of alternatives, adequately discusses the viability of those alternatives, and the anticipated impacts on groundwater and aquifers have been thoroughly

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

GENERALLY--Continued

evaluated and found to be either inconclusive or rendered acceptable by imposition of mitigating measures.

Western Colorado Congress, San Juan Citizens Alliance, 130 IBLA 244 (Aug. 5, 1994)

Actions taken by BIA on lands held in trust for an Indian tribe or individual are subject to the requirements of NEPA, 42 U.S.C. §§ 4321-4335 (1988).

Friends of the Wild Swan v. Portland Area Director, Bureau of Indian Affairs, 27 IBIA 8 (Nov. 14, 1994)

ENVIRONMENTAL STATEMENTS

The National Environmental Policy Act of 1969 requires that every agency study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement applies to the preparation of environmental assessments which serve as a basis for a Finding of No Significant Impact. Under this requirement, all reasonable alternatives must be considered and obvious alternatives may not be ignored. A site which poses sufficiently higher risks to the reliable provision of an essential public service is not a reasonable alternative that must be studied in preparing an environmental assessment for an amendment of a right-of-way for a gas pipeline compressor station.

Robert M. Perry et al., 114 IBLA 252 (May 9, 1990)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concerns have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere

differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

An environmental assessment must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are not significant. A finding of no significant impact will not be affirmed on appeal where the record suggests possible impacts on the environment, but the environmental assessment contains no discussion of environmental impacts of either the proposed action or the alternatives.

Rex Kipp, Jr., Justin Kipp, 115 IBLA 1 (May 30, 1990)

Compliance with the National Environmental Policy Act of 1969 requires BLM to take a hard look at the issues, identify relevant areas of environmental concern, and, where no EIS is prepared, make a convincing case that the potential environmental impacts are significant. Where a finding of no significant impact is based on mitigating measures designed to minimize the impacts, analysis of the proposed mitigating measures and how effective they would be in eliminating adverse environmental impacts is required.

Idaho Natural Resources Legal Foundation, Inc., et al., 115 IBLA 88 (June 21, 1990)

A FONSI will be affirmed if the record supports a conclusion that all relevent areas of environmental concern were identified and carefully reviewed, and that the final determination of no significant impact is reasonable in light of the environmental analysis. A party challenging a FONSI determination must show that it was premised on a clear error of law or demonstrable error of fact, or that analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be established by objective proof. Mere

expressions of a difference of opinion provide no basis for reversal.

Coy Brown, 115 IBLA 347 (Aug. 13, 1990)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

A decision to proceed with a timber sale will not be reversed due to an alleged failure to consider cumulative impacts in the sale EA where the EA is tiered to a programmatic EIS which adequately considered the cumulative impacts.

In re Grassy Overlook Timber Sale, 115 IBLA 359 (Aug. 14, 1990)

BLM properly denies a protest to a proposed timber sale where it has, in the course of its entire presale environmental review, fully considered all of the probable environmental impacts, both site-specific and cumulative, of the sale and concluded that no significant environmental impact will result which has not already been considered in an applicable environmental impact statement, and the appellant has failed to demonstrate otherwise.

Where, following a BLM decision denying a protest to a proposed timber sale and an appeal thereof, the U.S. Fish and Wildlife Service lists the northern spotted owl as a threatened species and BLM suspends the sale contracts pending the outcome of consultations with the U.S. Fish and Wildlife Service, the Board will

set aside the BLM decision and remand the case to BLM for further review of the effect of the listing.

Oregon Natural Resources Council, 116 IBLA 355 (Nov. 5, 1990)

A finding of no significant environmental impact associated with a special recreation use permit for an off-road vehicle tour may be affirmed where the record establishes that BLM took a "hard look" at the environmental impacts of the activity authorized by the permit, considered reasonable alternatives, and applied mitigating measures to avoid significant adverse environmental impacts.

Owen Severance et al., 118 IBLA 381 (Mar. 15, 1991)

The reasonableness of a FONSI will be upheld where the agency (1) has taken a hard look at the environmental consequences of the proposed action; (2) has identified relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project have sufficiently minimized such impact. When this does not occur, a FONSI cannot be upheld.

When a FONSI is based on mitigating measures designed to minimize the impacts, analysis of the proposed mitigating measures and how effective they would be in eliminating adverse environmental impacts is required. A mitigation plan must be sufficiently developed and explained to provide a convincing case that significant environmental impacts will be reduced to insignificance. A FONSI made before a mitigation plan is developed to this extent is premature because there is no basis for its finding, and it will be set aside and remanded.

Nez Perce Tribal Executive Committee et al., 120 IBLA 34 (July 11, 1991)

Issuance of oil and gas leases does not confer such an unfettered right to development of the oil and gas resources as to preclude detailed consideration of a range of alternatives, including the limitation or regulation of the manner and pace of development, when preparing an environmental analysis or EIS regarding development of methane gas from coal deposits underlying a 2,160-square mile area. Approval of applications for permit to drill for exploration and/or development of the gas is subject to regulation to avoid adverse environmental impacts in the interest of conservation of natural resources.

On appeal from a finding of no significant impact after completion of an environmental analysis of the effects of a proposed action, the issue is whether the record supports a finding that the agency took a "hard look" at the environmental consequences of the proposed action, identified relevant areas of environmental concern, and established that the impacts studied are insignificant, or, with respect to any potentially significant impacts, that mitigating measures incorporated in the proposal have reduced the potential impacts to insignificance.

The degree to which possible effects on the human environment are "highly uncertain or involve unique or unknown risks" is a relevant factor in determining the significance of the impact associated with a proposed action.

Powder River Basin Resource Council, Montana Dept. of Health & Environmental Sciences, Montana Dept. of Natural Resources & Conservation, 120 IBLA 47 (July 12, 1991)

The Department of the Interior has determined, as a general matter, that APD approval for exploratory drilling prior to the first confirmation well is an action categorically excluded from the NEPA process. The effect of a categorical exclusion is to eliminate the necessity for preparation of an EA. Individual actions within a categorical exclusion may, however, be excepted under certain circumstances, and require preparation of an environmental document.

An exploratory well is drilled in unproven or semiproven territory for the purpose of ascertaining the presence underground of a commercial petroleum deposit. Whether a well is exploratory and, accordingly, whether the Department's categorical exclusion for APD approval of an exploratory well applies, is committed to BLM's informed discretion.

An EA prepared by BLM to consider the impacts of the grant of an APD for an exploratory well will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Utah Chapter Sierra Club et al., 120 IBLA 229 (Aug. 8, 1991)

Where appellants protest a timber sale because of BLM's failure to address in an EA the impacts of the sale on the marbled murrelet, a robin-sized bird proposed for listing as threatened, the decision may be affirmed where the record on appeal fails to discluse any impact to the murrelet from the salvage sale of dead and blown-down timber.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

A determination that approval of an APD to drill exploratory wells will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party

challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

BLM is not required to provide for public review of an environmental assessment of APDs to drill exploratory wells before making a FONSI and deciding to approve the applications when the proposed action is not closely similar to one which normally requires the preparation of an EIS.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991)

It is proper for BLM to deny a protest to a proposed timber sale when it has fully considered all of the probably site-specific and cumulative environmental impacts of the sale (including the impact on the Northern spotted owl, a Federally listed threatened species) and concluded that there will be no significant environmental impact not previously considered in an applicable EIS, and the appellant has failed to demonstrate otherwise.

In re Cedar Pot Thinning Sale et al., 122 IBLA 53 (Jan. 9, 1992)

It is proper for BLM to deny a protest to a proposed timber sale contending that BLM failed to consider the impact of permitted overstory removal, salvage operations, and road building on the Pacific yew and that the proposed timber sale does not conform with applicable State office policy regarding management of the yew when BLM specifically reserved the yew from cutting in the sale contract, and the protestant submits no evidence that the sale may adversely affect the yew or that BLM is not abiding by its stated policy.

In re Grizzly Knob Timber Sale, 122 IBLA 155 (Feb. 4, 1992)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

It was proper for BLM to approve a notice of intent to conduct oil and gas geophysical exploration operations utilizing truck-mounted vibrating equipment and seismic wave-receiving stations after considering the environmental impact of the contemplated operations and alternatives thereto (including the no-action alternative), and concluding that no significant impact would result. Under the facts of this case, there was no error in BLM's failure to consider the possible subsequent drilling of a proposed well in the project area in conjunction with geophysical exploration operations.

Southern Utah Wilderness Alliance, Utah Chapter, Sierra Club, 122 IBLA 165 (Feb. 7, 1992)

A determination that approval of a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made; all relevant areas of environmental concern have been identified; and the final determination is reasonable in light of the environmental analysis. A party challenging the determination must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Mere differences of opinion provide no basis for reversal. A BLM decision approving a proposal to conduct seismic oil and gas geophysical exploration will be set aside where the EA upon which the decision was based failed to consider the no-action alternative and inadequately analyzed the effects of the proposed activity on wildlife in the project area, and BLM failed to provide a public comment period on the EA.

Southern Utah Wilderness Alliance, 122 IBLA 334 (Mar. 11, 1992)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

An EA may be tiered to an EIS. The purpose of tiering is to eliminate repetitive discussions of issues and allow focus on the issues ripe for decision. The similarity of environmental issues determines whether tiering is appropriate, not the nature of the decision made based upon the review. When an EA is tiered to an EIS, the question is whether the EIS adequately addresses the environmental effects of the proposed actions or whether, because the analysis is broad and does not address specific impacts, a supplemental statement is required.

When a programmatic EIS is sufficiently detailed, and there is not change in circumstances or departure from the policy in the programmatic EIS, no useful purpose would be served by requiring a site-specific EIS. Major variations between the actions considered in a broad EIS and a site-specific EA may vitiate compliance with NEPA. Conversely, the fact specific actions were anticipated in an EIS or matters addressed in the EIS were later carefully reviewed in regard to undertaking specific actions supports a finding of compliance with NEPA.

Absent an analysis of the possible consequences should proposed range-land improvement projects not be fully successful and lacking an anlysis of the immediate consequences of undertaking the projects, the Board cannot conclude that BLM has identified the relevant areas of environmental concern and has taken a hard look at the environmental consequences of the projects.

Southern Utah Wilderness Alliance, The Wilderness Society, Utah Chapter Sierra Club, 123 IBLA 302 (June 25, 1992)

An EA of a proposal to exchange public for private land is sufficiently detailed where it considers, generally, the environmental impact of likely development where no plans for development have yet been proposed and such plans, if and when formulated, will be subject to State environmental review.

Where review of the reasonably foreseeable impacts of a proposed exchange of public for private land,

including likely development of the land, failed to disclose a potentially significant impact and there was no evidence to the contrary an EIS was not required to be prepared.

In conducting an environmental review of a proposal to exchange public for private land, BLM need not consider the alternative of conveying other land if it is not desired by the private party involved in the exchange and conveyance of such land would not satisfy the purpose of the exchange.

Howard B. Keck, Jr., 124 IBLA 44 (Aug. 26, 1992)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. A party challenging the determination must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party, and such burden must be met by objective proof. Mere differences of opinion provide no basis for reversal.

The reasonableness of a FONSI will be upheld where the agency (1) has taken a hard look at the environmental consequences of the proposed action; (2) has identified the relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project have sufficiently minimized such impact. When the EA prepared for a proposed action identifies significant environmental impacts and suggests mitigating measures designed to minimize those impacts, but BLM's decision record/FONSI fails to incorporate the identified mitigating measures into the proposed action, BLM's decision will be set aside.

Sierra Club Legal Defense Fund, Inc., Citizen Alert, 124 IBLA 130 (Sept. 30, 1992)

Analysis under NEPA of the impacts to the human environment of an oil and gas pipeline designed to serve certain existing and proposed oil and gas wells properly considers the foreseeable cumulative impacts of the pipeline and the wells it is designed to serve.

An environmental analysis of the impacts of a proposed action may properly be tiered to and incorporate by reference from an EIS for a larger plan of action where the program analyzed in the EIS is not so broad as to preclude analysis of the impacts of the specific proposal.

On appeal from a FONSI based on an EA tiered to an EIS, the record must establish that BLM has taken a hard look at the proposed action, identified relevant areas of environmental concern, and that impacts of the proposed action not previously analyzed in the EIS are insignificant. Where the record shows a cumulative significant impact to cultural resources, a FONSI is inappropriate.

Southern Utah Wilderness Alliance et al., 124 IBLA 162 (Oct. 1, 1992)

When an EA of a proposed mining plan of operations for exploration does not include the analysis of whether potential mining is sufficiently specific to adequately analyze it at the exploration stage and of the details of the exploration process, the mining process, and other allegedly connected activities in the area that is necessary for BLM's decision to withstand judicial review, BLM's decision will be set aside and the matter remanded so the EA may be supplemented.

Concerned Citizens for Responsible Mining et al., 124 IBLA 191 (Oct. 15, 1992)

BLM properly approves a plan for the drilling of a series of holes for the purpose of identifying the presence and extent of lead mineralization where it has adequately considered the impact of such drilling and associated activity on the environment, and determined that, given certain mitigation measures, any impact will be insignificant. BLM need not consider the impact of

full-scale mining where approval of drilling does not commit BLM to approve further mining.

Missouri Coalition for the Environment et al., 124 IBLA 211 (Oct. 23, 1992)

A BLM decision to issue a right-of-way grant for an irrigation ditch and associated structures will be affirmed on appeal when based on a reasoned analysis of all relevant factors, including the threat to the human environment from potential breaches of the ditch and to the rights of downstream water users from the diversion of water, and provided the decision was made with due regard for the public interest and sufficient reasons for disturbing the decision have not been shown.

Daryl Richardson et al., 125 IBLA 132 (Jan. 15, 1993)

The general standard upon NEPA review of a BLM decision based on a FONSI for the proposed action is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. Where the action is further modified by stipulations designed to mitigate responding to the analysis in the EA, the appeal will be reviewed on the whole record including the modifications.

As a general rule, a FONSI for a proposed action may not be predicated solely on monitoring environmental impacts because doubt as to the nature of the impacts ordinarily precludes a rational basis for a FONSI. Where the record discloses an analysis of the impacts of the proposed action and the imposition of stipulations designed to mitigate any potentially significant impacts, use of monitoring to determine the choice of alternate methods of mitigation does not itself compel reversal of a FONSI. However, a FONSI may be set aside and remanded where it appears from the record that the

mitigating measures stipulated may be inadequate to mitigate potentially significant impacts.

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

Where BLM has prepared an EA and FONSI specific to a proposal to drill two exploratory geothermal observation/flow test wells and deepen an existing exploratory test well, and its analysis of possible full-field development is limited by the absence of any development proposal, that assessment is sufficient in scope and a site-specific EIS is not necessary.

Where review of the reasonably forseeable impacts of geothermal test drilling failed to disclose a potentially significant impact and there was no evidence to the contrary, an EIS was not required.

Sierra Club, Inc., et al., 126 IBLA 142 (May 6, 1993)

A BLM decision to implement a management plan by closing part of a road on public lands in a recreation area to motor vehicle use in order to promote other recreational activities beyond the closure point will be affirmed where the decision was made after a reasoned analysis of all relevant factors, including the impact of closure on the human environment and alternatives to closure, and where the decision is supported by the record, and there has been no showing of compelling reasons for modification or reversal of the decision.

Larry Griffin, 126 IBLA 304 (June 15, 1993)

A decision approving a right-of-way for an oil and gas pipeline on public lands on the basis of an EA finding no significant impact which is tiered to a programmatic EIS for oil and gas leasing in the area will be affirmed where BLM has considered the cumulative impact of the right-of-way and the foreseeable oil and gas development to be served thereby and the record provides a reasonable basis for the conclusion that

there will be no significant impacts other than those addressed in the EIS.

Southern Utah Wilderness Alliance, 127 IBLA 282 (Oct. 7, 1993)

A determination that approval of an application for a permit to drill an exploratory well and the grant of an associated right-of-way will not have a significant impact on the quality of the human environment will be affirmed on appeal where the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a FONSI has the burden of establishing by a preponderance of the evidence that the finding was based on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 127 IBLA 331 (Oct. 19, 1993) 100 I.D. 370

A determination that approval of an APD to drill a natural gas well will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

A decision assessing an operator $2,500 for failure to file an APD with BLM shall be vacated where the well at issue is a development well directionally drilled from unitized fee lands and completed in unitized Federal lands, and the operator has received an approved APD from the appropriate state body.

Chevron U.S.A. Inc., 128 IBLA 146 (Jan. 13, 1994)

A BLM decision to implement a RMP will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is supported by the record, including an EA which establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of environmental analysis. A party challenging the BLM decision must show that it was premised on an error of law or fact or that the analysis failed to consider a material environmental question. Unsupported differences of opinion provide no basis for reversal.

Southern Utah Wilderness Alliance et al., 128 IBLA 382 (Mar. 11, 1994)

BLM properly confined review of the environmental consequences of allowing a limited number of coalbed methane gas wells to be drilled on tribal lands within an Indian reservation to the impact of such activity where there was no evidence that approval of the project would necessarily lead to additional drilling throughout a larger oil and gas field.

BLM was not required by sec. 102(2)(C) of NEPA, as amended, 42 U.S.C. § 4332(2)(C) (1988), to prepare an EIS assessing the impact of drilling coalbed methane gas wells and related activity on tribal lands within an Indian reservation when it had taken a hard look at the environmental consequences of such activity, taking into account all relevant matters of environmental concern, and made a convincing case either that no significant impact would result or that any potentially significant

impact would be reduced to insignificance by mitigating measures.

San Juan Citizens Alliance et al., 129 IBLA 1 (Mar. 14, 1994)

A BLM decision to reject a right-of-way application calling for removal of vegetation and shaping the banks of a stream because the contemplated activity would conflict with BLM's riparian management policy will be affirmed when the record supports a finding that the decision was based upon a reasoned analysis of all relevant factors and made with due regard for the public interest.

Thomas L. Watson et al., 129 IBLA 18 (Mar. 15, 1994)

BLM prepares an EA to evaluate both whether approval of a plan of operations would constitute a major Federal action significantly affecting the quality of the human environment and whether mitigation measures and reclamation procedures are adequate to prevent unnecessary and undue degradation of the public lands and their resources. A finding that a plan of operations would not cause unnecessary or undue degradation of public lands does not preclude the possibility that it would cause significant environmental effects requiring preparation of an EIS.

Where BLM finds, based on an EA prepared by a state agency, that approval of a plan of operations will not cause significant impact to the quality of the human environment, the record must show that BLM critically reviewed the EA in relation to the plan of operations, took a hard look at the relevant areas of environmental concern, considered mitigation measures, and independently reached a reasoned conclusion that significant impact will not occur. Absent documentation of BLM's independent review and FONSI, the Board cannot conclude that BLM has complied with NEPA.

To determine whether approval of a plan of operations will cause unnecessary or undue degradation to public land, BLM is required to consider, in relation to operations of similar character, the extent of surface disturbance and the effects on resources and land use both within and outside the area of operations. Where

an EA does not analyze whether there will be unnecessary or undue degradation, and other documentation does not show that BLM conducted the required review and came to a reasoned conclusion, the record does not support a decision that the plan of operations was adequate to prevent unnecessary and undue degradation of public lands.

Kendall's Concerned Area Residents, 129 IBLA 130 (Apr. 15, 1994)

BLM Manual § 1601.09 requires that BLM prepare a RMP to fulfill a congressional requirement for a land-use plan, as set forth in legislation establishing a national conservation area. A RMP is considered a major Federal action signficantly affecting the quality of the human environment and, as such, is properly accompanied by an EIS.

New Mexico Wilderness Coalition, 129 IBLA 158 (Apr. 20, 1994)

Challenges to the approval or amendment of a RMP and its related EIS are accorded administrative review only in conformity with the protest procedures prescribed by 43 CFR Part 1600. Such challenges are properly distinguished from an appeal challenging implementing actions undertaken without preparation of a supplemental EIS which may be appealed to the Board of Land Appeals.

A supplemental EIS may be required if an agency makes substantial changes in a proposed action that are relevant to environmental concerns. A decision to hold an oil and gas lease sale without preparation of a supplemental EIS is properly affirmed where the basis for appeal is the omission of stipulations from lands delineated on a map in the original EIS, it appears from the EIS that the stipulations were designed to mitigate impacts to certain specific resource values which may or may not be found in the delineated lands, and no showing has been made of the presence of such resources requiring protection within the lease parcels.

Colorado Environmental Coalition, 130 IBLA 61 (July 22, 1994)

"Indirect effects." CEQ regulations define "indirect effects" that an agency must consider in its environmental analysis as effects caused by Federal action that are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

In deciding whether to issue an EIS, BLM must consider indirect environmental effects of development of private lands if caused by its action. Where the record shows that such development (construction of housing in a subdivision) will likely occur even if BLM does not take the action in question (granting a right-of-way for an access road across Federal land to the subdivision), it cannot be said that the effects of development were "caused by" the BLM action, and BLM need not consider those effects in an EA or EIS.

James Shaw, S. Eric Krasa, 130 IBLA 105 (Aug. 2, 1994)

Under the doctrine of administrative finality, when a party has had an opportunity to obtain administrative review of a timber sale and the EA on which it is based and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in a later case except upon a showing of compelling legal reasons such as a violation of basic rights of the parties or the need to prevent an injustice. In the case of a modification or addition to a timber sale, reconsideration of the sale is ordinarily barred except to the extent of environmentally significant modifications or changed circumstances occurring between the time of the two sales.

The general standard upon NEPA review of a BLM decision based on a FONSI for the proposed action is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. When, as a consequence of new

information, the action is the subject of a BLM biological evaluation and a FWS biological opinion subsequent to the EA, the appeal will be reviewed on the whole record including the reasonable and prudent measures incorporated by way of mitigation.

Oregon Natural Resources Council, 131 IBLA 180 (Nov. 3, 1994)

It is proper for BLM to deny a protest of a proposed timber sale if, in the course of its environmental review, it has fully considered the probable site-specific and cumulative environmental impacts and a reasonable range of alternatives, and has concluded that there will be no significant environmental impact not previously addressed in an applicable EIS.

In re Suce Creek Timber Sale, 131 IBLA 206 (Nov. 9, 1994)

NEPA does not require that BLM examine the environmental impacts of mine development when it approves a plan for exploration of a mineral property. Exploration and development are not connected actions as defined at 40 CFR 1508.25(a)(1). Mine development is not a reasonably foreseeable result of exploration and need not be examined as a cumulative impact of exploration.

Concerned Citizens for Responsible Mining (On Reconsideration), 131 IBLA 257 (Nov. 23, 1994)

A party challenging BLM's FONSI bears the burden of proving error, and a mere disagreement with BLM's finding is insufficient. On appeal, an appellant must demonstrate that BLM's FONSI is premised on a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial environmental question of material significance to the action.

Sierra Club, Toiyabe Chapter, 131 IBLA 342 (Dec. 27, 1994)

ENVIRONMENTAL STATEMENTS--Continued

A determination that a proposed action will not have a significant impact on the environment will be affirmed on appeal where the record establishes that environmental problems have been considered, relevant areas of environmental concern have been identified, and the determination is reasonable.

Bill Armstrong, 131 IBLA 349 (Dec. 28, 1994)

FINDING OF NO SIGNIFICANT IMPACT

The reasonableness of a FONSI will be upheld where the agency (1) has taken a hard look at the environmental consequences of the proposed action; (2) has identified relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project have sufficiently minimized such impact. When this does not occur, a FONSI cannot be upheld.

When a FONSI is based on mitigating measures designed to minimize the impacts, analysis of the proposed mitigating measures and how effective they would be in eliminating adverse environmental impacts is required. A mitigation plan must be sufficiently developed and explained to provide a convincing case that significant environmental impacts will be reduced to insignificance. A FONSI made before a mitigation plan is developed to this extent is premature because there is no basis for its finding, and it will be set aside and remanded.

Nez Perce Tribal Executive Committee et al., 120 IBLA 34 (July 11, 1991)

Issuance of oil and gas leases does not confer such an unfettered right to development of the oil and gas resources as to preclude detailed consideration of a range of alternatives, including the limitation or regulation of the manner and pace of development, when preparing an environmental analysis or EIS regarding development of methane gas from coal deposits underlying a 2,160-square mile area. Approval of applications for permit to drill for exploration and/or development of the gas is subject to regulation to avoid adverse

FINDING OF NO SIGNIFICANT IMPACT--Continued

environmental impacts in the interest of conservation of natural resources.

The Board is unable to affirm a finding that no significant impact to the environment will result from a proposal for drilling coalbed methane gas wells in a 2,160-acre study area where the environmental analysis upon which the finding is based fails to give appropriate consideration to obvious alternatives, such as staggering development over time, as required by 42 U.S.C. § 4332(2)(E) (1988), 40 CFR 1508.9(b), and 516 DM 3.4(A).

On appeal from a finding of no significant impact after completion of an environmental analysis of the effects of a proposed action, the issue is whether the record supports a finding that the agency took a "hard look" at the environmental consequences of the proposed action, identified relevant areas of environmental concern, and established that the impacts studied are insignificant, or, with respect to any potentially significant impacts, that mitigating measures incorporated in the proposal have reduced the potential impacts to insignificance.

The degree to which possible effects on the human environment are "highly uncertain or involve unique or unknown risks" is a relevant factor in determining the significance of the impact associated with a proposed action.

Powder River Basin Resource Council, Montana Dept. of Health & Environmental Sciences, Montana Dept. of Natural Resources & Conservation, 120 IBLA 47 (July 12, 1991)

An EA prepared by BLM to consider the impacts of the grant of an APD for an exploratory well will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion

provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Utah Chapter Sierra Club et al., 120 IBLA 229 (Aug. 8, 1991)

A determination that approval of an APD to drill exploratory wells will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

BLM is not required to provide for public review of an environmental assessment of APDs to drill exploratory wells before making a FONSI and deciding to approve the applications when the proposed action is not closely similar to one which normally requires the preparation of an EIS.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991)

A determination that approval of a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made; all relevant areas of environmental concern have been identified; and the final determination is reasonable in light of the environmental analysis. A party challenging the determination must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Mere differences of opinion provide no basis for reversal. A BLM decision approving a proposal to conduct seismic oil and gas geophysical exploration

will be set aside where the EA upon which the decision was based failed to consider the no-action alternative and inadequately analyzed the effects of the proposed activity on wildlife in the project area, and BLM failed to provide a public comment period on the EA.

Southern Utah Wilderness Alliance, 122 IBLA 334 (Mar. 11, 1992)

Where review of the reasonably foreseeable impacts of a proposed exchange of public for private land, including likely development of the land, failed to disclose a potentially significant impact and there was no evidence to the contrary an EIS was not required to be prepared.

Howard B. Keck, Jr., 124 IBLA 44 (Aug. 26, 1992)

Activity planning implementing an off-highway vehicle project management plan, based upon an environmental assessment sufficient to support an informed judgment, may not be overcome by a mere difference of opinion.

High Desert Multiple-Use Coalition et al., 124 IBLA 125 (Sept. 28, 1992)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. A party challenging the determination must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party, and such burden must be met by objective proof. Mere differences of opinion provide no basis for reversal.

The reasonableness of a FONSI will be upheld where the agency (1) has taken a hard look at the environmental

consequences of the proposed action; (2) has identified the relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project have sufficiently minimized such impact. When the EA prepared for a proposed action identifies significant environmental impacts and suggests mitigating measures designed to minimize those impacts, but BLM's decision record/FONSI fails to incorporate the identified mitigating measures into the proposed action, BLM's decision will be set aside.

Sierra Club Legal Defense Fund, Inc., Citizen Alert, 124 IBLA 130 (Sept. 30, 1992)

Analysis under NEPA of the impacts to the human environment of an oil and gas pipeline designed to serve certain existing and proposed oil and gas wells properly considers the foreseeable cumulative impacts of the pipeline and the wells it is designed to serve.

An environmental analysis of the impacts of a proposed action may properly be tiered to and incorporate by reference from an EIS for a larger plan of action where the program analyzed in the EIS is not so broad as to preclude analysis of the impacts of the specific proposal.

On appeal from a FONSI based on an EA tiered to an EIS, the record must establish that BLM has taken a hard look at the proposed action, identified relevant areas of environmental concern, and that impacts of the proposed action not previously analyzed in the EIS are insignificant. Where the record shows a cumulative significant impact to cultural resources, a FONSI is inappropriate.

Southern Utah Wilderness Alliance et al., 124 IBLA 162 (Oct. 1, 1992)

BLM properly approves a plan for the drilling of a series of holes for the purpose of identifying the presence and extent of lead mineralization where it has adequately considered the impact of such drilling and associated activity on the environment, and determined that, given certain mitigation measures, any impact will be insignificant. BLM need not consider the impact of full-scale mining where approval of drilling does not commit BLM to approve further mining.

Missouri Coalition for the Environment et al., 124 IBLA 211 (Oct. 23, 1992)

"Cumulative impact" is the impact on the environment that results from the incremental impact of an action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or persons undertake such other actions. An EA examining the cyanide retention qualities of a heap leach operation need not include a discussion of an exploration plan that, during the pendency of the appeal, is withdrawn by the operator.

Red Thunder, Inc., et al., 124 IBLA 267 (Nov. 3, 1992)

The general standard upon NEPA review of a BLM decision based on a FONSI for the proposed action is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. Where the action is further modified by stipulations designed to mitigate responding to the analysis in the EA, the appeal will be reviewed on the whole record including the modifications.

As a general rule, a FONSI for a proposed action may not be predicated solely on monitoring environmental impacts because doubt as to the nature of the impacts ordinarily precludes a rational basis for a FONSI. Where the record discloses an analysis of the impacts of the proposed action and the imposition of stipulations designed to mitigate any potentially significant

impacts, use of monitoring to determine the choice of alternate methods of mitigation does not itself compel reversal of a FONSI. However, a FONSI may be set aside and remanded where it appears from the record that the mitigating measures stipulated may be inadequate to mitigate potentially significant impacts.

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

Where review of the reasonably forseeable impacts of geothermal test drilling failed to disclose a potentially significant impact and there was no evidence to the contrary, an EIS was not required.

Sierra Club, Inc., et al., 126 IBLA 142 (May 6, 1993)

A decision approving a right-of-way for an oil and gas pipeline on public lands on the basis of an EA finding no significant impact which is tiered to a programmatic EIS for oil and gas leasing in the area will be affirmed where BLM has considered the cumulative impact of the right-of-way and the foreseeable oil and gas development to be served thereby and the record provides a reasonable basis for the conclusion that there will be no significant impacts other than those addressed in the EIS.

Southern Utah Wilderness Alliance, 127 IBLA 282 (Oct. 7, 1993)

A determination that approval of an application for a permit to drill an exploratory well and the grant of an associated right-of-way will not have a significant impact on the quality of the human environment will be affirmed on appeal where the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a FONSI has the burden of establishing by a preponderance of the evidence that the finding was based on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion

provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 127 IBLA 331 (Oct. 19, 1993) 100 I.D. 370

Although an appellant bears the burden of demonstrating error where BLM has determined that a proposed action is not likely to affect a threatened or endangered species, the record on appeal must support BLM's action, and where BLM concludes that the drilling of a natural gas well will not affect the bald eagle because no active eyries or nests were located during the survey of the area, but the record fails to show that searches for bald eagles were conducted in the winter and early spring when bald eagles are known to inhabit the area, BLM's determination will be set aside and the case remanded.

Where, in response to a challenge to approval of an APD to drill a natural gas well, BLM states that no special status plant species, including threatened and endangered plants, were found during a survey of the proposed project area, such a determination must be supported by the record. When the record on appeal contains no evidence of who conducted the survey, any field report, or any description of the methodology employed in making the determination, that determination will be set aside and the case remanded.

A determination by BLM that approval of an APD to drill a natural gas well will not eliminate a river from eligibility for potential inclusion within the National Wild and Scenic River System, pursuant to sec. 5(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1276(d) (1988), is supported by the record where there is no evidence in the record that drilling the well in question would adversely affect all the river's outstandingly remarkable values so as to render it ineligible for consideration.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

FINDING OF NO SIGNIFICANT IMPACT--Continued

"Indirect effects." CEQ regulations define "indirect effects" that an agency must consider in its environmental analysis as effects caused by Federal action that are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

In deciding whether to issue an EIS, BLM must consider indirect environmental effects of development of private lands if caused by its action. Where the record shows that such development (construction of housing in a subdivision) will likely occur even if BLM does not take the action in question (granting a right-of-way for an access road across Federal land to the subdivision), it cannot be said that the effects of development were "caused by" the BLM action, and BLM need not consider those effects in an EA or EIS.

James Shaw, S. Eric Krasa, 130 IBLA 105 (Aug. 2, 1994)

The general standard upon NEPA review of a BLM decision based on a FONSI for the proposed action is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. When, as a consequence of new information, the action is the subject of a BLM biological evaluation and a FWS biological opinion subsequent to the EA, the appeal will be reviewed on the whole record including the reasonable and prudent measures incorporated by way of mitigation.

Oregon Natural Resources Council, 131 IBLA 180 (Nov. 3, 1994)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

FINDING OF NO SIGNIFICANT IMPACT--Continued

An EIS need not be prepared if BLM finds, based on an adequate EA, that a proposed action will produce no significant impact. The Board will affirm a FONSI if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination that the impact is insignificant is reasonable in light of the environmental analysis.

A party challenging a FONSI finding must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Steamboaters, Oregon Rivers Council & Oregon Trout, Inc., Douglas County (Intervenor), 131 IBLA 223 (Nov. 17, 1994)

NATIONAL HISTORIC PRESERVATION ACT

GENERALLY

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. BLM properly rejects a selection application for a historical place when the record fails to establish that the site has historic significance for Native history or culture and the site does not meet the criteria set forth at 43 CFR 2653.5.

Sealaska Corp., 115 IBLA 257 (July 19, 1990)

Issuance of a special recreation permit for off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impact to cultural resources was carefully

NATIONAL HISTORIC PRESERVATION ACT--Continued

GENERALLY--Continued

considered, routes were altered accordingly, and protective stipulations were attached to the permit.

Owen Severance et al., 118 IBLA 381 (Mar. 15, 1991)

Sec. 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1988), provides the Secretary may withdraw and convey fee title to existing cemetery sites and historical places to the appropriate regional corporation. If a regional corporation files an application under sec. 14(h)(1), the Secretary may give favorable consideration to the application provided that the Secretary determines that the criteria in the regulations are met. 43 CFR 2653.5(a). For a historical place, this means that it must be a distinguishable tract of land or area where a significant Native historical event occured or which was subject to sustained Native historical activity.

When the evidence of record about a potential historical place is inconclusive, but the evidence offers sufficient indications of possible sustained Native historical activity, the rejection of an application for a historical place may be set aside and the case remanded for further investigation.

Sealaska Corp., 126 IBLA 383 (July 6, 1993)

Sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), provides the Secretary may withdraw and convey fee title to existing cemetery sites and historical places to the appropriate regional corporation. If a regional corporation files an application under sec. 14(h)(1), the Secretary may give favorable consideration to the application provided that the Secretary determines that the criteria in the regulations are met. 43 CFR 2653.5(a). For a historical place, this means that it must be a distinguishable tract of land or area where a significant Native historical event occurred or which was subject to sustained Native historical activity.

BLM properly rejects a selection application for a historical place under sec. 14(h)(1) of ANCSA when the record fails to establish that the site has historic

NATIONAL HISTORIC PRESERVATION ACT--Continued

GENERALLY--Continued

significance for Native history or culture and the site does not meet the criteria set forth at 43 CFR 2653.5.

Sealaska Corp., 127 IBLA 22 (July 15, 1993)

Sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. BLM properly grants an application for a historical place when the record establishes that the site is a distinguishable tract of land or area upon which occurred a significant Native historical event, which is importantly associated with Native historical cultural events or persons, and meets the criteria set forth at 43 CFR 2653.5.

Sealaska Corp., 127 IBLA 40 (July 15, 1993)

Sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. BLM properly rejects a selection application for a historical place when the site does not meet the criteria set forth at 43 CFR 2653.5.

Sealaska Corp., 127 IBLA 59 (July 20, 1993)

APPLICABILITY

Where the Montana State Historic Preservation Office is aware that an area may possess traditional cultural values, owing to the presence of Native American fasting and vision questing sites there, but nevertheless concludes that no properties eligible for inclusion on the National Register of Historic Places were identified in the area, BLM is not required to comply with sec. 106 of the National Historic Preservation Act. Rather, it is adequate for BLM to address effects of gold mining on cultural values through its compliance with the American Indian Religious Freedom Act. BLM complies with the latter Act where it actively solicits the opinions of Native Americans, both

NATIONAL HISTORIC PRESERVATION ACT--Continued

APPLICABILITY--Continued

individually and in tribal groups, and considers reasonable mitigating measures.

Red Thunder, Inc., et al., 124 IBLA 267 (Nov. 3, 1992)

The Federal grant for a pipeline right-of-way requires BLM to comply with sec. 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (1988), on both Federal and non-Federal lands involved in the project.

Central Valley Electric Cooperative, Inc., 128 IBLA 126 (Dec. 22, 1993)

NATIONAL PARK SERVICE

GENERALLY

The Board will apply the doctrine of estoppel in reversing a 1991 decision of BLM declaring mining claims situated in the Death Valley National Monument abandoned and void for failure to file a notice of intent to hold the claims in 1979, where confusion existed regarding recordation and filing requirements under the Mining in the Parks Act and FLPMA and the claimants inquired of BLM in 1979 whether they were required to make additional filings for their claims during 1979, and in response BLM not only provided inaccurate information about the proper place of filing but also concealed a material fact from claimants.

Carl Dresselhaus et al., 128 IBLA 26 (Nov. 16, 1993)

DONATIONS AND GIFTS

When unpatented mining claims have been donated to the NPS by quitclaim deed and the record before BLM discloses a dispute regarding the chain of title to the claims or the existence of encumbrances upon title to the claims, neither the regulations applicable to mining claims recordation nor the regulations governing acceptance of donated interests in real property authorizes

NATIONAL PARK SERVICE--Continued

DONATIONS AND GIFTS--Continued

BLM to adjudicate title to the claims and a decision purporting to do so is properly vacated.

David J. Bartoli, 123 IBLA 27 (Apr. 29, 1992)
99 I.D. 55

JURISDICTION OVER LANDS WITHIN

While the principal means by which a person becomes a "party to a case" within the meaning of 43 CFR 4.410(a) is to actively participate in the decision-making process which leads to the appeal, it is not the only means. Where BLM approves a Native allotment application on National Park System lands and the National Park Service files an appeal of that decision, the status of the National Park Service as the agency charged with administrative responsibilities for the management of such lands satisfies the "party to a case" requirement of 43 CFR 4.410(a).

National Park Service, 118 IBLA 204 (Mar. 6, 1991)

NAVIGABLE WATERS

Title to the bed of navigable rivers is held in trust for future states and passes to them upon admission to the Union. A placer mining claim is properly declared null and void to the extent that it includes the bed of a navigable river.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

An unsurveyed island, whether located in navigable or non-navigable waters, remains public domain, does not pass with the bed under the water to a state upon statehood or convey with a grant of riparian land, and may be surveyed and disposed of by the United States.

A railroad patent to the State of Michigan describing "all of section one" does not convey an unsurveyed island within the meander lines of a lake, whether navigable or non-navigable, located within

NAVIGABLE WATERS--Continued

sec. 1, and the United States may properly survey such island.

Northern Michigan Exploration Co., 114 IBLA 177 (Apr. 23, 1990) 97 I.D. 171

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

The Supreme Court has articulated a two-pronged test to determine whether a Federal reservation of public land defeats a state's equal footing entitlement: (1) that Congress clearly intended to include land beneath navigable waters (or tideland) within the reservation and (2) affirmatively intended to defeat future state title to such land.

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

NOTICE

GENERALLY

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations, and reliance on allegedly incomplete or inaccurate information provided by Federal employees cannot create any rights not authorized by law.

Magness Petroleum Corp., 113 IBLA 214 (Feb. 23, 1990)

NOTICE--Continued

GENERALLY--Continued

The Bureau of Indian Affairs is not required to give notice of actions relating to the management of a lease of trust or restricted Indian lands to a person who is not a party to the lease.

HCB Industries, Inc. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 222 (Mar. 28, 1990)

Where the record fails to establish that a copy of a BLM decision cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest was received by the interest holder, by a qualified representative of her estate, or by her heirs, a failure to appeal does not render BLM's decision final.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990) 97 I.D. 137

One who deals with the Government is presumed to know the applicable laws and regulation, and the United States cannot be bound or estopped by an act of its officers or agents if to estop the Government would undermine the correct enforcement of a particular statute or regulation.

Thomas L. Sawyer, 114 IBLA 135 (Apr. 18, 1990)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Jack Hammer dba Hammer Oil Co., 114 IBLA 340 (May 22, 1990)

BLM may use the American Gas Ass'n Gas Measurement Committee standards as the source for establishing a requirement as to the proper measurement of production, but a lessee is not in violation of that requirement

NOTICE--Continued

GENERALLY--Continued

until BLM has decided to impose it, has notified the lessee, and has given an opportunity to comply.

Luff Exploration Co., 115 IBLA 134 (June 28, 1990)

A Government contest of a millsite claim is not subject to dismissal for failure to name all interested parties.

United States v. Loyall Fraker, 122 IBLA 24 (Jan. 3, 1992)

BLM properly denied a request to file a late protest of a final river management plan, EIS, and record of decision after notice of the availability of the final plan and EIS for comment was published in the Federal Register and appellants were mailed copies of the plan, EIS, and record of decision.

Lawrence V. Smart Trust et al., 129 IBLA 351 (June 6, 1994)

One who deals with the Government is presumed to know the relevant statutes and duly promulgated regulations.

A decision declaring a mining claim abandoned and void must be mailed to each claim owner at his last address of record. Where BLM fails to serve each claim owner with a copy of a decision, the decision is not effective to adjudicate the rights and interests in the claims of those owners who were not served. A copy of the decision must be mailed even though previous correspondence has been returned to BLM. Without attempted delivery of a decision and its return to BLM, there cannot be constructive service under 43 CFR 1810.2(b).

Lanny Perry, 131 IBLA 1 (Sept. 16, 1994)

NOTICE--Continued

GENERALLY--Continued

Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1374, 1378-79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual payment of the claim rental fee as required by the Act shall conclusively constitute an abandonment of the unpatented mining claim, millsite, or tunnel site. Failure to pay the fee in accordance with the Act and implementing regulations results in a conclusive presumption of abandonment. Neither the claimant's lack of actual knowledge of the statutory requirement to pay rental fees nor BLM's failure to advise the claimant of that statutory requirement excuses the claimant's lack of compliance with the rental fee requirement since all persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Lester W. Pullen, 131 IBLA 271 (Nov. 23, 1994)

Knowledge acquired by an agent in the course of his activities pursuant to the agency is properly imputed to the principal. Similarly, since all persons dealing with the Government are presumed to have knowledge of duly promulgated rules and regulations. both an agent and the principal are properly charged with knowledge of both the terms and applicability of Onshore Oil and Gas Order No. 2.

Conley P. Smith Oil Producers, 131 IBLA 313 (Dec. 13, 1994)

CONSTRUCTIVE NOTICE

It is proper for BLM to reject location notices for placer mining claims submitted for recordation under 43 CFR 3833.1-4(a) because the claimants failed to tender the proper service charge within 30 days from the date claimants were deemed to have constructively received a deficiency notice requiring such payment. The record establishes that the deficiency notice was

NOTICE--Continued

CONSTRUCTIVE NOTICE--Continued

addressed to and the post office properly attempted delivery to the claimants' last address of record.

Gerhard W. Befeld, Marie D. Befeld, 123 IBLA 118 (May 19, 1992)

BLM properly denied a request to file a late protest of a final river management plan, EIS, and record of decision after notice of the availability of the final plan and EIS for comment was published in the Federal Register and appellants were mailed copies of the plan, EIS, and record of decision.

Lawrence V. Smart Trust et al., 129 IBLA 351 (June 6, 1994)

OFFICE OF HEARINGS AND APPEALS
(See also Director, Office of Hearings & Appeals)

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105

OFFICE OF HEARINGS AND APPEALS--Continued

(1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

OFFICERS AND EMPLOYEES
(See also Federal Employees & Officers)

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

OIL AND GAS

GENERALLY

Oil and gas geophysical exploration on public lands, the surface of which is administered by BLM, requires BLM approval.

When a protest against a notice of intent to conduct geophysical operations has been filed or an appeal has been filed from a decision to allow such operations, BLM is obliged to inform the party filing the notice of intent that the notice cannot be processed until the protest and any appeal therefrom has been resolved.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concerns have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

While Congress has prohibited the Secretary from issuing mineral leases for lands within a wilderness study area under 30 U.S.C. § 226-3(a) (Supp. V 1987), Congress also provided that nothing in this section shall affect any authority of the Secretary to issue permits for exploration by means not requiring construction of roads or improvement of existing roads if such activity is conducted in a manner compatible with the preservation of the wilderness environment. 30 U.S.C. § 226-3(b) (Supp. V 1987).

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

OIL AND GAS--Continued

GENERALLY--Continued

A Federal oil and gas lessee is under an obligation to assume the expenses of placing any gas produced and sold into "marketable condition." No deduction from royalty is allowed for the expenses of gathering and compressing gas required to place it in marketable condition regardless of whether these costs are paid directly by the lessee or by a third party. The price of gas sold at the wellhead which has been reduced from the price of gas in marketable condition by the costs of gathering the gas and compressing it as required for marketing to a pipeline purchaser does not establish the value of the gas in marketable condition.

R. E. Yarbrough & Co., 122 IBLA 217 (Feb. 21, 1992)

A proposal for vertical contraction of the Bogle Flats Unit Area could not be approved without amendment of a provision of the unit agreement that was inconsistent with the proposal because it prohibited exclusion from the unit of any part of a legal subdivision included in a participating area; since amendment of the agreement required the consent of all parties to the agreement in order to be effective, it could not be accomplished over the objection of one of the parties, and BLM therefore properly refused to approve the proposed contraction of the unit.

Chevron U.S.A. Inc., 130 IBLA 1 (July 5, 1994)

PIPELINES

Generally

An MMS decision denying a transportation allowance is properly affirmed to the extent that the allowance deducts line losses attributed to the transportation of royalty natural gas from the wellhead of an Outer Continental Shelf oil and gas lease to an offshore delivery point.

A transportation allowance deducting a percentage for "gas consumed" may be allowable as a deduction for "lease-use" gas. Where the record is insufficient to determine whether circumstances warrant a "lease-use" gas deduction, a decision by MMS summarily denying the allowance will be set aside and the case remanded to

OIL AND GAS--Continued

PIPELINES--Continued

Generally--Continued

MMS for consideration of the extent to which the transportation allowance represents "lease-use" gas.

Arco Oil & Gas Co., 115 IBLA 393 (Aug. 21, 1990)

Rights-of-Ways

The MLA, as implemented by Departmental regulations, does not require rights-of-way for construction and operation of "production facilities." In the case of gas, under 43 CFR 2880.5(k), production facilities include a lessee's or lease operator's gathering lines which are located on lease upstream from the point of delivery to a transportation pipeline.

Where pipelines on a Federal oil and gas lease (described by the lessee as "lateral lines") move lease production to a central accumulation point on each lease; where each such line connects directly to a gas well and brings gas by separate individual lines to a central point where the gas is delivered into a single line; and where the primary function of the lines is gathering, they are properly considered "gathering lines" under 43 CFR 2880.0-5(k).

It is incumbent upon BLM to examine the facts and circumstances of individual cases to determine where the point of delivery from production facilities to the transportation pipeline actually is. A decision by BLM establishing the point of delivery as the "approved production accounting measurement point" at the wellhead will be set aside where the record does not establish that delivery took place at that point.

Enron Oil & Gas Co., 122 IBLA 224 (Feb. 26, 1992)
99 I.D. 20

OIL AND GAS LEASES
(See also Mineral Leasing Act, Outer Continental Shelf Lands Act)

GENERALLY

Where a Federal lessee is required to pay royalty for part of a lease on a sliding scale at a higher rate than 12-1/2 percent, the part paying at the higher rate is considered an entirety for purposes of royalty calculation, and gross production from a producing well on that portion is properly used to determine the sliding-scale royalty rate.

Conoco, Inc., 113 IBLA 47 (Jan. 30, 1990)

The procedural safeguards applicable to civil penalties assessed pursuant to 30 U.S.C. § 1719 (1982), do not apply to late reporting assessments levied pursuant to 30 CFR 218.40.

The party choosing the means of delivery of a document must accept the responsibility for and bear the consequences of that choice, including the possibility of delay or nondelivery.

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

Cancellation of overriding royalty interests in an oil and gas lease and the requirement to repay overriding royalties does not constitute an adversary adjudication under sec. 203(a)(1) of the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 (Supp. IV 1986), thus entitling the prevailing party on appeal to recover attorney fees and expenses.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)
97 I.D. 137

OIL AND GAS LEASES--Continued

GENERALLY--Continued

Payment of the balance of the bonus bid at a competitive lease sale is properly construed as timely where payment is received by BLM on the seventh working day after the lease sale within the time allowed by both the regulations in effect at the time of the sale and the proposed regulations promulgated prior to the sale.

Earl M. Cranston, 115 IBLA 230 (July 12, 1990)

Assignment of a Federal oil and gas lease remains ineffective to release a record titleholder of the lease from ultimate responsibility to plug or produce a well on leased land until such assignment is approved by the Department.

Ralph G. Abbott, 115 IBLA 343 (Aug. 9, 1990)

The regulation at 43 CFR 3162.3-4(a) requires that the plugging and abandonment of an oil and gas well be conducted in accordance with a plan first approved in writing or prescribed by the authorized officer. BLM is not required to accept, as final plugging and abandonment, operations which were conducted without its approval and without an opportunity to witness and ascertain the integrity of the work.

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan first approved in writing or prescribed by the authorized officer, as required by regulation 43 CFR 3152.3-4(a). Where the record establishes that the Secretary's technical experts have evaluated unapproved plugging and abandonment work performed by an operator and have found such work deficient, the Secretary is entitled to rely on their professional opinion, absent a showing of error by a preponderance of the evidence.

Daniel C. Wychgram, 116 IBLA 89 (Sept. 17, 1990)

OIL AND GAS LEASES--Continued

GENERALLY--Continued

Where BLM issues a decision that gas may have been vented on a Federal oil and gas lease without prior authorization and indicates that royalty may be due for the vented gas, and where BLM issues an instruction memorandum adopting a significant change in the interpretation of BLM policy concerning determinations of whether gas vented from Federal and Indian leases is subject to royalty and directing BLM to review all prior determinations to conform them to the new policy, BLM's decision will be vacated and the case remanded for further review under the terms of the new policy.

C. C. Co., 116 IBLA 384 (Nov. 8, 1990)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

ANR Production Co., 118 IBLA 338 (Mar. 12, 1991)

A finding that a lessee must pay the United States for the full value of vented gas that was avoidably lost from 1980 to 1984 is reversed, because 43 CFR 3162.7-1(d), issued in Oct. 1984, changed Departmental policy to require that compensation for avoidably lost gas shall be limited to payment of the royalty value of gas so vented. Because the 1984 regulation changed the prior policy, which had been to assess vented gas at full value, affected lessees who would benefit by the amended rule are allowed the benefit of the change.

Mobil Exploration & Producing U.S., Inc., 119 IBLA 76 (Apr. 5, 1991) 98 I.D. 207

It was proper for BLM to approve a notice of intent to conduct oil and gas geophysical exploration operations utilizing truck-mounted vibrating equipment and seismic wave-receiving stations after considering the environmental impact of the contemplated operations and alternatives thereto (including the no-action alternative), and concluding that no significant impact would result. Under the facts of this case, there was no

OIL AND GAS LEASES--Continued

GENERALLY--Continued

error in BLM's failure to consider the possible subsequent drilling of a proposed well in the project area in conjunction with geophysical exploration operations.

Southern Utah Wilderness Alliance, Utah Chapter, Sierra Club, 122 IBLA 165 (Feb. 7, 1992)

Proof that a Federal lease was being drained by a private lease and that complications during completion of a well on the lease required more than 30 days in order to complete initial testing justified allowance of flaring of gas from an oil well even though prior application to flare had not been sought.

There was insufficient evidence to establish that a Federal lease was being drained by a well on a private lease where no evidence was submitted to show that the Federal well experienced any decline in reservoir pressure when tested.

The burden to establish that there are engineering, geologic, or economic reasons to justify venting or flaring gas from an oil well rests with the lessee who appeals a decision that there has been avoidable waste as a result of such venting or flaring. Where no proof is offered by the lessee to support allegations that there was a danger of drainage, relief cannot be afforded. Arguments that assessment for avoidably lost gas were barred by laches or limitations of action cannot be considered favorably where the lessee was timely notified of an audit that indicated avoidable loss was occurring, even though subsequent review of the matter was protracted.

Proper application of IM 87-652 required that BLM evaluate whether, if an application to flare gas had been made for oil wells produced by the lessee prior to flaring, the application would have been entitled to approval on the merits.

Current law requires that compensation for avoidably lost gas is to be limited to payment of royalty value.

Maxus Exploration Co., 122 IBLA 190 (Feb. 10, 1992)

OIL AND GAS LEASES--Continued

GENERALLY--Continued

A determination that approval of a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made; all relevant areas of environmental concern have been identified; and the final determination is reasonable in light of the environmental analysis. A party challenging the determination must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Mere differences of opinion provide no basis for reversal. A BLM decision approving a proposal to conduct seismic oil and gas geophysical exploration will be set aside where the EA upon which the decision was based failed to consider the no-action alternative and inadequately analyzed the effects of the proposed activity on wildlife in the project area, and BLM failed to provide a public comment period on the EA.

Southern Utah Wilderness Alliance, 122 IBLA 334 (Mar. 11, 1992)

Before an assessment for noncompliance with a permit can be made under provision of 43 CFR 3163.1 (1988), BLM must give the affected oil and gas operator written notice of the violation and provide an opportunity to abate the violation. When, after a blowout was controlled, the operator was not notified that continued flaring of gas would not be allowed, a subsequent assessment for avoidably lost gas could not properly be assessed under Departmental regulation 43 CFR 3163.1 (1988).

"Unavoidably lost." Notice to Lessees and Operators 4A, Part II.C.(2), provides that gas escaping in blowouts must be considered "unavoidably lost," subject to specified exceptions, among which is the failure of the operator to take all reasonable measures to prevent or control the loss. When, before a blowout occurred, the operator failed to pressure-test well casing contrary to a provision of the Federal permit under which the well was entered, an assessment for avoidably lost gas under provisions of NTL-4A was proper

OIL AND GAS LEASES--Continued

GENERALLY--Continued

because the operator had not taken all reasonable measures to prevent gas loss that occurred after the blowout was controlled.

Chuska Energy Co., 123 IBLA 321 (July 9, 1992)

A BLM decision that assumes all gas wells connected to a plant were connected because the production rates and distance to an existing pipeline were economically favorable, and therefore gas vented or flared was avoidably lost, will be set aside and remanded when the record is inadequate to determine whether it was uneconomic to capture the gas.

Western Production Co., 124 IBLA 111 (Sept. 21, 1992)

Under the provisions of 43 CFR 3101.7-3. a third-party objecting to issuance of an oil and gas lease on land within the National Forest System, pursuant to the consent of the FS, has standing to appeal to the Interior Board of Land Appeals. However, to the extent that the third-party raises objections to the conformity of actions undertaken by the FS with respect to its own internal operating procedures or with laws solely applicable to the FS, the Board will not review such contentions where the FS has provided its own appeal system for the resolution of such issues.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

The provisions of sec. 1323(b) of ANILCA, 16 U.S.C. § 3210(b) (1988), do not apply with respect to access to a Federal oil and gas lease since the leasehold estate does not constitute "nonfederally owned land" within the meaning of the statute.

Issuance of a Federal oil and gas lease carries with it neither an express nor implied right of access to the leasehold. Thus, where a pre-FLPMA lease is surrounded by lands within a WSA, there is no valid existing right, within the meaning of sec. 701(h) of FLPMA, to obtain access to the lease boundaries across Federal land and, in the absence of grandfathered uses, access may not be granted if it would violate the nonimpairment

OIL AND GAS LEASES--Continued

GENERALLY--Continued

standard mandated by sec. 603(c), 43 U.S.C. § 1782(c) (1988).

Southern Utah Wilderness Alliance et al., 127 IBLA 331 (Oct. 19, 1993) 100 I.D. 370

BLM properly rejected an oil and gas lease application that was not made on a standard form as required by 43 CFR 3101.1-1.

Carlton Oil Corp., 129 IBLA 144 (Apr. 18, 1994)

The exception from royalty for gas used on a lease in producing operations does not serve to automatically exempt gas used to lift and, thus, produce oil from a well, which gas is subsequently vented without authorization, without regard to whether marketing the gas would have been economic.

The regulations require an operator to market all oil and gas production if economically feasible and to conduct operations in a manner to prevent avoidable loss of oil and gas. In adjudicating an application to vent gas used to produce oil from a well when gas production was formerly sold into a pipeline until disconnectd as uneconomic, the issue is whether the vented gas was unavoidably lost in that the expenditures necessary to market such gas were not economically justified and that conservation of the gas, if required, would lead to the premature abandonment of recoverable oil reserves.

A decision to deny an application to vent gas used in the production of oil from an oil and gas lease will be reversed where a preponderance of the evidence shows that the gas was unavoidably lost in that recovery of the gas was not economically feasible.

Rife Oil Properties, Inc., 131 IBLA 357 (Dec. 30, 1994) 101 I.D. 161

ACQUIRED LANDS LEASES

An over-the-counter noncompetitive oil and gas lease offer for acquired military lands filed prior to the passage of legislation making such lands available for leasing must be rejected. However, where the lease applicant completes a new lease form, and submits it at a time when the lands are subject to leasing, BLM should treat the application as a new offer to lease, and assign the offer priority as of that date.

Caldwell Oil & Gas Co., 113 IBLA 271 (Mar. 9, 1990)

A party challenging a KGS determination by BLM has the burden of showing by a preponderance of the evidence that BLM's determination is wrong. No error is established by the fact that KGS limits conform to the boundaries of the smallest legal subdivision, surveyed tract, or lot. Lands designated within a KGS may only be leased competitively. The fact that lease proceeds serve to retire a State debt obligation for a reclamation project on the leased lands is not determinative of competitive leasing of the project lands in 1983, and is not a criterion for consideration by BLM in determining the boundaries of a KGS.

Lavaca-Navidad River Authority, State of Texas, Water Development Board, 115 IBLA 373 (Aug. 16, 1990)

Rejection by BLM of an acquired lands oil and gas lease offer, which described the surveyed lands sought, in accordance with 43 CFR 3111.2-2(a) (1987), by legal subdivision, section, township, range, and meridian, because the offeror failed to file three copies of a map required by 43 CFR 3111.2-2(d) (1987), is improper. The map requirement is limited to acquired lands oil and gas lease offers for lands which cannot be conformed to the rectangular system of public land surveys.

Thomas Connell, 116 IBLA 113 (Sept. 20, 1990)

ACQUIRED LANDS LEASES--Continued

In accordance with 43 CFR 311.2-2(b) and (c) (1983), a noncompetitive future interest oil and gas lease offer may properly describe requested lands by the tract acquisition number assigned by the acquiring agency where the lands have not been surveyed under the rectangular survey system. Because a specific offer form was not required for noncompetitive future interest oil and gas lease offers submitted in 1983, the offer may include several descriptions of requested lands. An offer to lease which describes the lands sought by the tract acquisition number followed by a description taken from the acquiring deed is sufficient, even though the description contains a typographical error, provided BLM can identify the lands sought within the documents which constitute the offer.

Beard Oil Co., 117 IBLA 54 (Nov. 27, 1990)

A noncompetitive over-the-counter future interest lease offer for acquired lands which incorrectly describes the lands sought because the description fails to close is properly subject to rejection. The future interest lease offeror may cure a defective description after the vesting of the mineral estate in the United States, so long as the curative action occurs prior to the filing of a present interest lease offer. Correcting the defective offer thereafter affords no priority in the face of the conflicting present interest lease offer.

The Moran Corp., 119 IBLA 178 (May 7, 1991)

A noncompetitive over-the-counter future interest lease application for acquired lands which incorrectly describes the land sought must be rejected since BLM is without jurisdiction to alter, modify, or correct such a description so as to make it acceptable.

A future interest oil and gas application for less than an entire tract of acquired land, not surveyed under the rectangular system of public land surveys, is required to describe the lands sought for leasing by course and distance between the successive angle points of the boundary of the tract. Where the description of the exterior boundary of one such tract includes within it another tract not sought for leasing, the area

OIL AND GAS LEASES--Continued

ACQUIRED LANDS LEASES--Continued

excluded must likewise be described by course and distance between its angle points.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

Under sec. 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1988), the Secretary of the Interior lacks authority to issue an oil and gas lease over the objection of the agency having jurisdiction of the acquired land.

Blue Ridge Oil & Gas Exploration, Inc., 127 IBLA 279 (Oct. 5, 1993)

BLM properly rejected an oil and gas lease application that was not made on a standard form as required by 43 CFR 3101.1-1.

Carlton Oil Corp., 129 IBLA 144 (Apr. 19, 1994)

APPLICATIONS

Generally

One challenging a Bureau of Land Management determination that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Western American Exploration Co., 112 IBLA 317 (Jan. 10, 1990)

A Record of Decision and Finding of No Significant Impact based on an environmental record of review or an environmental assessment prepared in response to the filing of an application for a permit to drill under 43 CFR 3162.3-1 is first subject to administrative review by a State Director of BLM in accordance with 43 CFR 3165.3(b). Any party adversely affected by the

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

decision of the State Director may appeal that decision to the Interior Board of Land Appeals.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

The filing of a noncompetitive oil and gas lease offer at a time when the lands are available for leasing does not establish any legal or equitable right to a lease where the land subsequently becomes unavailable for leasing either by reason of the exercise of the Secretary's discretion not to lease a tract of land in the public interest or by operation of law.

Lowell J. Simons, 114 IBLA 284 (May 9, 1990)

When no acceptable bids are received at an oral auction of oil and gas leases the first-qualified person making application for the lease within 2 years from the date of the competitive sale is generally entitled to a lease. It is well within the scope of the discretionary authority granted to the Department to hold a drawing to establish the priority of the various applications if the Bureau of Land Management receives more than one application for the same tract on the same day.

Don D. Armentrout, 117 IBLA 1 (Nov. 16, 1990)

BLM may properly reject a noncompetitive oil and gas lease offer for lands which received a minimum bid at a competitive oil and gas lease sale, even though the bidder subsequently withdrew the bid.

Donald J. Eckelberg, 117 IBLA 390 (Feb. 13, 1991)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

An oil and gas lease offer is properly rejected when the offer is deficient in the first year's rental by more than 10 percent. As the commingling, or transfer, of funds from one account to another without prior written permission is contrary to the orderly administration of the oil and gas leasing program, the offer must be rejected despite the fact that BLM held funds in other accounts to be returned to the offeror.

Stephen S. Lange, 119 IBLA 45 (Mar. 25, 1991)

43 CFR 3165.4(c) prevents the suspension on appeal of a notice of violation or assessment or an instruction, order, or decision or a notice of proposed penalty. In accordance with 43 CFR 4.21(a), a timely appeal to the Interior Board of Land Appeals suspends the effect of a decision approving an Application for Permit to Drill pending the decision on appeal.

Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, 121 IBLA 1 (Oct. 4, 1991) 98 I.D. 267

Filing a noncompetitive oil and gas lease offer when the lands are available for leasing does not establish a legal or equitable right to a lease if the land subsequently become unavailable for leasing by operation of law. Congress mandated that lands within the Ouachita National Forest be offered for competitive leasing even though valid noncompetitive lease offers may be outstanding. If lands were offered at a competitive sale and a bid in excess of the national minimum acceptable bid was received from a responsible qualified bidder then the pending noncompetitive offer to lease that tract was properly rejected.

William E. Dent, Jr., 122 IBLA 152 (Feb. 4, 1992)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

A ROD and FONSI issued by a BLM Area Manager, which is based on an environmental record of review or an EA prepared in response to the filing of an APD an oil and gas well under 43 CFR 3162.3-1, is first subject to administrative review by a BLM State Director in accordance with 43 CFR 3165.3(b). An appeal to this Board of such a decision that has not been the subject of State Director review will be dismissed and the case remanded for referral to the appropriate State Director.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 283 (Mar. 5, 1992)

A decision approving an application for permit to drill an oil and gas well under 43 CFR 3162.3-1 is first subject to administrative review by the appropriate BLM State Director in accordance with 43 CFR 3165.3(b). Where an appeal to this Board from such a decision has not been the subject of State Director review, it will be dismissed.

Wyoming Wildlife Federation, 123 IBLA 392 (Aug. 7, 1992)

A defect in an noncompetitive oil and gas lease offer may be cured prior to rejection, with priority as of the date of perfection of the offer. However, after BLM has rejected an offer because it violates the 6-mile square rule, no curative submissions will be accepted; a new offer is required to estabish priority.

Lonetree Energy, Inc., 127 IBLA 70 (July 20, 1993)

Under sec. 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1988), the Secretary of the Interior lacks authority to issue an oil and gas lease over the objection of the agency having jurisdiction of the acquired land.

Blue Ridge Oil & Gas Exploration, Inc., 127 IBLA 279 (Oct. 5, 1993)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

Land included within a WSA are not subject to leasing pursuant to the MLA. An oil and gas lease offer filed for lands which are not subject to leasing by reason of inclusion in a WSA is properly rejected without suspending adjudication of the offer pending the ultimate determination whether the lands will be designated as wilderness.

Richard D. Sawyer, 127 IBLA 392 (Oct. 29, 1993)

Attorneys-in-Fact or Agents

An oil and gas offer signed by someone other than the potential lessee, which does not disclose the relationship between the potential lessee and the signatory, and where the signatory is not authorized as an agent or attorney-in-fact of the potential lessee, is subject to rejection under 43 CFR 3102.4 and 3112.6-1.

Elaine Wolf, 113 IBLA 364 (Mar. 27, 1990)

An oil and gas lease offer signed by an attorney-in-fact for lease applicants was not subject to rejection for failure to disclose the relationship between them contrary to 43 CFR 3102.4.

William J. Manville, Jr., 124 IBLA 257 (Nov. 3, 1992)

Description

In accordance with 43 CFR 311.2-2(b) and (c) (1983), a noncompetitive future interest oil and gas lease offer may properly describe requested lands by the tract acquisition number assigned by the acquiring agency where the lands have not been surveyed under the rectangular survey system. Because a specific offer form was not required for noncompetitive future interest oil and gas lease offers submitted in 1983, the offer may include several descriptions of requested lands. An offer to lease which describes the lands sought by the tract acquisition number followed by a

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Description--Continued

description taken from the acquiring deed is sufficient, even though the description contains a typographical error, provided BLM can identify the lands sought within the documents which constitute the offer.

Beard Oil Co., 117 IBLA 54 (Nov. 27, 1990)

A noncompetitive over-the-counter future interest lease offer for acquired lands which incorrectly describes the lands sought because the description fails to close is properly subject to rejection. The future interest lease offeror may cure a defective description after the vesting of the mineral estate in the United States, so long as the curative action occurs prior to the filing of a present interest lease offer. Correcting the defective offer thereafter affords no priority in the face of the conflicting present interest lease offer.

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. Because a specific offer form was not required for noncompetitive future interest oil and gas lease offers submitted in 1984, the offer may include several descriptions or means to identify the lands sought. If, after BLM has reviewed all available documents in the offer, it must still refer to extraneous materials to delimit the extent of the offer, the offer is insufficient and must be rejected.

The Moran Corp., 119 IBLA 178 (May 7, 1991)

A noncompetitive over-the-counter future interest lease application for acquired lands which incorrectly describes the land sought must be rejected since BLM is without jurisdiction to alter, modify, or correct such a description so as to make it acceptable.

A future interest oil and gas application for less than an entire tract of acquired land, not surveyed under the rectangular system of public land surveys, is required to describe the lands sought for leasing by course and distance between the successive angle points

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Description--Continued

of the boundary of the tract. Where the description of the exterior boundary of one such tract includes within it another tract not sought for leasing, the area excluded must likewise be described by course and distance between its angle points.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

Drawings

A simultaneous oil and gas lease application is properly rejected when it does not disclose the identity of another person that holds an interest. An application is also properly rejected as a prohibited multiple filing when a person has an interest in more than one application filed for the same parcel.

"Interest in an oil and gas lease offer." When an applicant for an oil and gas lease has executed a promissory note entitling the holder to 60 percent of the proceeds from a Federal oil and gas lease, the holder of the note has an interest in the oil and gas lease, as defined by 43 CFR 3100.0-5(b).

Taylor Basin Partnership et al., 116 IBLA 23 (Aug. 27, 1990)

When no acceptable bids are received at an oral auction of oil and gas leases the first-qualified person making application for the lease within 2 years from the date of the competitive sale is generally entitled to a lease. It is well within the scope of the discretionary authority granted to the Department to hold a drawing to establish the priority of the various applications if the Bureau of Land Management receives more than one application for the same tract on the same day.

Don D. Armentrout, 117 IBLA 1 (Nov. 16, 1990)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Filing

An over-the-counter noncompetitive oil and gas lease offer for acquired military lands filed prior to the passage of legislation making such lands available for leasing must be rejected. However, where the lease applicant completes a new lease form, and submits it at a time when the lands are subject to leasing, BLM should treat the application as a new offer to lease, and assign the offer priority as of that date.

Caldwell Oil & Gas Co., 113 IBLA 271 (Mar. 9, 1990)

Rejection by BLM of an acquired lands oil and gas lease offer, which described the surveyed lands sought, in accordance with 43 CFR 3111.2-2(a) (1987), by legal subdivision, section, township, range, and meridian, because the offeror failed to file three copies of a map required by 43 CFR 3111.2-2(d) (1987), is improper. The map requirement is limited to acquired lands oil and gas lease offers for lands which cannot be conformed to the rectangular system of public land surveys.

Thomas Connell, 116 IBLA 113 (Sept. 20, 1990)

BLM properly rejected an oil and gas lease application that was not made on a standard form as required by 43 CFR 3101.1-1.

Carlton Oil Corp., 129 IBLA 144 (Apr. 18, 1994)

6-mile Square Rule

BLM properly rejects a noncompetitive oil and gas lease offer which does not comply with the requirements of 43 CFR 3110.3-3(b) that lands in an offer be entirely within an area of 6 miles square or within an area not exceeding six surveyed sections in length or width measured in cardinal directions.

A defect in an noncompetitive oil and gas lease offer may be cured prior to rejection, with priority as of the date of perfection of the offer. However, after BLM has rejected an offer because it violates the 6-mile

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

6-mile Square Rule--Continued

square rule, no curative submissions will be accepted; a new offer is required to estabish priority.

Lonetree Energy, Inc., 127 IBLA 70 (July 20, 1993)

Sole Party in Interest

Where the record establishes that a firm filed DECs prepared and signed by its employees, and that the employee/applicants were required by verbal agreement, as a condition of their employment, to sell their leases to parties as directed by the firm, the firm had a claim to an advantage or benefit from a lease within the meaning of 43 CFR 3100.0-5 (1978). Thus, the firm held an "interest" in its employees' DECs, and, where that interest was not disclosed at the time the DECs were filed as required by 43 CFR 3102.7 (1978), they should have been rejected.

Where the record fails to show that there was any enforceable agreement between a lease filing firm and nonemployees under which the nonemployees were bound to transfer any leases they acquired as directed by the firm and shows instead that the method for acquiring leases developed by the firm rested solely on the fact that the nonemployees enlisted to sign DECs were friends and relatives of the employees or principals of the firm and, thus, could be expected to sell any subsequently acquired lease to the firm by ties of loyalty, the firm held no "interest" in the DECs it filed on behalf of the nonemployees. Such claims of loyalty amounted merely to a hope or expectancy that a successful applicant would sell the lease to the firm.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)
97 I.D. 137

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Sole Party in Interest--Continued

A simultaneous oil and gas lease application is properly rejected when it does not disclose the identity of another person that holds an interest. An application is also properly rejected as a prohibited multiple filing when a person has an interest in more than one application filed for the same parcel.

"Interest in an oil and gas lease offer." When an applicant for an oil and gas lease has executed a promissory note entitling the holder to 60 percent of the proceeds from a Federal oil and gas lease, the holder of the note has an interest in the oil and gas lease, as defined by 43 CFR 3100.0-5(b).

Taylor Basin Partnership et al., 116 IBLA 23 (Aug. 27, 1990)

ASSIGNMENTS OR TRANSFERS

Where a partial assignment of an oil and gas lease was filed with BLM after Dec. 22, 1987, when amendments to provision of the Mineral Leasing Act controlling administration of partial assignments became effective, the partial assignment became subject to the amended law. Therefore, because the land assigned was less than the entire lease, was part of a legal subdivision, and there was no showing that approval of the partial assignment would further development of oil and gas, the partial assignment was correctly denied.

Wheeler-Lea Co., 114 IBLA 73 (Apr. 10, 1990)

Assignment of a Federal oil and gas lease remains ineffective to release a record titleholder of the lease from ultimate responsibility to plug or produce a well on leased land until such assignment is approved by the Department.

Ralph G. Abbott, 115 IBLA 343 (Aug. 9, 1990)

OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

An assignee of an oil and gas lease agrees to be bound by the terms and conditions of the lease as issued, including any stipulations consented to by the lessee as a condition of leasing. Accordingly, an appeal by an assignee of stipulations consented to by the lessee, his predecessor-in-interest, is properly denied.

Texaco Inc., 115 IBLA 369 (Aug. 15, 1990)

BLM properly denies an oil and gas lease operator's request for the suspension of the automatic elimination provisions of a unit agreement where more than 10 percent of working interest owners has not consented to the suspension at the time of the request. To determine whether there has been the necessary consent, BLM properly takes into account any assignments it has approved effective as of the date of the request, despite the operator's contention that such assignments were not effective because the parties thereto had not notified the operator at the time the request for suspension was made in accordance with the unit operating agreement.

Piute Energy Co., 116 IBLA 1 (Aug. 23, 1990)

A noncompetitive oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law upon failure of a lessee to pay the full amount of the rental due on or before the anniversary date of the lease. However, a partial assignment of record title to acreage in a Federal oil and gas lease, filed by a qualified assignee prior to the lease anniversary date, may be approved where the annual rental for the segregated acreage in the assignment was tendered prior to the anniversary date, even though the base lease terminated for nonpayment of the full lease rental on the anniversary date of the lease.

In the absence of a clear indication that it is intended for the preservation of a specific parcel or parcels, a partial payment of rental should be attributed to the leasehold generally. Such partial payment by an unapproved assignor may not be used to preserve the interests of parcels held by unapproved assignees in

OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

the absence of a clear indication that it was intended to be used to do so.

An unapproved assignor may not rely on BLM's approval of the assignment prior to the anniversary date in determining whether to submit rental for the entire leasehold. That is, where the assignor apparently submits less than full rental in the expectation that BLM would approve a pending assignment prior to the anniversary date (thereby reducing the rental due to be paid) he bears the risk that the assignment will not be approved prior to the anniversary date and that less than the full amount will be timely paid by the assignor and assignees.

Where the assignment of an oil and gas lease is pending before BLM, the assignor remains responsible for the performance of all obligations under the lease until the assignment has been approved, and BLM's failure to approve an assignment by the date the rental is due does not obviate the requirement the rental for the entire leasehold be paid on or before the anniversary date of the lease. The obligation to pay annual rental exists without regard to the fact that assignments of lease interests are pending, even though the assignments may ultimately be made effective retroactively to a date prior to the anniversary date.

Where the record titleholder of an oil and gas lease fails to request reinstatement within the time allowed, reinstatement is not authorized under governing statutory and regulatory provisions, and the termination of the lease becomes final. BLM must refuse to approve any pending assignments, as there is no lease interest left to be assigned.

Interior Reserves Corp., et al., 116 IBLA 73 (Sept. 5, 1990)

The provisions of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 expanding the discretion of the Bureau of Land Management to deny either partial assignments or assignments of less than 640 acres out of onshore oil and gas leases on public lands (other than those in Alaska) without a showing that the assignment will further oil and gas development, do not apply retroactively to deny an assignment to a bona fide purchaser who had acquired an interest in the oil

OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

and gas lease prior to Dec. 22, 1987, the effective date of the statute.

Lillian C. Luke, 116 IBLA 391 (Nov. 13, 1990)

A decision disapproving a pending partial assignment of an oil and gas lease will be affirmed if, prior to approval of the partial assignment, the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date, and the assignee had not tendered the rental for the lands described in the partial assignment prior to the anniversary date.

Martin Faley, 116 IBLA 398 (Nov. 14, 1990)

A lease may not be assigned except with the consent of the Secretary of the Interior and an assignment does not become effective until after it has been filed in the proper BLM office and other requirements have been met. The requirement to file three original executed copies of an assignment was established by Congress and cannot be waived by the Department. A lease assignment not executed using a proper lease transfer form may not be approved.

An oil and gas lease assignment filed with BLM is properly denied where the assignee fails to file three original executed copies of the assignment on an approved form. However, where BLM is aware of a controversy concerning assignment of the lease, Department policy requires withholding action on any other assignment until the dispute is resolved through settlement or litigation. And if BLM has approved another assignment, it will be directed to take no further action concerning the land for a period of time in order to allow the parties to undertake settlement or initiate court action to otherwise resolve the dispute. Failure to take appropriate action within the time allowed will result in confirmation of the approved assignment.

Pat Reed, 119 IBLA 338 (June 18, 1991)

OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

BLM properly refused to accept an assignment of record title to an oil and gas lease filed on a form previously declared obsolete by the Director, BLM, by notice published in the Federal Register pursuant to Departmental regulation 43 CFR 3106.4-1.

E. Barger Miller, III, 120 IBLA 177 (July 26, 1991)

A purported assignee of a competitive oil and gas lease lacks standing to appeal from a BLM decision amending the lease to correct an erroneous acreage figure and requiring the lessee to pay additional first year's rental and minimum bonus bid depending on the revised figure, when the purported assignee has failed to sign the assignment document.

Stanley Energy, Inc., 122 IBLA 118 (Jan. 16, 1992)

Where BLM approves the assignment of the transfer of record title to an oil and gas lease from two co-lessees, who are co-principals on a lease bond, one of whom is also the operator of a well on the lease, to an assignee with a statewide bond, responsibility for performance of all lease obligations, including bonding, shifts, in accordance with 43 CFR 3106.7-2, to the assignee and its surety. A decision to terminate the period of liability on the lease bond is properly issued.

Where an operator provides bond coverage for a lease, upon transfer of its rights, the new operator must, in accordance with 43 CFR 3106.6-1, furnish an appropriate replacement bond or provide evidence of consent of the surety under the existing bond to become co-principal on such bond. However, where co-lessees, one of whom is the operator of a well on the lease, are co-principals on the lease bond, and BLM approves a transfer of record title interest in the lease, the co-lessee/operator is not required to maintain the lease bond in the absence of the designation of a new operator. The reason is that upon approval of the assignment of the record title, the assignee and its surety become

OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

responsible for the performance of all lease obligations, including bonding.

R. E. Puckett, R. C. Altrogge, 124 IBLA 288 (Nov. 3, 1992)

Sec. 102(a) of FOGRMA, 30 U.S.C. § 1712(a) (1988), requires a lessee to notify the Secretary of the assignment of the obligation to pay royalty. Sec. 3(7) of FOGRMA, 30 U.S.C. § 1702(7) (1988), defines lessee as including any person who has been assigned an obligation to make a royalty or other payment required by a lease. Under secs. 102(a) and 3(7) of FOGRMA, for a person who holds no interest in a lease to be liable for the lessee's royalty payments, the lessee and the person must have agreed to an assignment of the obligation to pay royalty, and notice of that assignment or either evidence of or notice of an assignment, and filing a PIF, without more, does not render the person filing it a lessee under sec. 3(7) of FOGRMA, 30 U.S.C. § 1702(7) (1988). There must be a document assigning the obligation to make royalty payments or a contract or agreement stating this obligation.

The assignment of the obligation to make royalty payments is not related to an assignment of a lease or an interest in a lease that must be approved by BIA under 25 CFR 212.22.

The making of royalty payments and the filing of PIFs are not sufficient evidence to indicate an intent to be bound as an agent by lessees' obligation to pay royalty.

Mesa Operating Ltd Partnership, 125 IBLA 28 (Dec. 31, 1992) 99 I.D. 272

In the absence of a regulation and a PIF explicitly stating that filing the form constitutes the assumption of the lessee's obligation to pay royalty by the person filing it, a document evidencing the person's agreement to accept this responsibility is necessary.

OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

A division order may constitute evidence that the obligation to pay royalty has been assigned.

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

Where an Indian oil and gas lease held by production has been deemed by BIA to have terminated due to lack of production, BLM properly requires the lessee of record to plug and abandon wells on the leased land.

Cross Creek Corp., 131 IBLA 32 (Sept. 29, 1994)

BONA FIDE PURCHASER

The provisions of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 expanding the discretion of the Bureau of Land Management to deny either partial assignments or assignments of less than 640 acres out of onshore oil and gas leases on public lands (other than those in Alaska) without a showing that the assignment will further oil and gas development, do not apply retroactively to deny an assignment to a bona fide purchaser who had acquired an interest in the oil and gas lease prior to Dec. 22, 1987, the effective date of the statute.

Lillian C. Luke, 116 IBLA 391 (Nov. 13, 1990)

A bona fide purchaser who is the assignee of a lease describing lands unavailable for lease is not entitled to the protection offered by 30 U.S.C. § 184(h)(2) (1988), and 43 CFR 3108.4.

Petrolex 84-1 Ltd., 118 IBLA 372 (Mar. 14, 1991)

OIL AND GAS LEASES--Continued

BONDS

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs decision increasing a bond for an oil and gas lease under 25 CFR 213.15(c) is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence.

GMG Oil & Gas Corp. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 187 (Mar. 7, 1990)

K. D. McPhail, dba Macro Oil Co. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 353 (July 6, 1990)

When an appellant attempts to remedy the defects which led to a BLM decision rejecting a nationwide oil and gas geophysical exploration bond rider by providing additional information on appeal, the Board may affirm the rejection decision but remand the matter to BLM for adjudication of the acceptability of the rider in light of the additional information.

Frontier Exploration, Inc., Frontier Geophysical Co., 114 IBLA 280 (May 9, 1990)

Under the regulations governing bonds for oil and gas geophysical exploration, liability for a particular oil and gas geophysical exploration operation automatically terminates by operation of law on the 91st day following the filing of a notice of completion of oil and gas exploration operations if BLM fails to notify the party filing the notice within 90 days of the filing that all terms and conditions have been met or that additional action is required to rehabilitate the lands. Where BLM fails to provide such notice and a number of years later seeks to collect on the nationwide oil and gas geophysical exploration bond for the costs of correcting improperly plugged shot holes, the regulation precludes such collection.

Insurance Co. of North America, 120 IBLA 384 (Sept. 25, 1991)

OIL AND GAS LEASES--Continued

BONDS--Continued

Confirmation by the bankruptcy court of a plan of reorganization under Chapter 11 of the Bankruptcy Code is binding on both the debtor and the creditors. Although BLM has the authority by regulation to increase the amount of bond coverage required of an oil and gas operator, an order of the bankruptcy court confirming the plan of reorganization of a Federal oil and gas lessee which expressly bars an increase in bond coverage as a condition of production is binding on the Department in the absence of modification thereof. A finding that an oil and gas lease in its extended term by reason of production terminated automatically for failure to produce lease wells within 60 days of notice to do so will be remanded where production was conditioned upon increased bond coverage expressly barred by order of the bankruptcy court.

Great Western Petroleum & Refining Co., 124 IBLA 16 (Aug. 19, 1992)

Where BLM approves the assignment of the transfer of record title to an oil and gas lease from two co-lessees, who are co-principals on a lease bond, one of whom is also the operator of a well on the lease, to an assignee with a statewide bond, responsibility for performance of all lease obligations, including bonding, shifts, in accordance with 43 CFR 3106.7-2, to the assignee and its surety. A decision to terminate the period of liability on the lease bond is properly issued.

Where an operator provides bond coverage for a lease, upon transfer of its rights, the new operator must, in accordance with 43 CFR 3106.6-1, furnish an appropriate replacement bond or provide evidence of consent of the surety under the existing bond to become co-principal on such bond. However, where co-lessees, one of whom is the operator of a well on the lease, are co-principals on the lease bond, and BLM approves a transfer of record title interest in the lease, the co-lessee/operator is not required to maintain the lease bond in the absence of the designation of a new operator. The reason is that upon approval of the assignment of the record title, the assignee and its surety become

OIL AND GAS LEASES--Continued

BONDS--Continued

responsible for the performance of all lease obligations, including bonding.

R. E. Puckett, R. C. Altrogge, 124 IBLA 288 (Nov. 3, 1992)

BLM properly required an operator of a producing oil and gas lease to furnish a bond under 43 CFR Subpart 3104 although the operator did not plan to begin surface disturbing activities related to drilling operations.

Franklin Oil Co., 129 IBLA 94 (Apr. 5, 1994)

CANCELLATION

The Secretary of the Interior has the authority to cancel any oil and gas lease issued contrary to law or regulation because of the inadvertence of his subordinates. Where an oil and gas lease offer should have been rejected because it failed to comply with applicable regulations, a lease based on such an offer is properly cancelled.

Elaine Wolf, 113 IBLA 364 (Mar. 27, 1990)

Under 43 CFR 3108.3 (1987), BLM lacks the power to administratively cancel any oil and gas lease or interest therein that is in production.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)
97 I.D. 137

The Secretary of the Interior has the authority to cancel any oil and gas lease issued contrary to law because of the inadvertence of his subordinates. When a lease has been issued in violation of the terms of a regulation promulgated pursuant to statutory authority to the prejudice of the rights of others, it is properly cancelled.

Oil and gas lease offers filed for land embraced in an Alaska State selection pursuant to sec. 6(b) of the Alaska Statehood Act of 1958 will be rejected when

OIL AND GAS LEASES--Continued

CANCELLATION--Continued

and if the selection is tentatively approved. Where an oil and gas lease has inadvertently been issued for land embraced in an outstanding selection, a decision cancelling the lease after a determination has been made to approve the selection will be affirmed on appeal.

Weston B. Andrews, 116 IBLA 41 (Aug. 28, 1990)

An oil and gas lease which was improperly issued because title to the land embraced by the lease was vested in the State of Oklahoma is properly cancelled by the Bureau of Land Management pursuant to 43 CFR 3108.3(d) (1988), when the leasehold does not contain a well capable of production of oil or gas in paying quantities, and is not committed to an approved cooperative or unit plan or communitization agreement.

Suzanne Walsh, 117 IBLA 267 (Jan. 15, 1991)

An oil and gas lease is properly cancelled where it was inadvertently issued in violation of the regulatory requirement to conform use authorizations to the approved RMP for lands officially designated as an area of critical environmental concern, with a prescription for no leasing because the area contains several Federally listed endangered and threatened plant species.

High Plains Petroleum Corp., 125 IBLA 24 (Dec. 29, 1992)

CIVIL ASSESSMENTS AND PENALTIES

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

To sustain an assessment for failure to file documents required by an order issued by an Area Manager, evidence must appear in the record to support the finding of noncompliance. Where the record is unclear as to what documents were required or whether documents filed were inadequate, the record is

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

insufficient to support assessment of a civil penalty for noncompliance with the order.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

Drilling a gas well on Federal lands without obtaining the prior approval of the Bureau of Land Management is a violation of 43 CFR 3162.3-1(c), and under 43 CFR 3163.1(b)(2), the Bureau is required to impose an assessment of $500 for each day that the violation exists, including the days the violation existed prior to discovery, not to exceed $5,000.

Magness Petroleum Corp., 113 IBLA 214 (Feb. 23, 1990)

The procedural safeguards applicable to civil penalties assessed pursuant to 30 U.S.C. § 1719 (1982), do not apply to late reporting assessments levied pursuant to 30 CFR 218.40.

The party choosing the means of delivery of a document must accept the responsibility for and bear the consequences of that choice, including the possibility of delay or nondelivery.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

Where an operator initiates drilling operations at 7 a.m. but his application for permit to drill is not approved by BLM until 4:20 p.m. the same day, BLM properly issues a notice of noncompliance for drilling without approval for a portion of 1 day, pursuant to 43 CFR 3163.1.

Verbal permission to drill from a BLM employee prior to approval by BLM of an application for permit to drill, even if established in the record, would not provide a defense to the issuance of an incident of noncompliance for drilling without approval, where such

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

verbal permission is contrary to controlling Departmental regulations, knowledge of which is limited to the operator.

Where a minimum assessment of $500 per day is mandated for drilling without approval under 43 CFR 3163.1(b)(2), BLM is not barred from correcting an incident of noncompliance to make an assessment of $500 for a violation, representing the portion of 1 day that the violation existed.

Jack J. Grynberg dba Grynberg Petroleum Co., 114 IBLA 225 (Apr. 26, 1990)

Under 43 CFR 3163.1(b)(2) (1987), BLM shall impose an immediate assessment when an oil and gas lessee causes a surface disturbance preliminary thereto without obtaining prior BLM approval. The amount of the assessment, prescribed in the regulation, shall be $500 for each day that the violation exists, including the days the violation existed prior to its discovery, not to exceed $5,000.

Jack Hammer dba Hammer Oil Co., 114 IBLA 340 (May 22, 1990)

Imposition of an assessment to compel compliance with regulations implementing the Mineral Leasing Act is an exercise of the Department's regulatory power which is not stayed by the filing of a bankruptcy petition by an oil and gas lessee or operator.

It is proper for BLM to issue a written order directing clean up of oil-contaminated soil from a well site. It may also assess the operator $250 pursuant to 43 CFR 3163.1(a)(2) for failure to comply with that written order.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

As owner of the land and minerals, the Federal Government has an interest in being paid royalties based on accurate measurements. The regulation at 43 CFR 3162.7-3 contemplates that "the authorized officer" will issue orders and notices setting forth the methods and procedures for measuring gas production. The standards established by the American Gas Ass'n Gas Measurement Committee are well recognized and are a reliable source from which to draw Federal requirements as to the method for accurately measuring gas for the purpose of Federal royalty payments.

BLM may use the American Gas Ass'n Gas Measurement Committee standards as the source for establishing a requirement as to the proper measurement of production, but a lessee is not in violation of that requirement until BLM has decided to impose it, has notified the lessee, and has given an opportunity to comply.

The regulations at 43 CFR 3162.1(a) and 43 CFR 3161.2 reflect BLM's broad authority to issue orders governing operations at lease sites. Challenges to the scope of BLM's authority and the manner in which it is exercised are properly raised by a party adversely affected by appeal to the Board of Land Appeals, after administrative review by the State Director.

Luff Exploration Co., 115 IBLA 134 (June 28, 1990)

Two applications for attorney's fees and expenses filed with the Board under the Equal Access to Justice Act, 5 U.S.C. § 504 (West Supp. 1990), one for services rendered in connection with an appeal of a BLM decision which was dismissed by the Board as premature, and the other in connection with a BLM decision which was withdrawn by BLM, are both properly denied because no adversary adjudication has occurred and the Office of Hearing and Appeals has not conducted an adjudication.

Rife Oil Properties, Inc., 116 IBLA 18 (Aug. 24, 1990)

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

Assessments for late reporting of royalty on production pursuant to the regulation at 30 CFR 218.40 are properly distinguished from civil penalties assessed under sec. 109 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1719 (1982), and are not subject to the procedures required by that section.

An assessment of $10 per report for the late reporting of royalty on production pursuant to 30 CFR 218.40 will be affirmed where 30 CFR 210.52 requires the filing of a completed Form MMS-2014 by the end of the month following the production month and it appears from the record that the reports were filed late.

Phillips Petroleum Co., 116 IBLA 152 (Sept. 24, 1990)

Assessments for the nonreporting and late reporting of royalties pursuant to 30 CFR 218.40 are properly distinguished from civil penalties assessed under sec. 109 of FOGRMA, 30 U.S.C. § 1719 (1988), and are not subject to the procedures required by that section.

ANR Production Co., 118 IBLA 338 (Mar. 12, 1991)

Violation of the regulation requiring posting of signs on a well within a Federal or Indian lease (43 CFR 3162.6(a)) is a minor violation and BLM may properly assess an operator $250 for failure to abate a minor violation within the time allowed. 43 CFR 3163.1(a)(2).

Diversified Operating Corp., 119 IBLA 107 (Apr. 15, 1991)

Drilling a gas well on a Federal or Indian oil and gas lease without obtaining the prior approval of BLM is a violation of 43 CFR 3162.3-1(c), and, under 43 CFR 3163.1(b)(2), BLM is required to impose an assessment of $500 per day for each day that the violation exists, including the days the violation existed prior to discovery, not to exceed $5,000.

A person who holds no interest in a Federal or Indian oil and gas lease, yet, through inadvertence, ignorance, or dishonesty, drills a well on such a lease, is liable for violations of the Federal oil and gas

operating regulations and may be assessed for drilling the well without obtaining prior BLM approval.

Jack Corman, 119 IBLA 289 (June 6, 1991)

Under 43 CFR 3163.1(a)(2), BLM may properly assess an oil and gas operator $500 for failure to comply timely with notices of incidents of noncompliance requiring the removal of oil from water disposal pits.

Joseph B. Gould, 120 IBLA 237 (Aug. 9, 1991)

It is proper for BLM to levy an assessment pursuant to 43 CFR 3163.1(b)(1), for an oil and gas lessee's failure to have blowout prevention equipment installed at a well during plugging and abandoning operations, when the installation of that equipment is required by an approved plan.

Pioneer Oil & Gas, 121 IBLA 253 (Nov. 15, 1991)

An assessment levied pursuant to 43 CFR 3163.1(a)(2) is for failure to comply with a written order or instruction of the authorized officer within the time stated for abatement or compliance. Such an assessment is not a penalty or fine, but is in the nature of liquidated damages to cover loss or damage incurred by the lessor as a result of the specified incident of noncompliance. Assessments under 43 CFR 3162.1(a)(2) are only applicable to those violations deemed "minor" by the authorized officer and the amount of damages is discretionary, limited to a maximum amount of $250. As the Board normally accords considerable deference to such judgmental decisions when they are supported by substantial evidence, a decision to assess $250 for each minor violation will be affirmed where the appellant has not presented sufficient evidence to establish by a preponderance that the decision is in error.

Fancher Oil Co., 121 IBLA 397 (Dec. 26, 1991)

BLM may properly assess an operator $500 for failure to abate three minor violations within the time prescribed where it fails to demonstrate by a preponderance of the evidence that BLM's determination was in error. Violation of Onshore Oil and Gas Order No. 3, requiring valves on equalizer and drain (or recycle) lines to be effectively sealed in a closed position during the production phase, is a minor violation.

Omimex Petroleum, Inc., 123 IBLA 1 (Apr. 7, 1992)

Assessments for the late reporting of royalties pursuant to 30 CFR 218.40 are properly distinguished from penalties assessed under sec. 109 of FOGRMA, 30 U.S.C. § 1719 (1988), and do not effectively increase the royalty rate designated in an oil and gas lease.

By choosing the method of delivery of its report of sales and royalty remittance (Form MMS-2014), the payor must accept the responsibility for and bear the consequences of that choice, including the possibility of delay in delivery or nondelivery of the report.

An assessment of $10 per report for the late reporting of royalty on production pursuant to 30 CFR 218.40 will be affirmed where 30 CFR 210.52 requires the filing of a completed Form MMS-2014 by the end of the month following the production month and it appears from the record that the reports were filed late.

Linmar Petroleum Co., 123 IBLA 45 (May 6, 1992)

The Board will not overturn a BLM decision that an assessment for drilling a well without prior approval pursuant to 43 CFR 3163.1(e) (1989), should not be waived or reduced if the operator fails to demonstrate that the decision was arbitrary or that it was not supported by the evidence.

Northland Royalty Operating Co., 123 IBLA 104 (May 14, 1992)

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

Under 43 CFR 3163.1(a)(2) BLM may properly assess an oil and gas operator $250 for failure to comply timely with a notice of INC directing the operator to paint production equipment and facilities, as previously required as a condition of approval of a sundry notice.

Jack J. Grynberg, 125 IBLA 259 (Feb. 16, 1993)

Departmental regulation 30 CFR 216.408(a) calls for an assessment of an amount not to exceed $10 per day for each report not received by MMS by the designated due date. Consistent with the longstanding practice of the DOI in public land matters, the postmark date is not the date of receipt, and a document is deemed to have been filed when actually received.

For reporting under MMS' Production Accounting and Auditing System, a report is defined as each line of production information required on the applicable form.

McMurry Oil Co., 126 IBLA 278 (June 4, 1993)

An assessment may be levied pursuant to 43 CFR 3163.1(a) for failure to comply with a written order or instruction of the authorized officer within the time stated for abatement or compliance. Such an assessment is not a penalty or fine, but is in the nature of liquidated damages to cover loss or damage incurred by the lessor as a result of the specified incident of non-compliance. For a major violation, $500 per day for each day nonabatement continues may be assessed.

A decision to assess $500 for a major violation is a judgmental decision by agency personnel who have special authority to make such decisions. The Board normally accords deference to such BLM decisions when supported by substantial evidence. However, an appellant may overcome such a decision by a preponderance of the evidence.

Petro-X Corp., 127 IBLA 111 (Aug. 12, 1993)

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

Failure of the operator to appeal assessment decisions for incidents of noncompliance issued for violations of the oil and gas operations regulations renders those decisions and the findings contained therein final for the Department and precludes the operator from challenging the merits of the violations or the amounts assessed in a subsequent appeal of a decision demanding payment.

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the U.S. does not limit administrative proceedings within the DOI to recover indebtedness from an oil and gas operator.

CCCo., 127 IBLA 291 (Oct. 7, 1993)

Drilling an oil and gas well on a Federal or Indian lease without prior submission and approval of an APD is a violation of the operating regulations at 43 CFR 3162.3-1(c) and, under the regulations governing INCs, an assessment of $500 per day such violation exists (not to exceed $5,000) is mandated. 43 CFR 3163.1(b)(2). Prior notice and opportunity to abate such a violation is not a prerequisite to an assessment.

Northland Royalty Operating Co., 129 IBLA 164 (Apr. 21, 1994)

Under 43 CFR 3163.1(b)(2), BLM is to impose an immediate assessment of $500 per day, not to exceed $5,000, for drilling an oil or gas well on a Federal oil and gas lease without approval or for causing surface disturbance on Federal or Indian surface preliminary to drilling without approval. An assessment under 43 CFR 3163.1(b)(2) of $3,000 for 4 days of surface disturbance and 2 days for drilling will be reduced to $1,000, where the surface disturbance did not take place on Federal or Indian surface.

Oil, Gas & Other Minerals, Inc., 131 IBLA 279 (Nov. 30, 1994)

CIVIL ASSESSMENTS AND PENALTIES--Continued

Under the provisions of 43 CFR 3163.1(b)(1), where a notice of an incident of noncompliance has issued for a failure to install well control equipment in accordance with an approved APD, BLM must issue an immediate assessment in the amount of $500 per day for each day the violation existed, including days the violation existed prior to discovery, up to a limit of $5,000.

Absent the existence of unusual circumstances which might be revealed on a case-by-case analysis, the exercise of a State Director's discretion under 43 CFR 3163.1(e) in the context of reviewing an assessment for a violation of 43 CFR 3163.1(b)(1), which violation was properly classified as "minor," should result in a reduction of the assessment so that the assessment does not exceed a $250 daily rate.

Conley P. Smith Oil Producers, 131 IBLA 313 (Dec. 13, 1994)

COMMUNITIZATION AGREEMENTS

BLM properly required oil production to be reported on a leasehold basis after finding it was not subject to a communitization agreement because wells drilled on a restricted Indian lease included in a 640-acre communitized area produced oil instead of natural gas and associated liquid hydrocarbons identified in the agreement as the substances communitized.

Home-Stake Royalty Corp., 130 IBLA 36 (July 12, 1994)

COMPENSATORY ROYALTY

Decisions requiring payment of compensatory royalty for drainage from Indian oil and gas leases are affirmed on appeal where no error is shown to exist in parameters used to calculate drainage from a well on an adjacent lease.

Decisions requiring an Indian oil and gas lessee to pay compensatory royalty for drainage resulting from an adjacent well on another Federal lease are ordered set aside where royalty was assessed from the effective date of lease issuance rather than from a reasonable time following lease issuance within which a prudent

COMPENSATORY ROYALTY--Continued

operator would drill a protective well under all relevant circumstances.

A Federal oil and gas lessee alleged to be draining Indian land who subsequently leased that same Indian land had no obligation to drill a protective well prior to issuance of the Indian leases.

Jerome P. McHugh & Assocs., 113 IBLA 341 (Mar. 21, 1990)

Compensatory royalties accrue after the passage of a reasonable time following the date the lessee knew or should have known that drainage was occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case BLM need not assume the initial burden of showing that the lessee knew or that a reasonably prudent operator should have known that drainage was occurring, as the common lessee is presumed to have knowledge of the drainage upon first production from its offending well. This bears the ultimate burden of persuasion as to the date he had notice that drainage was occurring.

Under the usual statement of the standard for prudent operation, the lessee is not obligated to drill an offset well unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling the well. The prudent operator standard applies to situations in which a leased Federal tract is being drained by a well operated by a common lessee. In such cases, BLM has the burden of establishing that the leased Federal tract is being drained by the common lessee's non-Federal well, but need not prove as a part of its cause of action that a protective well would be economic. The burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

No breach of a lessee's duty to prevent drainage will occur if the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas. However, if a lessee can make a reasonable profit by drilling the well, he has a duty to prevent drainage by drilling a well. The prudent

operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil and/or gas which would be lost if the well were not drilled.

An oil and gas lessee is generally required to take such actions as would be prudent to protect his lessor from unnecessary losses due to drainage. The scope of this responsibility is not limited to drilling an offset well, but embraces all other actions a prudent operator might consider. Thus, if a prudent operator would unitize, it follows that a failure to do so would constitute a breach of the duty to protect the lessor from unnecessary loss due to drainage.

The concept of a duty to unitize is thoroughly compatible with the prudent operator standard governing a lessee's conduct and the viability of unitization is a factor to be considered when determining whether a lessee has discharged his duty to protect the leased premises from drainage. However, the lessee may always demonstrate that a prudent operator would not have formed a unit, that the lessee had unsuccessfully attempted to establish a unit, or that the costs of unitization would not leave him a profit.

When an offset well would not now be, and never would have been, profitable there is no legally defensible basis for requiring unitization. To require unitization in such cases ignores economics and simple practicalities. Quite apart from any theoretical difficulties in justifying unitization, the unitization of a producing property with a property that could not profitably be produced is virtually impossible. The operating and nonoperating interest owners of the producing property have no practical or economic reason for consenting to such unitization.

NGC Energy Co., Mono Power Co., 114 IBLA 141 (Apr. 19, 1990) 97 I.D. 159

When the same party is the operator of both the Federal tract being drained and the offspring well, BLM need not prove as a part of its cause of action that a protective well would be economic. In such cases the

burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

Compensatory royalties commence upon passage of a reasonable time following the date the lessee knew or should have known that drainage is occurring. The common operator who drills the offending well is in the best position to know that drainage is occurring. In such case, BLM need not assume the initial burden of showing that the common operator knew or that a reasonably prudent operator should have known that drainage was occurring. The common operator is presumed to have knowledge of drainage upon first production from its offending well. This presumption is rebuttable by the common operator, who bears the ultimate burden of persuasion as to the notice of drainage.

Petroleum, Inc., Pennzoil Co., 115 IBLA 188 (July 3, 1990)

Before the Board of Land Management may assess compensatory royalties against an oil and gas lessee for drainage by an adjacent well, it must demonstrate that the lessee knew, or that a reasonably prudent operator should have known, of the drainage. While a lessee who holds an interest in both the offending well and the drained Federal lease, is considered to have knowledge of drainage from the time he drills the offending well, under other circumstances the Department must show that a lessee knew or that a reasonably prudent operator would have known there was drainage.

Jerome P. McHugh & Associates (On Reconsideration), 117 IBLA 303 (Jan. 17, 1991)

A Federal oil and gas lessee was properly assessed compensatory royalty for failure to drill an offset well within 5 months after collection of data indicating that an economic offsetting well should be drilled to protect the Federal lessor.

Kerr-McGee Corp., 118 IBLA 119 (Mar. 6, 1991)

OIL AND GAS LEASES--Continued

COMPENSATORY ROYALTY--Continued

A finding that there was drainage from an Indian oil and gas lease is affirmed on appeal where no error is shown to exist in parameters used by BLM to calculate drainage.

An assessment of compensatory royalty effective 6 months after completion of the offending well must be vacated where the record does not establish whether the lessee of the drained oil and gas lease had learned that drainage was occurring before notice of that fact was given by BLM, an event that did not occur until 9 years after the offending well was completed.

Meridian Oil Co., 120 IBLA 359 (Sept. 16, 1991)

An operator who obtains a lease that is being drained by his offending well becomes a common lessee and is presumed to have knowledge of the drainage. This knowledge is presumed from the date that the party becomes the common lessee. Any duty to drill an offset well or pay compensatory royalty would arise a reasonable time thereafter.

Once BLM has established that a tract is being drained by a common lessee, the ultimate burden of proof that a protective well would be uneconomic rests with the common lessee. If the cost of drilling and operating an offset well, based on the conditions at the time this duty is acquired, is greater than the value of the recovered oil and gas, there is no breach of the lessee's duty to prevent drainage.

In order for BLM to assess an operator/lessee compensatory royalty for a period of time when the operator/lessee was a stranger to the lease, BLM must show, for example, that it had provided written notice to the operator/lessee's predecessor in interest and that the operator/lessee could be considered to have taken the leases subject to that notice or that it had been made a condition of Departmental approval of the assignment.

Benson-Montin-Greer Drilling Corp., 123 IBLA 341 (July 15, 1992) 99 I.D. 115

OIL AND GAS LEASES--Continued

COMPENSATORY ROYALTY--Continued

Compensatory royalties accrue upon the passage of a reasonable time following the date the lessee knew or should have known that drainage was occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case BLM need not assume the initial burden of showing that the lessee knew or that a reasonably prudent operator should have known that drainage was occurring, as the common lessee is presumed to have knowledge of the drainage upon first production from its offending well. This presumption is rebuttable by the common lessee, who bears the ultimate burden of persuasion as to the date he had notice that drainage was occurring.

Under the usual statement of the standard for prudent operation, the lessee is not obligated to drill an offset well unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well. The prudent operator standard applies to situations in which a leased Federal (or Indian) tract is being drained by a well operated by a common lessee. In such cases, BLM has the burden of establishing that the leased Federal (or Indian) tract is being drained by the common lessee's non-Federal well, but need not prove as a part of its cause of action that a protective well would be economic. The burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

No breach of a lessee's duty to prevent drainage will occur if the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas. However, if a lessee can make a reasonable profit by drilling the well, he has a duty to protect the lease from drainage. The prudent operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil and/or gas which would be lost if the well were not drilled.

A BLM assessment of compensatory royalty will be overturned on appeal where the lessee establishes by a preponderance of the evidence that little or no drainage occurred from the lease in question and that at all

OIL AND GAS LEASES--Continued

COMPENSATORY ROYALTY--Continued

relevant times a prudent operator would not have drilled a well to protect the lease in question from drainage.

Cowden Oil & Gas Properties (L. L. Cowden), 126 IBLA 32 (Apr. 14, 1993)

It is the responsibility of all Federal oil and gas lessees to drill and produce all wells necessary to offset or protect the lease lands from drainage, or, to compensate the Federal Government for the loss of royalties through drainage. Royalties lost by a lessee's failure to drill an offset well do not commence on completion of the offending well, but upon the lessee's failure to drill a protective offset well within a reasonable time after notice of drainage. BLM may recover compensatory royalties even if it has not notified a lessee of drainage, where it can establish that the lessee knew or should have known that drainage was occurring.

The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively researched the question of drainage of oil and gas beneath lands covered by a Federal oil and gas lease and has produced a significant body of evidence showing that a well was draining a Federal lease and in what amount, its conclusion that drainage is occurring and its establishment of a drainage factor wil be affirmed, where appellant fails to demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusions.

The duty to drill an offset well to prevent drainage arises when the lessee knew or should have known that drainage was occurring, unless the lessee can show that oil or gas could not be found on the lease at that time under conditions adequate to allow it to be economically developed. The burden of proving that a lessee's predecessor in interest knew or should have known that drainage was occurring rests with BLM. BLM has not met its burden of showing that compensatory royalty was due from 1980, where it did not inform the lessee that there was drainage until 1985, and where it shows on appeal only that lessee's predecessor had

OIL AND GAS LEASES--Continued

COMPENSATORY ROYALTY--Continued

access to certain well data in 1979 from the offending well that could have been reasonably interpreted to show that no drainage was occurring.

BLM's decision requiring payment of compensatory royalty from 1979 is properly reversed where it fails to establish that the lessee knew or should have known that drainage was occurring prior to 1985, and where BLM conceded that a well drilled a reasonable time after receipt of such notice would not be economic.

Amoco Production Co., 129 IBLA 186 (Apr. 28, 1994)
101 I.D. 39

COMPETITIVE LEASES

A company check for oil and gas lease bid deposit is not an acceptable form of remittance under 43 CFR 3120.4-1 (1987), which requires remittances to be submitted in the form specified in the competitive sale notice, where that notice requires bidders to submit a bid deposit "by guaranteed remittance, i.e., cash, cashier's check, or money order."

Gulf States Petroleum, Inc., 113 IBLA 55 (Jan. 31, 1990)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale if the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

When the Government rejects a competitive oil and gas lease high bid because the bid was less than its fair market valuation, the bidder must not only show the lack of a rational basis for the decision, or that BLM erred when formulating its fair market valuation, but must also establish that its bid represents fair market value in order to be awarded the lease.

Hanna Oil & Gas Co., 113 IBLA 76 (Feb. 9, 1990)

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

Payment of the balance of the bonus bid at a competitive lease sale is properly construed as timely where payment is received by BLM on the seventh working day after the lease sale within the time allowed by both the regulations in effect at the time of the sale and the proposed regulations promulgated prior to the sale.

Earl M. Cranston, 115 IBLA 230 (July 12, 1990)

Pursuant to the provisions of 43 CFR Part 3120, a personal check is an acceptable method of payment for a bid submitted at a competitive lease sale. However, a personal check that is not honored by the bank does not constitute payment, absent an acknowledgment of error by the bank. A letter from the bank to BLM stating that a check was not honored because it was an "outdated" check does not constitute an acknowledgment of bank error.

Twin Arrow, Inc., 118 IBLA 55 (Feb. 21, 1991)

The regulations governing competitive lease sales provide that the winning bidder must submit the minimum bonus bid, the first year's rental, and the administrative fee on the date of the sale. 43 CFR 3120.5-2(b). The balance of the bonus bid must be submitted within 10 working days after the competitive lease sale date (43 CFR 3120.5-2(c)), and failure to submit the balance within the prescribed period will result in bid rejection and forfeiture of monies previously tendered. 43 CFR 3120.5-3(a).

A party claiming reliance upon a misrepresentation by a Department employee must be ignorant of the true facts. When a party successfully bidding at an oil and gas lease sale receives a Receipt and Accounting Advice Statement indicating less than full payment of the monies owing, the bidder cannot claim ignorance of the fact that additional monies are due. BLM properly rejected the lease offer upon the bidder's failure to pay the balance of the bonus bid within 10 working days after the sale.

Partnership One, Inc., 119 IBLA 7 (Mar. 15, 1991)

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

Departmental regulation 43 CFR 3120.1-3 provides that no action taken pursuant to regulations governing competitive oil and gas leasing in Subpart 3120 shall be suspended under 43 CFR 4.21(a), which would otherwise suspend the effect of decisions after appeal or while an appeal could be filed. Although BLM's authorized officer may suspend offering a particular lease parcel while a protest or appeal is considered, BLM properly refused to suspend sale of 37 lease parcels where objection was made on the day of sale but no reason was stated for the protest.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 17 (Jan. 2, 1992)

A purported assignee of a competitive oil and gas lease lacks standing to appeal from a BLM decision amending the lease to correct an erroneous acreage figure and requiring the lessee to pay additional first year's rental and minimum bonus bid depending on the revised figure, when the purported assignee has failed to sign the assignment document.

Stanley Energy, Inc., 122 IBLA 118 (Jan. 16, 1992)

Filing a noncompetitive oil and gas lease offer when the lands are available for leasing does not establish a legal or equitable right to a lease if the land subsequently become unavailable for leasing by operation of law. Congress mandated that lands within the Ouachita National Forest be offered for competitive leasing even though valid noncompetitive lease offers may be outstanding. If lands were offered at a competitive sale and a bid in excess of the national minimum acceptable bid was received from a responsible qualified bidder then the pending noncompetitive offer to lease that tract was properly rejected.

William E. Dent, Jr., 122 IBLA 152 (Feb. 4, 1992)

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

Departmental regulations governing competitive lease sales provide that the balance of a bonus bid must be submitted within 10 working days after a competitive lease sale date and that failure to timely submit the required payment will result in bid rejection. 43 CFR 3120.5-2(c), 3120.5-3(a).

Eastern American Energy Corp., 123 IBLA 300 (June 25, 1992)

Under 43 CFR 3120.5-3(a), failure by a successful bidder at a competitive lease sale to pay BLM the balance of the bonus bid due within 10 working days of the sale pursuant to provision of 43 CFR 3120.5-2(c) properly resulted in bid rejection and forfeiture of monies previously tendered. An assertion that payment was timely mailed in order to comply with the regulatory deadline was not sufficient to establish that payment was timely received by BLM.

Morgan Richardson Operating Co., 126 IBLA 332 (June 16, 1993)

CONSENT OF AGENCY

Under the provisions of 43 CFR 3101.7-3. a third-party objecting to issuance of an oil and gas lease on land within the National Forest System, pursuant to the consent of the FS, has standing to appeal to the Interior Board of Land Appeals. However, to the extent that the third-party raises objections to the conformity of actions undertaken by the FS with respect to its own internal operating procedures or with laws solely applicable to the FS, the Board will not review such contentions where the FS has provided its own appeal system for the resolution of such issues.

Where the record establishes that oil and gas leasing recommendations contained in an applicable land and RMP adopted by the FS were subject to revision upon site-specific examination and the FS, pursuant to such an examination, consents to leasing lands formerly designated as unavailable or as available for leasing with NSO restrictions, objections to a decision by BLM to issue leases in reliance on the FS recommendations will be rejected where the party objecting fails to show

OIL AND GAS LEASES--Continued

CONSENT OF AGENCY--Continued

that the FS site-specific analysis was, in any way, flawed.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

Under sec. 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1988), the Secretary of the Interior lacks authority to issue an oil and gas lease over the objection of the agency having jurisdiction of the acquired land.

Blue Ridge Oil & Gas Exploration, Inc., 127 IBLA 279 (Oct. 5, 1993)

DESCRIPTION OF LAND

Rejection by BLM of an acquired lands oil and gas lease offer, which described the surveyed lands sought, in accordance with 43 CFR 3111.2-2(a) (1987), by legal subdivision, section, township, range, and meridian, because the offeror failed to file three copies of a map required by 43 CFR 3111.2-2(d) (1987), is improper. The map requirement is limited to acquired lands oil and gas lease offers for lands which cannot be conformed to the rectangular system of public land surveys.

Thomas Connell, 116 IBLA 113 (Sept. 20, 1990)

In accordance with 43 CFR 311.2-2(b) and (c) (1983), a noncompetitive future interest oil and gas lease offer may properly describe requested lands by the tract acquisition number assigned by the acquiring agency where the lands have not been surveyed under the rectangular survey system. Because a specific offer form was not required for noncompetitive future interest oil and gas lease offers submitted in 1983, the offer may include several descriptions of requested lands. An offer to lease which describes the lands sought by the tract acquisition number followed by a

DESCRIPTION OF LAND--Continued

description taken from the acquiring deed is sufficient, even though the description contains a typographical error, provided BLM can identify the lands sought within the documents which constitute the offer.

Beard Oil Co., 117 IBLA 54 (Nov. 27, 1990)

A noncompetitive over-the-counter future interest lease application for acquired lands which incorrectly describes the land sought must be rejected since BLM is without jurisdiction to alter, modify, or correct such a description so as to make it acceptable.

A future interest oil and gas application for less than an entire tract of acquired land, not surveyed under the rectangular system of public land surveys, is required to describe the lands sought for leasing by course and distance between the successive angle points of the boundary of the tract. Where the description of the exterior boundary of one such tract includes within it another tract not sought for leasing, the area excluded must likewise be described by course and distance between its angle points.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

DISCOVERY

An exploratory well is drilled in unproven or semiproven territory for the purpose of ascertaining the presence underground of a commercial petroleum deposit. Whether a well is exploratory and, accordingly, whether the Department's categorical exclusion for APD approval of an exploratory well applies, is committed to BLM's informed discretion.

Utah Chapter Sierra Club et al., 120 IBLA 229 (Aug. 8, 1991)

DISCRETION TO LEASE

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale if the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

When the Government rejects a competitive oil and gas lease high bid because the bid was less than its fair market valuation, the bidder must not only show the lack of a rational basis for the decision, or that BLM erred when formulating its fair market valuation, but must also establish that its bid represents fair market value in order to be awarded the lease.

Hanna Oil & Gas Co., 113 IBLA 76 (Feb. 9, 1990)

Filing a noncompetitive oil and gas lease offer when the lands are available for leasing does not establish a legal or equitable right to a lease if the land subsequently become unavailable for leasing by operation of law. Congress mandated that lands within the Ouachita National Forest be offered for competitive leasing even though valid noncompetitive lease offers may be outstanding. If lands were offered at a competitive sale and a bid in excess of the national minimum acceptable bid was received from a responsible qualified bidder then the pending noncompetitive offer to lease that tract was properly rejected.

William E. Dent, Jr., 122 IBLA 152 (Feb. 4, 1992)

The provision in 43 CFR 3110.1(b) that land not sold at a competitive sale will be available for noncompetitive leasing for a 2-year period does not preclude a decision not to issue a lease. The fact that an oil and gas lease offer is pending when lands are made unavailable for leasing, either by exercise of Secretarial discretion or by operation of law, does not invest the offeror with legal or equitable title, claim, interest, or right to receive the lease.

The Secretary of the Interior has the discretion to choose not to lease lands for oil and gas purposes, in favor of considerations such as wildlife, endangered

DISCRETION TO LEASE--Continued

species preservation, recreational use, and aesthetic or scenic values. When the record contains evidence of the dedication of land to a worthy public purpose, supports a finding that oil and gas development would be incompatible with that public purpose, and the public interest clearly favors preserving the status quo, BLM's rejection of the lease offer will be affirmed.

When the record on appeal indicates that certain lands have been generally closed to mineral leasing, subject to BLM reconsideration of the exclusion if it can be shown that leasing would not impact the critical habitat, it is error for BLM to reject an oil and gas lease offer for such lands without first affording the offeror an opportunity to show that leasing subject to a no-surface occupancy stipulation would protect the critical habitat.

George G. Witter, 129 IBLA 359 (June 6, 1994)

DRAINAGE

Decisions requiring payment of compensatory royalty for drainage from Indian oil and gas leases are affirmed on appeal where no error is shown to exist in parameters used to calculate drainage from a well on an adjacent lease.

Decisions requiring an Indian oil and gas lessee to pay compensatory royalty for drainage resulting from an adjacent well on another Federal lease are ordered set aside where royalty was assessed from the effective date of lease issuance rather than from a reasonable time following lease issuance within which a prudent operator would drill a protective well under all relevant circumstances.

A Federal oil and gas lessee alleged to be draining Indian land who subsequently leased that same Indian land had no obligation to drill a protective well prior to issuance of the Indian leases.

Jerome P. McHugh & Assocs., 113 IBLA 341 (Mar. 21, 1990)

DRAINAGE--Continued

Compensatory royalties accrue after the passage of a reasonable time following the date the lessee knew or should have known that drainage was occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case BLM need not assume the initial burden of showing that the lessee knew or that a reasonably prudent operator should have known that drainage was occurring, as the common lessee is presumed to have knowledge of the drainage upon first production from its offending well. This bears the ultimate burden of persuasion as to the date he had notice that drainage was occurring.

Under the usual statement of the standard for prudent operation, the lessee is not obligated to drill an offset well unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling the well. The prudent operator standard applies to situations in which a leased Federal tract is being drained by a well operated by a common lessee. In such cases, BLM has the burden of establishing that the leased Federal tract is being drained by the common lessee's non-Federal well, but need not prove as a part of its cause of action that a protective well would be economic. The burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

No breach of a lessee's duty to prevent drainage will occur if the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas. However, if a lessee can make a reasonable profit by drilling the well, he has a duty to prevent drainage by drilling a well. The prudent operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil and/or gas which would be lost if the well were not drilled.

An oil and gas lessee is generally required to take such actions as would be prudent to protect his lessor from unnecessary losses due to drainage. The scope of this responsibility is not limited to drilling an offset well, but embraces all other actions a prudent operator might consider. Thus, if a prudent operator would unitize, it follows that a failure to do so would

constitute a breach of the duty to protect the lessor from unnecessary loss due to drainage.

The concept of a duty to unitize is thoroughly compatible with the prudent operator standard governing a lessee's conduct and the viability of unitization is a factor to be considered when determining whether a lessee has discharged his duty to protect the leased premises from drainage. However, the lessee may always demonstrate that a prudent operator would not have formed a unit, that the lessee had unsuccessfully attempted to establish a unit, or that the costs of unitization would not leave him a profit.

When an offset well would not now be, and never would have been, profitable there is no legally defensible basis for requiring unitization. To require unitization in such cases ignores economics and simple practicalities. Quite apart from any theoretical difficulties in justifying unitization, the unitization of a producing property with a property that could not profitably be produced is virtually impossible. The operating and nonoperating interest owners of the producing property have no practical or economic reason for consenting to such unitization.

NGC Energy Co., Mono Power Co., 114 IBLA 141 (Apr. 19, 1990) 97 I.D. 159

When the same party is the operator of both the Federal tract being drained and the offspring well, BLM need not prove as a part of its cause of action that a protective well would be economic. In such cases the burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

Compensatory royalties commence upon passage of a reasonable time following the date the lessee knew or should have known that drainage is occurring. The common operator who drills the offending well is in the best position to know that drainage is occurring. In such case, BLM need not assume the initial burden of showing that the common operator knew or that a reasonably prudent operator should have known that drainage was occurring. The common operator is presumed to have knowledge of drainage upon first production from its offending well. This presumption is rebuttable by the

common operator, who bears the ultimate burden of persuasion as to the notice of drainage.

Petroleum, Inc., Pennzoil Co., 115 IBLA 188 (July 3, 1990)

Before the Board of Land Management may assess compensatory royalties against an oil and gas lessee for drainage by an adjacent well, it must demonstrate that the lessee knew, or that a reasonably prudent operator should have known, of the drainage. While a lessee who holds an interest in both the offending well and the drained Federal lease, is considered to have knowledge of drainage from the time he drills the offending well, under other circumstances the Department must show that a lessee knew or that a reasonably prudent operator would have known there was drainage.

Jerome P. McHugh & Associates (On Reconsideration), 117 IBLA 303 (Jan. 17, 1991)

A Federal oil and gas lessee was properly assessed compensatory royalty for failure to drill an offset well within 5 months after collection of data indicating that an economic offsetting well should be drilled to protect the Federal lessor.

If a lessee contends that a prudent operator would not have drilled a protective well in 1982 because it would not have been profitable, to prevail, the lessee must also prove by a preponderance of evidence that a protective well drilled in 1982 would not then have been profitable.

Kerr-McGee Corp., 118 IBLA 119 (Mar. 6, 1991)

A finding that there was drainage from an Indian oil and gas lease is affirmed on appeal where no error is shown to exist in parameters used by BLM to calculate drainage.

An assessment of compensatory royalty effective 6 months after completion of the offending well must be vacated where the record does not establish whether the lessee of the drained oil and gas lease had learned that

OIL AND GAS LEASES--Continued

DRAINAGE--Continued

drainage was occurring before notice of that fact was given by BLM, an event that did not occur until 9 years after the offending well was completed.

Meridian Oil Co., 120 IBLA 359 (Sept. 16, 1991)

An operator who obtains a lease that is being drained by his offending well becomes a common lessee and is presumed to have knowledge of the drainage. This knowledge is presumed from the date that the party becomes the common lessee. Any duty to drill an offset well or pay compensatory royalty would arise a reasonable time thereafter.

Once BLM has established that a tract is being drained by a common lessee, the ultimate burden of proof that a protective well would be uneconomic rests with the common lessee. If the cost of drilling and operating an offset well, based on the conditions at the time this duty is acquired, is greater than the value of the recovered oil and gas, there is no breach of the lessee's duty to prevent drainage.

In order for BLM to assess an operator/lessee compensatory royalty for a period of time when the operator/lessee was a stranger to the lease, BLM must show, for example, that it had provided written notice to the operator/lessee's predecessor in interest and that the operator/lessee could be considered to have taken the leases subject to that notice or that it had been made a condition of Departmental approval of the assignment.

Benson-Montin-Greer Drilling Corp., 123 IBLA 341 (July 15, 1992) 99 I.D. 115

Compensatory royalties accrue upon the passage of a reasonable time following the date the lessee knew or should have known that drainage was occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case BLM need not assume the initial burden of showing that the lessee knew or that a reasonably prudent operator should have known that drainage was occurring, as the common lessee is presumed to have knowledge of the drainage upon first production from its offending well. This presumption is

OIL AND GAS LEASES--Continued

DRAINAGE--Continued

rebuttable by the common lessee, who bears the ultimate burden of persuasion as to the date he had notice that drainage was occurring.

Under the usual statement of the standard for prudent operation, the lessee is not obligated to drill an offset well unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well. The prudent operator standard applies to situations in which a leased Federal (or Indian) tract is being drained by a well operated by a common lessee. In such cases, BLM has the burden of establishing that the leased Federal (or Indian) tract is being drained by the common lessee's non-Federal well, but need not prove as a part of its cause of action that a protective well would be economic. The burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

No breach of a lessee's duty to prevent drainage will occur if the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas. However, if a lessee can make a reasonable profit by drilling the well, he has a duty to protect the lease from drainage. The prudent operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil and/or gas which would be lost if the well were not drilled.

A BLM assessment of compensatory royalty will be overturned on appeal where the lessee establishes by a preponderance of the evidence that little or no drainage occurred from the lease in question and that at all relevant times a prudent operator would not have drilled a well to protect the lease in question from drainage.

Cowden Oil & Gas Properties (L. L. Cowden), 126 IBLA 32 (Apr. 14, 1993)

When reducing spacing requirements for coalbed methane gas wells in a formation on tribal lands within an Indian reservation, BLM could protect offsetting operators from drainage by restricting production to one-half the estimated ultimate recovery of gas from

OIL AND GAS LEASES--Continued

DRAINAGE--Continued

each well when there was no evidence such action would not be adequate to protect offsetting wells.

San Juan Citizens Alliance et al., 129 IBLA 1 (Mar. 14, 1994)

It is the responsibility of all Federal oil and gas lessees to drill and produce all wells necessary to offset or protect the lease lands from drainage, or, to compensate the Federal Government for the loss of royalties through drainage. Royalties lost by a lessee's failure to drill an offset well do not commence on completion of the offending well, but upon the lessee's failure to drill a protective offset well within a reasonable time after notice of drainage. BLM may recover compensatory royalties even if it has not notified a lessee of drainage, where it can establish that the lessee knew or should have known that drainage was occurring.

The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively researched the question of drainage of oil and gas beneath lands covered by a Federal oil and gas lease and has produced a significant body of evidence showing that a well was draining a Federal lease and in what amount, its conclusion that drainage is occurring and its establishment of a drainage factor wil be affirmed, where appellant fails to demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusions.

The duty to drill an offset well to prevent drainage arises when the lessee knew or should have known that drainage was occurring, unless the lessee can show that oil or gas could not be found on the lease at that time under conditions adequate to allow it to be economically developed. The burden of proving that a lessee's predecessor in interest knew or should have known that drainage was occurring rests with BLM. BLM has not met its burden of showing that compensatory royalty was due from 1980, where it did not inform the lessee that there was drainage until 1985, and where it shows on appeal only that lessee's predecessor had

OIL AND GAS LEASES--Continued

DRAINAGE--Continued

access to certain well data in 1979 from the offending well that could have been reasonably interpreted to show that no drainage was occurring.

BLM's decision requiring payment of compensatory royalty from 1979 is properly reversed where it fails to establish that the lessee knew or should have known that drainage was occurring prior to 1985, and where BLM conceded that a well drilled a reasonable time after receipt of such notice would not be economic.

Amoco Production Co., 129 IBLA 186 (Apr. 28, 1994)
101 I.D. 39

DRILLING

A Record of Decision and Finding of No Significant Impact based on an environmental record of review or an environmental assessment prepared in response to the filing of an application for a permit to drill under 43 CFR 3162.3-1 is first subject to administrative review by a State Director of BLM in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director may appeal that decision to the Interior Board of Land Appeals.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

Where, on appeal, the principal objection to issuance of an application for permit to drill a coal-bed methane well is the failure to consider the cumulative impacts of drilling the well in question in conjunction with other proposed coal-bed methane drilling in the same area, the appeal may be dismissed as moot, where the record shows that the well has been drilled and the surface managing agency and BLM have undertaken an environmental analysis designed to assess the cumulative impacts of such proposed drilling.

San Juan Citizens Alliance, Western Colorado Congress, 114 IBLA 366 (May 24, 1990)

OIL AND GAS LEASES--Continued

DRILLING--Continued

Under the decision of the Court of Appeals for the Tenth Circuit in Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609 (1987), where an initial exploratory well has been successfully drilled and a lessee files an APD for additional development wells, the filing of the APD normally triggers the requirement for an environmental impact statement, unless an environmental impact statement has already been prepared which analyzes the impacts that can be expected from full-field development.

Michael Gold (On Reconsideration), 115 IBLA 218 (July 12, 1990)

25 CFR 226.33 prohibits drilling within 300 feet of the boundary of an Osage oil and gas lease without the written permission of the Osage Agency Superintendent.

Jimmy D. Fox, Sr. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 444 (Sept. 21, 1990)

Issuance of oil and gas leases does not confer such an unfettered right to development of the oil and gas resources as to preclude detailed consideration of a range of alternatives, including the limitation or regulation of the manner and pace of development, when preparing an environmental analysis or EIS regarding development of methane gas from coal deposits underlying a 2,160-square mile area. Approval of applications for permit to drill for exploration and/or development of the gas is subject to regulation to avoid adverse environmental impacts in the interest of conservation of natural resources.

The Board is unable to affirm a finding that no significant impact to the environment will result from a proposal for drilling coalbed methane gas wells in a 2,160-acre study area where the environmental analysis upon which the finding is based fails to give appropriate consideration to obvious alternatives, such as staggering development over time, as required by

OIL AND GAS LEASES--Continued

DRILLING--Continued

42 U.S.C. § 4332(2)(E) (1988), 40 CFR 1508.9(b), and 516 DM 3.4(A).

Powder River Basin Resource Council, Montana Dept. of Health & Environmental Sciences, Montana Dept. of Natural Resources & Conservation, 120 IBLA 47 (July 12, 1991)

The Department of the Interior has determined, as a general matter, that APD approval for exploratory drilling prior to the first confirmation well is an action categorically excluded from the NEPA process. The effect of a categorical exclusion is to eliminate the necessity for preparation of an EA. Individual actions within a categorical exclusion may, however, be excepted under certain circumstances, and require preparation of an environmental document.

An exploratory well is drilled in unproven or semiproven territory for the purpose of ascertaining the presence underground of a commercial petroleum deposit. Whether a well is exploratory and, accordingly, whether the Department's categorical exclusion for APD approval of an exploratory well applies, is committed to BLM's informed discretion.

An EA prepared by BLM to consider the impacts of the grant of an APD for an exploratory well will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Utah Chapter Sierra Club et al., 120 IBLA 229 (Aug. 8, 1991)

OIL AND GAS LEASES--Continued

DRILLING--Continued

43 CFR 3165.4(c) prevents the suspension on appeal of a notice of violation or assessment or an instruction, order, or decision or a notice of proposed penalty. In accordance with 43 CFR 4.21(a), a timely appeal to the Interior Board of Land Appeals suspends the effect of a decision approving an Application for Permit to Drill pending the decision on appeal.

Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, 121 IBLA 1 (Oct. 4, 1991) 98 I.D. 267

A determination that approval of an APD to drill exploratory wells will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

BLM is not required to provide for public review of an environmental assessment of APDs to drill exploratory wells before making a FONSI and deciding to approve the applications when the proposed action is not closely similar to one which normally requires the preparation of an EIS.

BLM does not violate sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), by approving APDs before receiving a belated response from the U.S. Fish and Wildlife Service to a request for consultation when it plans to require the lessee to take an action that obviates the need for formal consultation.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991)

OIL AND GAS LEASES--Continued

DRILLING--Continued

A ROD and FONSI issued by a BLM Area Manager, which is based on an environmental record of review or an EA prepared in response to the filing of an APD an oil and gas well under 43 CFR 3162.3-1, is first subject to administrative review by a BLM State Director in accordance with 43 CFR 3165.3(b). An appeal to this Board of such a decision that has not been the subject of State Director review will be dismissed and the case remanded for referral to the appropriate State Director.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 283 (Mar. 5, 1992)

A decision approving an application for permit to drill an oil and gas well under 43 CFR 3162.3-1 is first subject to administrative review by the appropriate BLM State Director in accordance with 43 CFR 3165.3(b). Where an appeal to this Board from such a decision has not been the subject of State Director review, it will be dismissed.

Wyoming Wildlife Federation, 123 IBLA 392 (Aug. 7, 1992)

When, on appeal from a decision on State Director review affirming a Decision Record and FONSI approving an APD to drill a natural gas well, the appellant seeks to raise additional issues which it did not present for State Director review and which were not addressed in the decision, the Board need not adjudicate such issues, but may confine its review to matters addressed in that decision.

Although an appellant bears the burden of demonstrating error where BLM has determined that a proposed action is not likely to affect a threatened or endangered species, the record on appeal must support BLM's action, and where BLM concludes that the drilling of a natural gas well will not affect the bald eagle because no active eyries or nests were located during the survey of the area, but the record fails to show that searches for bald eagles were conducted in the winter and early spring when bald eagles are known to inhabit the area, BLM's determination will be set aside and the case remanded.

Where, in response to a challenge to approval of an APD to drill a natural gas well, BLM states that no

OIL AND GAS LEASES--Continued

DRILLING--Continued

special status plant species, including threatened and endangered plants, were found during a survey of the proposed project area, such a determination must be supported by the record. When the record on appeal contains no evidence of who conducted the survey, any field report, or any description of the methodology employed in making the determination, that determination will be set aside and the case remanded.

A determination by BLM that approval of an APD to drill a natural gas well will not eliminate a river from eligibility for potential inclusion within the National Wild and Scenic River System, pursuant to sec. 5(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1276(d) (1988), is supported by the record where there is no evidence in the record that drilling the well in question would adversely affect all the river's outstandingly remarkable values so as to render it ineligible for consideration.

A determination that approval of an APD to drill a natural gas well will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

A decision assessing an operator $2,500 for failure to file an APD with BLM shall be vacated where the well at issue is a development well directionally drilled from unitized fee lands and completed in unitized Federal lands, and the operator has received an approved APD from the appropriate state body.

Chevron U.S.A. Inc., 128 IBLA 146 (Jan. 13, 1994)

OIL AND GAS LEASES--Continued

DRILLING--Continued

BLM properly overruled an order of the Colorado Oil and Gas Commission refusing to reduce spacing requirements for coalbed methane gas wells in a formation on tribal-owned lands within an Indian reservation where such action was shown to be reasonable and was supported by the record.

When reducing spacing requirements for coalbed methane gas wells in a formation on tribal lands within an Indian reservation, BLM could protect offsetting operators from drainage by restricting production to one-half the estimated ultimate recovery of gas from each well when there was no evidence such action would not be adequate to protect offsetting wells.

BLM properly confined review of the environmental consequences of allowing a limited number of coalbed methane gas wells to be drilled on tribal lands within an Indian reservation to the impact of such activity where there was no evidence that approval of the project would necessarily lead to additional drilling throughout a larger oil and gas field.

BLM was not required by sec. 102(2)(C) of NEPA, as amended, 42 U.S.C. § 4332(2)(C) (1988), to prepare an EIS assessing the impact of drilling coalbed methane gas wells and related activity on tribal lands within an Indian reservation when it had taken a hard look at the environmental consequences of such activity, taking into account all relevant matters of environmental concern, and made a convincing case either that no significant impact would result or that any potentially significant impact would be reduced to insignificance by mitigating measures.

San Juan Citizens Alliance et al., 129 IBLA 1 (Mar. 14, 1994)

A BLM ROD adopting a drilling alternative set out in a FEIS and approving permits to drill coalbed methane wells will not be disturbed by an appeal alleging failure to present an adequate number of alternatives and failure to properly evaluate the impacts on aquifers and groundwater in an EIS when the FEIS addresses a sufficient range of alternatives, adequately discusses the viability of those alternatives, and the anticipated impacts on groundwater and aquifers have been thoroughly

OIL AND GAS LEASES--Continued

DRILLING--Continued

evaluated and found to be either inconclusive or rendered acceptable by imposition of mitigating measures.

Western Colorado Congress, San Juan Citizens Alliance, 130 IBLA 244 (Aug. 5, 1994)

EXPIRATION

A decision holding an oil and gas lease to have expired at the end of its extended term will be affirmed in the absence of a well capable of producing oil or gas in paying quantities. Where a well on the leasehold has been found not capable of production in paying quantities as of the end of the primary term of the lease in a prior decision affirmed by the Board on appeal, a subsequent decision on remand finding the lease to have expired at the end of its extended term will be affirmed in the absence of evidence of further development of the well during the extended term of the lease.

Jim's Water Service, Inc., 114 IBLA 1 (Mar. 29, 1990)

An oil and gas lease issued under the IMLA of 1938, 25 U.S.C. §§ 396a-396f (1988), for a primary term and "as long thereafter as oil and/or gas is produced in paying quantities" expires by operation of law when, after the primary term, production ceases. The expiration occurs under the terms of the statute, not under any rule or regulation of the Department of the Interior.

Any test for "production in paying quantities" sought to be applied to an oil and gas lease of Indian land must be analyzed in context to ensure that there is no conflict with overriding principles of Federal Indian law.

Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director, Bureau of Indian Affairs, 21 IBIA 88 (Dec. 18, 1991) 98 I.D. 419

OIL AND GAS LEASES--Continued

EXPIRATION--Continued

An operator of an oil and gas lease is responsible for reclamation of land leased for oil and gas purposes, even after expiration of the lease and even where the surface estate is privately owned. Such reclamation includes the restoration of any area within the lease boundaries disturbed by lease operations to the condition in which it was found prior to surface-disturbing activities.

Glen Morgan, 122 IBLA 36 (Jan. 7, 1992)

An oil and gas lease in its extended term by reason of production which embraces a well capable of producing oil or gas in paying quantities expires by operation of law when production ceases and, thereafter, the lessee fails to produce the well upon 60 days' notice to place the well in production. Termination of the lease by operation of law in such circumstances is properly distinguished from cancellation of an oil and gas lease for violation of the lease terms, regulations, or statutes. No judicial action is required to effect termination by operation of law.

An oil and gas lease in its extended term by reason of production which embraces a well capable of producing oil or gas in paying quantities expires by operation of law when production ceases and, thereafter, the lessee fails to produce the well upon 60 days' notice to place the well in production. Termination of the lease in such circumstances occurs by operation of law and does not involve any judicial or administrative proceeding. Accordingly, the termination of the lease does not involve an action or proceeding against the debtor or an act to obtain property of the debtor which would be barred by the automatic stay provided by the Bankruptcy Code, 11 U.S.C. § 362(a) (1988), upon the filing of a petition in bankruptcy.

Confirmation by the bankruptcy court of a plan of reorganization under Chapter 11 of the Bankruptcy Code is binding on both the debtor and the creditors. Although BLM has the authority by regulation to increase the amount of bond coverage required of an oil and gas operator, an order of the bankruptcy court confirming the plan of reorganization of a Federal oil and gas lessee which expressly bars an increase in bond coverage as a condition of production is binding on the Department in the absence of modification thereof. A finding that an oil and gas lease in its extended term

OIL AND GAS LEASES--Continued

EXPIRATION--Continued

by reason of production terminated automatically for failure to produce lease wells within 60 days of notice to do so will be remanded where production was conditioned upon increased bond coverage expressly barred by order of the bankruptcy court.

Great Western Petroleum & Refining Co., 124 IBLA 16 (Aug. 19, 1992)

A lease issued under the IMLA, 25 U.S.C. §§ 396a-396f (1988), does not expire because of a temporary shut-in caused by a mechanical breakdown or accident, as long as the shut-in does not continue beyond the time reasonably necessary to make repairs and resume production.

Citation Oilfield Supply & Leasing, Ltd, & Murphy Oil U.S.A., Inc. v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 163 (Jan. 28, 1993)

When an oil and gas development agreement entered into under the Indian Mineral Development Act, 25 U.S.C. §§ 2101-2108 (1988), provides that it remains in effect after its initial term as long as oil and/or gas is produced in paying quantities, it expires by its own terms when production in paying quantities ceases.

Jay Magness v. Albuquerque Area Director, Bureau of Indian Affairs, 25 IBIA 65 (Dec. 6, 1993)

EXTENSIONS

A decision holding an oil and gas lease to have expired at the end of its extended term will be affirmed in the absence of a well capable of producing oil or gas in paying quantities. Where a well on the leasehold has been found not capable of production in paying quantities as of the end of the primary term of the lease in a prior decision affirmed by the Board on appeal, a subsequent decision on remand finding the lease to have expired at the end of its extended term will be affirmed in the absence of evidence of further

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

development of the well during the extended term of the lease.

Jim's Water Service, Inc., 114 IBLA 1 (Mar. 29, 1990)

Where, following receipt of a 60-day notice from BLM that it does not regard an oil and gas lease as containing a well capable of producing hydrocarbons in paying quantities, the operator or lessee of such lease in an extended term by reason of production fails to present any evidence establishing the well's current potential production to produce the lease, the lease is properly declared to have terminated on account of the cessation of production.

Great Plains Petroleum, Inc., 117 IBLA 130 (Dec. 3, 1990)

An oil and gas lease in its extended term by reason of production which embraces a well capable of producing oil or gas in paying quantities expires by operation of law when production ceases and, thereafter, the lessee fails to produce the well upon 60 days' notice to place the well in production. Termination of the lease by operation of law in such circumstances is properly distinguished from cancellation of an oil and gas lease for violation of the lease terms, regulations, or statutes. No judicial action is required to effect termination by operation of law.

Great Western Petroleum & Refining Co., 124 IBLA 16 (Aug. 19, 1992)

FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT OF 1987

The provisions of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 expanding the discretion of the Bureau of Land Management to deny either partial assignments or assignments of less than 640 acres out of onshore oil and gas leases on public lands (other than those in Alaska) without a showing that the assignment will further oil and gas development, do not apply retroactively to deny an assignment to a bona fide purchaser who had acquired an interest in the oil

OIL AND GAS LEASES--Continued

FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT OF 1987--Continued

and gas lease prior to Dec. 22, 1987, the effective date of the statute.

Lillian C. Luke, 116 IBLA 391 (Nov. 13, 1990)

Land included within a WSA are not subject to leasing pursuant to the MLA. An oil and gas lease offer filed for lands which are not subject to leasing by reason of inclusion in a WSA is properly rejected without suspending adjudication of the offer pending the ultimate determination whether the lands will be designated as wilderness.

Richard D. Sawyer, 127 IBLA 392 (Oct. 29, 1993)

FIRST-QUALIFIED APPLICANT

Because of the Department's obligation to lease to the first-qualified applicant, issuance of a lease pursuant to a noncompetitive future interest oil and gas lease offer for acquired lands does not preclude a junior offeror from challenging issuance of the lease on appeal from BLM's rejection of the junior offer for the reasons that the lands requested were leased to a senior offeror. The junior offeror has standing to appeal for, if the lease is cancelled, the junior offer must be processed. The right to challenge issuance of the lease and the Department's authority to cancel an improperly issued lease were not lost through estoppel or laches where the junior offeror was not notified of lease issuance nor allowed to be heard until the decision rejecting its offer.

Beard Oil Co., 117 IBLA 54 (Nov. 27, 1990)

BLM properly rejected a noncompetitive oil and gas lease offer for land that was not available for leasing because it was part of an existing oil and gas lease.

Robert G. Volkmann, 128 IBLA 159 (Jan. 13, 1994)

OIL AND GAS LEASES--Continued

FUTURE AND FRACTIONAL INTEREST LEASES

Where an oil and gas lease has issued for the fractional mineral interest belonging to the United States in a certain tract of land and, subsequently, title to the remaining fractional interest vests in the United States, a decision rejecting a noncompetitive fractional interest lease offer for lands already subject to a Federal oil and gas lease is properly affirmed.

Bernard Silver, 116 IBLA 341 (Oct. 29, 1990)

BLM properly rejects a future interest noncompetitive oil and gas lease offer where the land has been determined to be within the known geologic structure of a producing oil or gas field because there is a reasonable probability that a producing structure continues across that land, and where the offeror has not established the contrary by a preponderance of the evidence.

Enron Oil & Gas Co., 117 IBLA 392 (Feb. 13, 1991)

A noncompetitive over-the-counter future interest lease offer for acquired lands which incorrectly describes the lands sought because the description fails to close is properly subject to rejection. The future interest lease offeror may cure a defective description after the vesting of the mineral estate in the United States, so long as the curative action occurs prior to the filing of a present interest lease offer. Correcting the defective offer thereafter affords no priority in the face of the conflicting present interest lease offer.

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. Because a specific offer form was not required for noncompetitive future interest oil and gas lease offers submitted in 1984, the offer may include several descriptions or means to identify the lands sought. If, after BLM has reviewed all available

documents in the offer, it must still refer to extraneous materials to delimit the extent of the offer, the offer is insufficient and must be rejected.

The Moran Corp., 119 IBLA 178 (May 7, 1991)

A noncompetitive over-the-counter future interest lease application for acquired lands which incorrectly describes the land sought must be rejected since BLM is without jurisdiction to alter, modify, or correct such a description so as to make it acceptable.

A future interest oil and gas application for less than an entire tract of acquired land, not surveyed under the rectangular system of public land surveys, is required to describe the lands sought for leasing by course and distance between the successive angle points of the boundary of the tract. Where the description of the exterior boundary of one such tract includes within it another tract not sought for leasing, the area excluded must likewise be described by course and distance between its angle points.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

INCIDENTS OF NONCOMPLIANCE

To sustain an assessment for failure to file documents required by an order issued by an Area Manager, evidence must appear in the record to support the finding of noncompliance. Where the record is unclear as to what documents were required or whether documents filed were inadequate, the record is insufficient to support assessment of a civil penalty for noncompliance with the order.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

Where an operator initiates drilling operations at 7 a.m. but his application for permit to drill is not approved by BLM until 4:20 p.m. the same day, BLM properly issues a notice of noncompliance for drilling without approval for a portion of 1 day, pursuant to 43 CFR 3163.1.

Verbal permission to drill from a BLM employee prior to approval by BLM of an application for permit to drill, even if established in the record, would not provide a defense to the issuance of an incident of noncompliance for drilling without approval, where such verbal permission is contrary to controlling Departmental regulations, knowledge of which is limited to the operator.

Where a minimum assessment of $500 per day is mandated for drilling without approval under 43 CFR 3163.1(b)(2), BLM is not barred from correcting an incident of noncompliance to make an assessment of $500 for a violation, representing the portion of 1 day that the violation existed.

Jack J. Grynberg dba Grynberg Petroleum Co., 114 IBLA 225 (Apr. 26, 1990)

It is proper for BLM to issue a written order directing clean up of oil-contaminated soil from a well site. It may also assess the operator $250 pursuant to 43 CFR 3163.1(a)(2) for failure to comply with that written order.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

As owner of the land and minerals, the Federal Government has an interest in being paid royalties based on accurate measurements. The regulation at 43 CFR 3162.7-3 contemplates that "the authorized officer" will issue orders and notices setting forth the methods and procedures for measuring gas production. The standards established by the American Gas Ass'n Gas Measurement Committee are well recognized and are a reliable source from which to draw Federal

requirements as to the method for accurately measuring gas for the purpose of Federal royalty payments.

BLM may use the American Gas Ass'n Gas Measurement Committee standards as the source for establishing a requirement as to the proper measurement of production, but a lessee is not in violation of that requirement until BLM has decided to impose it, has notified the lessee, and has given an opportunity to comply.

The regulations at 43 CFR 3162.1(a) and 43 CFR 3161.2 reflect BLM's broad authority to issue orders governing operations at lease sites. Challenges to the scope of BLM's authority and the manner in which it is exercised are properly raised by a party adversely affected by appeal to the Board of Land Appeals, after administrative review by the State Director.

Luff Exploration Co., 115 IBLA 134 (June 28, 1990)

Violation of the regulation requiring posting of signs on a well within a Federal or Indian lease (43 CFR 3162.6(a)) is a minor violation and BLM may properly assess an operator $250 for failure to abate a minor violation within the time allowed. 43 CFR 3163.1(a)(2).

Diversified Operating Corp., 119 IBLA 107 (Apr. 15, 1991)

Under 43 CFR 3163.1(a)(2), BLM may properly assess an oil and gas operator $500 for failure to comply timely with notices of incidents of noncompliance requiring the removal of oil from water disposal pits.

Joseph B. Gould, 120 IBLA 237 (Aug. 9, 1991)

It is proper for BLM to levy an assessment pursuant to 43 CFR 3163.1(b)(1), for an oil and gas lessee's failure to have blowout prevention equipment installed at a well during plugging and abandoning

operations, when the installation of that equipment is required by an approved plan.

Pioneer Oil & Gas, 121 IBLA 253 (Nov. 15, 1991)

An oil and gas operator that challenges a determination that it did not timely abate an incident of noncompliance with applicable regulations, lease terms, or written order bears the burden of establishing by a preponderance of the evidence that the determination was in error.

Fancher Oil Co., 121 IBLA 397 (Dec. 26, 1991)

BLM may properly assess an operator $500 for failure to abate three minor violations within the time prescribed where it fails to demonstrate by a preponderance of the evidence that BLM's determination was in error. Violation of Onshore Oil and Gas Order No. 3, requiring valves on equalizer and drain (or recycle) lines to be effectively sealed in a closed position during the production phase, is a minor violation.

Omimex Petroleum, Inc., 123 IBLA 1 (Apr. 7, 1992)

The Board will not overturn a BLM decision that an assessment for drilling a well without prior approval pursuant to 43 CFR 3163.1(e) (1989), should not be waived or reduced if the operator fails to demonstrate that the decision was arbitrary or that it was not supported by the evidence.

Northland Royalty Operating Co., 123 IBLA 104 (May 14, 1992)

Before an assessment for noncompliance with a permit can be made under provision of 43 CFR 3163.1 (1988), BLM must give the affected oil and gas operator written notice of the violation and provide an opportunity to abate the violation. When, after a blowout was controlled, the operator was not notified that continued flaring of gas would not be allowed, a subsequent assessment for avoidably lost gas could not

properly be assessed under Departmental regulation 43 CFR 3163.1 (1988).

Chuska Energy Co., 123 IBLA 321 (July 9, 1992)

Under 43 CFR 3163.1(a)(2) BLM may properly assess an oil and gas operator $250 for failure to comply timely with a notice of INC directing the operator to paint production equipment and facilities, as previously required as a condition of approval of a sundry notice.

Jack J. Grynberg, 125 IBLA 259 (Feb. 16, 1993)

Where an oil and gas operator is cited by BLM with violations of the oil and gas operations regulations and Onshore Oil and Gas Orders, the operator may not escape liability for those infractions by asserting that BLM has failed to cite other operators with allegedly more serious violations.

When an oil and gas lease operator challenges incidents of noncompliance that have been removed from the record by the decision under appeal and the operator does not contest the fact of violation, the appeal will be dismissed because there is no effective relief that can be afforded to the operator by the Board.

An incident of noncompliance is properly issued where the site facility diagram does not include all the information required by 43 CFR 3162.7-5(d)(3), including the current seal placements, valve positions, and the prevailing security plan and its location.

Failure to seal a sales valve during the production phase is a major violation. The production phase is defined in 43 CFR 3162.7-5(a) as that period of time or mode of operation during which crude oil is delivered directly to or through production vessels to the storage facilities and includes all operations at the facility other than those defined by the sales phase. Where production from an oil well on a Federal lease is present in a storage tank on the lease and it is not being removed from the tank for sales, transportation,

or other purposes, the operation must be construed to be in the production phase.

An assessment may be levied pursuant to 43 CFR 3163.1(a) for failure to comply with a written order or instruction of the authorized officer within the time stated for abatement or compliance. Such an assessment is not a penalty or fine, but is in the nature of liquidated damages to cover loss or damage incurred by the lessor as a result of the specified incident of noncompliance. For a major violation, $500 per day for each day nonabatement continues may be assessed.

A decision to assess $500 for a major violation is a judgmental decision by agency personnel who have special authority to make such decisions. The Board normally accords deference to such BLM decisions when supported by substantial evidence. However, an appellant may overcome such a decision by a preponderance of the evidence.

Petro-X Corp., 127 IBLA 111 (Aug. 12, 1993)

Failure of the operator to appeal assessment decisions for incidents of noncompliance issued for violations of the oil and gas operations regulations renders those decisions and the findings contained therein final for the Department and precludes the operator from challenging the merits of the violations or the amounts assessed in a subsequent appeal of a decision demanding payment.

CCCo., 127 IBLA 291 (Oct. 7, 1993)

A decision assessing an operator $2,500 for failure to file an APD with BLM shall be vacated where the well at issue is a development well directionally drilled from unitized fee lands and completed in unitized Federal lands, and the operator has received an approved APD from the appropriate state body.

Chevron U.S.A. Inc., 128 IBLA 146 (Jan. 13, 1994)

OIL AND GAS LEASES--Continued

INCIDENTS OF NONCOMPLIANCE--Continued

Drilling an oil and gas well on a Federal or Indian lease without prior submission and approval of an APD is a violation of the operating regulations at 43 CFR 3162.3-1(c) and, under the regulations governing INCs, an assessment of $500 per day such violation exists (not to exceed $5,000) is mandated. 43 CFR 3163.1(b)(2). Prior notice and opportunity to abate such a violation is not a prerequisite to an assessment.

Northland Royalty Operating Co., 129 IBLA 164 (Apr. 21, 1994)

Under 43 CFR 3163.1(b)(2), BLM is to impose an immediate assessment of $500 per day, not to exceed $5,000, for drilling an oil or gas well on a Federal oil and gas lease without approval or for causing surface disturbance on Federal or Indian surface preliminary to drilling without approval. An assessment under 43 CFR 3163.1(b)(2) of $3,000 for 4 days of surface disturbance and 2 days for drilling will be reduced to $1,000, where the surface disturbance did not take place on Federal or Indian surface.

Oil, Gas & Other Minerals, Inc., 131 IBLA 279 (Nov. 30, 1994)

Under the provisions of 43 CFR 3163.1(b)(1), where a notice of an incident of noncompliance has issued for a failure to install well control equipment in accordance with an approved APD, BLM must issue an immediate assessment in the amount of $500 per day for each day the violation existed, including days the violation existed prior to discovery, up to a limit of $5,000.

Absent the existence of unusual circumstances which might be revealed on a case-by-case analysis, the exercise of a State Director's discretion under 43 CFR 3163.1(e) in the context of reviewing an assessment for a violation of 43 CFR 3163.1(b)(1), which violation was properly classified as "minor," should result in a reduction of the assessment so that the assessment does not exceed a $250 daily rate.

Conley P. Smith Oil Producers, 131 IBLA 313 (Dec. 13, 1994)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE

When the Bureau of Land Management has determined that any part of the lands described in a noncompetitive oil and gas lease is within a known geologic structure, the lessee is required to pay increased rental of $2 per acre for the entire lease.

One challenging a Bureau of Land Management determination that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Western American Exploration Co., 112 IBLA 317 (Jan. 10, 1990)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). When BLM determines lands lie within such a structure before issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Excelsior Exploration Corp., 113 IBLA 177 (Feb. 14, 1990)

An appellant who challenges a determination by BLM that land is within the KGS of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error. An appellant must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. Absent such a showing, the determination will not be disturbed on appeal.

Paul T. Walton, 114 IBLA 194 (Apr. 24, 1990)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

A party challenging a KGS determination by BLM has the burden of showing by a preponderance of the evidence that BLM's determination is wrong. No error is established by the fact that KGS limits conform to the boundaries of the smallest legal subdivision, surveyed tract, or lot. Lands designated within a KGS may only be leased competitively. The fact that lease proceeds serve to retire a State debt obligation for a reclamation project on the leased lands is not determinative of competitive leasing of the project lands in 1983, and is not a criterion for consideration by BLM in determining the boundaries of a KGS.

Lavaca-Navidad River Authority, State of Texas, Water Development Board, 115 IBLA 373 (Aug. 16, 1990)

BLM properly rejects a future interest noncompetitive oil and gas lease offer where the land has been determined to be within the known geologic structure of a producing oil or gas field because there is a reasonable probability that a producing structure continues across that land, and where the offeror has not established the contrary by a preponderance of the evidence.

Enron Oil & Gas Co., 117 IBLA 392 (Feb. 13, 1991)

BLM properly rejected a noncompetitive future interest oil and gas lease application for land determined to be within the KGS of a producing oil or gas field.

BLM improperly included all of a State survey of a tract of acquired lands in Texas within the KGS of a producing oil or gas field where the survey was crossed by the presumptively productive limits of that structure.

BLM designation of a KGS structure of a producing oil or gas field will be upheld where BLM has established a reasonable probability that the area included in that structure is underlain by a series of related stratigraphic traps in formations that have elsewhere been shown to be productive of oil or gas, and a

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

challenge to the KGS designation that fails to demonstrate otherwise by a preponderance of the evidence must be rejected.

Foster Minerals, Ltd., Beard Oil Co., 128 IBLA 192 (Feb. 10, 1994)

LANDS SUBJECT TO

An over-the-counter noncompetitive oil and gas lease offer for acquired military lands filed prior to the passage of legislation making such lands available for leasing must be rejected. However, where the lease applicant completes a new lease form, and submits it at a time when the lands are subject to leasing, BLM should treat the application as a new offer to lease, and assign the offer priority as of that date.

Caldwell Oil & Gas Co., 113 IBLA 271 (Mar. 9, 1990)

Noncompetitive oil and gas lease offers filed prior to Nov. 14, 1983, for any lands which are part of a unit of the National Wildlife Refuge System outside of Alaska may not be adjudicated pending promulgation of regulations explicitly authorizing the leasing of such lands, a hearing on such regulatory revisions, and preparation of an environmental impact statement as required by the terms of P.L. 98-151, § 137, 97 Stat. 964, 981 (1983). Such offers are properly suspended pending compliance with the statutory requirements.

Lowell J. Simons, 114 IBLA 284 (May 9, 1990)

Oil and gas lease offers filed for land embraced in an Alaska State selection pursuant to sec. 6(b) of the Alaska Statehood Act of 1958 will be rejected when and if the selection is tentatively approved. Where an oil and gas lease has inadvertently been issued for land embraced in an outstanding selection, a decision cancelling the lease after a determination has been made to approve the selection will be affirmed on appeal.

Weston B. Andrews, 116 IBLA 41 (Aug. 28, 1990)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

Lands situated within the boundaries of incorporated cities and towns are expressly excluded from leasing by sec. 1 of the Mineral Leasing Act of 1920 and a decision rejecting an offer for such lands is properly affirmed.

Estate of D. A. Moore, 120 IBLA 271 (Aug. 22, 1991)

A protest against sale of oil and gas leases that contends the sale should not proceed because the land to be leased has wilderness characteristics is properly dismissed because the final administrative determination that the land was not wilderness in character was made in 1985 when BLM and the Board decided not to include the land at issue in a WSA.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 17 (Jan. 2, 1992)

Michigan law determined when title to the oil and gas estate passed to the U.S. under a grant retaining mineral title "until May 16, 1985." The conclusion that an oil and gas lease offer for acquired lands was prematurely filed on May 16, 1985, must therefore be reversed where Michigan case law indicates that ambiguity is properly construed against a grantor if it appears as a limitation on the grant.

Wilfred Plomis, 126 IBLA 68 (Apr. 14, 1993)

Land included within a WSA are not subject to leasing pursuant to the MLA. An oil and gas lease offer filed for lands which are not subject to leasing by reason of inclusion in a WSA is properly rejected without suspending adjudication of the offer pending the ultimate determination whether the lands will be designated as wilderness.

Richard D. Sawyer, 127 IBLA 392 (Oct. 29, 1993)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

BLM properly rejected a noncompetitive oil and gas lease offer for land that was not available for leasing because it was part of an existing oil and gas lease.

Robert G. Volkmann, 128 IBLA 159 (Jan. 13, 1994)

BLM properly rejected a noncompetitive future interest oil and gas lease application for land determined to be within the KGS of a producing oil or gas field.

Foster Minerals, Ltd., Beard Oil Co., 128 IBLA 192 (Feb. 10, 1994)

Land subject to an outstanding lease is not available for leasing, and an offer to lease land subject to an outstanding lease is properly rejected.

Newiel, Inc., 130 IBLA 298 (Aug. 30, 1994)

NONCOMPETITIVE LEASES

One challenging a Bureau of Land Management determination that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Western American Exploration Co., 112 IBLA 317 (Jan. 10, 1990)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). When BLM determines lands lie within such a structure before issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Excelsior Exploration Corp., 113 IBLA 177 (Feb. 14, 1990)

An appellant who challenges a determination by BLM that land is within the KGS of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error. An appellant must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. Absent such a showing, the determination will not be disturbed on appeal.

Paul T. Walton, 114 IBLA 194 (Apr. 24, 1990)

The filing of a noncompetitive oil and gas lease offer at a time when the lands are available for leasing does not establish any legal or equitable right to a lease where the land subsequently becomes unavailable for leasing either by reason of the exercise of the Secretary's discretion not to lease a tract of land in the public interest or by operation of law.

Lowell J. Simons, 114 IBLA 284 (May 9, 1990)

Rejection by BLM of an acquired lands oil and gas lease offer, which described the surveyed lands sought, in accordance with 43 CFR 3111.2-2(a) (1987), by legal subdivision, section, township, range, and meridian, because the offeror failed to file three copies of a map required by 43 CFR 3111.2-2(d) (1987), is improper. The map requirement is limited to acquired lands oil and gas lease offers for lands which cannot be conformed to the rectangular system of public land surveys.

Thomas Connell, 116 IBLA 113 (Sept. 20, 1990)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

When no acceptable bids are received at an oral auction of oil and gas leases the first-qualified person making application for the lease within 2 years from the date of the competitive sale is generally entitled to a lease. It is well within the scope of the discretionary authority granted to the Department to hold a drawing to establish the priority of the various applications if the Bureau of Land Management receives more than one application for the same tract on the same day.

Don D. Armentrout, 117 IBLA 1 (Nov. 16, 1990)

BLM may properly reject a noncompetitive oil and gas lease offer for lands which received a minimum bid at a competitive oil and gas lease sale, even though the bidder subsequently withdrew the bid.

Donald J. Eckelberg, 117 IBLA 390 (Feb. 13, 1991)

Michigan law determined when title to the oil and gas estate passed to the U.S. under a grant retaining mineral title "until May 16, 1985." The conclusion that an oil and gas lease offer for acquired lands was prematurely filed on May 16, 1985, must therefore be reversed where Michigan case law indicates that ambiguity is properly construed against a grantor if it appears as a limitation on the grant.

Wilfred Plomis, 126 IBLA 68 (Apr. 14, 1993)

A defect in an noncompetitive oil and gas lease offer may be cured prior to rejection, with priority as of the date of perfection of the offer. However, after BLM has rejected an offer because it violates the 6-mile square rule, no curative submissions will be accepted; a new offer is required to estabish priority.

Lonetree Energy, Inc., 127 IBLA 70 (July 20, 1993)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

The provision in 43 CFR 3110.1(b) that land not sold at a competitive sale will be available for noncompetitive leasing for a 2-year period does not preclude a decision not to issue a lease. The fact that an oil and gas lease offer is pending when lands are made unavailable for leasing, either by exercise of Secretarial discretion or by operation of law, does not invest the offeror with legal or equitable title, claim, interest, or right to receive the lease.

George G. Witter, 129 IBLA 359 (June 6, 1994)

OFFERS TO LEASE

An oil and gas offer signed by someone other than the potential lessee, which does not disclose the relationship between the potential lessee and the signatory, and where the signatory is not authorized as an agent or attorney-in-fact of the potential lessee, is subject to rejection under 43 CFR 3102.4 and 3112.6-1.

Elaine Wolf, 113 IBLA 364 (Mar. 27, 1990)

An appellant who challenges a determination by BLM that land is within the KGS of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error. An appellant must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. Absent such a showing, the determination will not be disturbed on appeal.

Paul T. Walton, 114 IBLA 194 (Apr. 24, 1990)

The filing of a noncompetitive oil and gas lease offer at a time when the lands are available for leasing does not establish any legal or equitable right to a lease where the land subsequently becomes unavailable for leasing either by reason of the exercise of

OIL AND GAS LEASES--Continued

OFFERS TO LEASE--Continued

the Secretary's discretion not to lease a tract of land in the public interest or by operation of law.

Lowell J. Simons, 114 IBLA 284 (May 9, 1990)

Rejection by BLM of an acquired lands oil and gas lease offer, which described the surveyed lands sought, in accordance with 43 CFR 3111.2-2(a) (1987), by legal subdivision, section, township, range, and meridian, because the offeror failed to file three copies of a map required by 43 CFR 3111.2-2(d) (1987), is improper. The map requirement is limited to acquired lands oil and gas lease offers for lands which cannot be conformed to the rectangular system of public land surveys.

Thomas Connell, 116 IBLA 113 (Sept. 20, 1990)

When no acceptable bids are received at an oral auction of oil and gas leases the first-qualified person making application for the lease within 2 years from the date of the competitive sale is generally entitled to a lease. It is well within the scope of the discretionary authority granted to the Department to hold a drawing to establish the priority of the various applications if the Bureau of Land Management receives more than one application for the same tract on the same day.

Don D. Armentrout, 117 IBLA 1 (Nov. 16, 1990)

Pursuant to the lease terms and the applicable regulation, 30 CFR 218.50, royalty payments are required to be made by the last day of the month following production. Late payment charges will be assessed where payments are made after the due date. However, the regulations found at 43 CFR 218.102(a) and 218.150(b) establish exceptions to late payment charges for royalty payments made after the end of the month following the month in which the oil and gas is produced and sold where the payor has filed estimated payments in accordance with the instructions in the MMS Oil & Gas Payor Handbook. Where a payor fails to provide estimated payments at the lease level, and fails to identify estimated payments by specific product codes on the MMS-2014 form, MMS properly assesses late

OIL AND GAS LEASES--Continued

OFFERS TO LEASE--Continued

payment charges. This charge is appropriate even though the total amount of all the estimated payments made by the payor for its leases exceeds the total amount of royalties due for all of the payor's leases, including those for which no estimated payment has been established.

Exxon Co., U.S.A., 117 IBLA 199 (Dec. 21, 1990)

BLM properly rejects a future interest noncompetitive oil and gas lease offer where the land has been determined to be within the known geologic structure of a producing oil or gas field because there is a reasonable probability that a producing structure continues across that land, and where the offeror has not established the contrary by a preponderance of the evidence.

Enron Oil & Gas Co., 117 IBLA 392 (Feb. 13, 1991)

Filing a noncompetitive oil and gas lease offer when the lands are available for leasing does not establish a legal or equitable right to a lease if the land subsequently become unavailable for leasing by operation of law. Congress mandated that lands within the Ouachita National Forest be offered for competitive leasing even though valid noncompetitive lease offers may be outstanding. If lands were offered at a competitive sale and a bid in excess of the national minimum acceptable bid was received from a responsible qualified bidder then the pending noncompetitive offer to lease that tract was properly rejected.

William E. Dent, Jr., 122 IBLA 152 (Feb. 4, 1992)

It is proper for BLM to reject a noncompetitive oil and gas lease offer for land included in a competitive oil and gas lease sale held the previous day when a bid had been received at the competitive sale.

William C. Francis, 124 IBLA 119 (Sept. 23, 1992)

OIL AND GAS LEASES--Continued

OFFERS TO LEASE--Continued

An oil and gas lease offer signed by an attorney-in-fact for lease applicants was not subject to rejection for failure to disclose the relationship between them contrary to 43 CFR 3102.4.

William J. Manville, Jr., 124 IBLA 257 (Nov. 3, 1992)

Land included within a WSA are not subject to leasing pursuant to the MLA. An oil and gas lease offer filed for lands which are not subject to leasing by reason of inclusion in a WSA is properly rejected without suspending adjudication of the offer pending the ultimate determination whether the lands will be designated as wilderness.

Richard D. Sawyer, 127 IBLA 392 (Oct. 29, 1993)

BLM properly rejected a noncompetitive oil and gas lease offer for land that was not available for leasing because it was part of an existing oil and gas lease.

Robert G. Volkmann, 128 IBLA 159 (Jan. 13, 1994)

BLM properly rejected a noncompetitive future interest oil and gas lease application for land determined to be within the KGS of a producing oil or gas field.

Foster Minerals, Ltd., Beard Oil Co., 128 IBLA 192 (Feb. 10, 1994)

BLM properly rejected an oil and gas lease application that was not made on a standard form as required by 43 CFR 3101.1-1.

Carlton Oil Corp., 129 IBLA 144 (Apr. 18, 1994)

OIL AND GAS LEASES--Continued

OVERRIDING ROYALTIES

Under 43 CFR 3108.3 (1987), BLM lacks the power to administratively cancel any oil and gas lease or interest therein that is in production.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)
97 I.D. 137

PRODUCTION

Departmental regulations at 43 CFR Part 3160 governing onshore oil and gas operations apply to gas produced from private leases which participate with Federal and/or Indian leases under a unit agreement approved by the Department's authorized officer. Accordingly, a unit operator is required to measure all gas produced and submit monthly production reports for production from such leases under 43 CFR 3162.7-3 and 3162.4-3(d), respectively, to aid BLM in accounting for royalties due for the Federal and/or Indian leases.

Norfolk Energy Inc., 115 IBLA 265 (July 25, 1990)

Pursuant to provision of 43 CFR 3162.3-4, the Department must allow an oil and gas operator a reasonable time to produce or plug and abandon a well in which oil and gas is not encountered in paying quantities. It was not unreasonable to require an operator to plug and abandon a well after the operator was allowed from Aug. 1988 until Feb. 1990 to produce the well.

Viking Exploration, Inc., 119 IBLA 73 (Apr. 5, 1991)

Pursuant to 43 CFR 3162.3-4(a), an operator shall promptly plug and abandon, in accordance with a plan first approved in writing or prescribed by BLM, each newly completed or recompleted well in which oil or gas is not encountered in paying quantities or which, after being completed as a production well, is demonstrated to the satisfaction of the authorized officer to be no longer capable of producing oil or gas in paying quantities, unless BLM shall approve the use of the well as a service well for injection to recover additional oil or gas or for subsurface disposal of produced water. An order to plug and abandon a well will be affirmed where the record shows that the well has not produced for more

OIL AND GAS LEASES--Continued

PRODUCTION--Continued

than a decade and the operator's plans for a waterflood program have not been implemented despite over 18 months of delay awaiting favorable economic conditions.

ERC Industries, 124 IBLA 331 (Nov. 17, 1992)

Where applicable statutes and regulations require that the MMS value wet gas production from a Federal lease on the greater of the gross proceeds accruing to the lessee from the sale thereof or the aggregate value determined by the Secretary of all the commodities, including residue gas, a valuation determination that royalty shall be paid on the value of one-third of all liquids extracted from the gas and 100 percent of the residue gas is properly upheld by the Director, MMS.

Kerr-McGee Corp., 125 IBLA 279 (Feb. 25, 1993)

REINSTATEMENT

A decision denying a petition for reinstatement of a noncompetitive oil and gas lease filed pursuant to 30 U.S.C. § 188(c) (1982), will be reversed on appeal where appellant has established that she was ill at the time the payment was due, and that such illness was the proximate cause of the late payment.

Sandra Lewis, 113 IBLA 174 (Feb. 14, 1990)

For class II reinstatement, the lessee must tender the back rental and royalty at the increased rates accruing from the date of termination, together with a petition for reinstatement within 60 days from the date of receipt of the Notice of Termination. Submission of back rental that is deficient may only be cured during the 60-day period allowed for filing for reinstatement.

William F. Corkran, 114 IBLA 76 (Apr. 10, 1990)

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of a lease on which there is no well capable of producing oil and gas in paying quantities, the lease automatically terminates by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the lessee can show that the failure to timely pay was either not due to a lack of reasonable diligence or was justifiable.

An unsigned check is not a negotiable instrument pursuant to the Uniform Commerical Code and where such a check is submitted to MMS in payment of the annual rental for an oil and gas lease such submission does not constitute timely payment within the meaning of 30 U.S.C. § 188(b) (1982). MMS has no affirmative obligation to attempt to negotiate an unsigned check since, by definition, such an unsigned check is not a negotiable instrument.

Burton/Hawks, Inc., 115 IBLA 143 (June 28, 1990)

Where the record titleholder of an oil and gas lease fails to request reinstatement within the time allowed, reinstatement is not authorized under governing statutory and regulatory provisions, and the termination of the lease becomes final. BLM must refuse to approve any pending assignments, as there is no lease interest left to be assigned.

Interior Reserves Corp., et al., 116 IBLA 73 (Sept. 5, 1990)

BLM has no authority to grant Class I reinstatement of an oil and gas lease under 30 U.S.C. § 188(c) (1988), if the rentai amount is not submitted within 20 days after the anniversary date.

Cashing a late rental check for an oil and gas lease and depositing the funds in an unearned account does not constitute acceptance of rental payment or reinstate a terminated oil and gas lease.

Class II reinstatement under 30 U.S.C. § 188(d) (1988), is expressly limited to oil and gas leases

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

"issued pursuant to section 226(b) or (c) of this title." There is no authority under sec. 188(d) to reinstate terminated 20-year or renewal leases issued pursuant to 30 U.S.C. § 223 (1988).

Paul D. Lieb, Pardee Petroleum Corp., Ralph W. M. Keating, 116 IBLA 279 (Oct. 22, 1990)

A petitioner for reinstatement of an oil and gas lease under 30 U.S.C. § 188(c) (1988), is required to show that failure to timely pay rental was justifiable or not due to a lack of reasonable diligence. Where petitioners failed to show how a late payment was caused by reasons beyond their control, their petition was properly denied.

Denise M. White, Robert M. White, 120 IBLA 163 (July 18, 1991)

Where a noncompetitive oil and gas lessee fails to pay annual rental on or before the anniversary date of the lease and no oil or gas is being produced on the lease, the lease automatically terminates by operation of law. BLM may reinstate the lease pursuant to 43 CFR 3108.2-2(a) if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Where BLM approves an assignment of record title in an oil and gas lease to a party on May 12, well in advance of the June 1 anniversary date of the lease, lessee's assertion that she was unable to ascertain whether the assignment had been approved and where to mail the rental payment does not establish that the failure to pay rental timely was justified where she admits that she knew of the approval on or prior to the due date for the payment.

A late payment of rental may not be justified on the basis that the lessee did not receive a courtesy notice from MMS.

The provisions of 43 CFR 3108.2-2(a) recognize as reasonable diligence the mailing of rental payment to MMS on or before its due date and direct BLM to consider the postmark date in determining when the payment was mailed. This provision tacitly requires that a rental payment must be timely mailed to MMS in such a

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

manner that it has a reasonable chance of being received there. Where a lessee mails the payment to MMS in an envelope bearing no street address, city, state, or zip code, the payment had no chance of being received by MMS, and the lessee's actions do not constitute reasonable diligence in timely making the rental payment.

Late payment of annual rental may be considered justifiable if the untimeliness was proximately caused by extenuating circumstances outside the lessee's control at or near the anniversary date. In the absence of proof of other extraordinary circumstances causing disruption in a lessee's life, deaths in her family almost 8 months prior to the anniversary date of the lease, and a corresponding increase in the complexity of the lessee's business affairs, do not excuse her late payment.

Sybil W. Taylor, 120 IBLA 193 (July 30, 1991)

Pursuant to 30 U.S.C. § 188(b) (1988), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1988), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment on the lease anniversary date does not constitute reasonable diligence in the absence of a postmark on or before the lease anniversary date (or if the office is closed on the anniversary date, the next day on which the office is open) as required by the regulation at 43 CFR 3108.2-2(a).

Karl Mladinich, Victor Votaw, 120 IBLA 391 (Sept. 30, 1991)

Pursuant to 30 U.S.C. § 188(b) (1988), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1988), if the full rental is paid within 20 days of the lease anniversary date, and the

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

failure to timely pay was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to pay rent timely is neither justifiable nor demonstrative of reasonable diligence. Therefore, a petition for reinstatement under 30 U.S.C. § 188(c) (1988), must be rejected.

Albert F. Porfilio, 123 IBLA 138 (May 22, 1992)

When a competitive oil and gas lease fails to pay annual rental on or before the anniversary date of its lease on which there is no well capable of producing oil or gas in paying quantities, the lease automatically terminates by operation of law. The Department's regulation at 43 CFR 3103.1-2(2) provides that second-year and subsequent rentals are to be paid to MMS at its Royalty Management Program/BRASS in Denver, Colorado. Payment sent to BLM's Wyoming State Office will not constitute a proper tender of rental.

Mailing a rental payment after the lease anniversary date does not constitute reasonable diligence. The explanation for failure to pay on or before the anniversary date was that the payment had initially been mailed to the wrong office by mistake. This does not demonstrate that the failure to submit the payment in a timely manner was not due to a lack of reasonable diligence.

Petro Resources, Inc., 123 IBLA 310 (June 26, 1992)

A petition for class I reinstatement of an oil and gas lease is properly denied where the rental payment was received by BLM after the anniversary date, and the lessee, having paid the rental within 20 days following the lease anniversary date, fails to establish that the failure to pay the rental on the anniversary date was justified or not due to a lack of reasonable diligence.

Petro-Hunt Corp., 124 IBLA 318 (Nov. 4, 1992)

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

BLM properly denies a petition for class I reinstatement of an oil and gas lease which terminated automatically by operation of law for failure to pay the rental on or before the lease anniversary date where the lessee, having paid the full rental within 20 days following the anniversary date, fails to establish that the failure to timely pay the rental was justified or not due to a lack of reasonable diligence.

Gilbert & Bonnie Sockwell, 125 IBLA 150 (Jan. 21, 1993)

Under the provisions of the Act of Nov. 15, 1990, 104 Stat. 2802, an oil and gas lease issued under sec. 14 of the MLA, 30 U.S.C. § 223 (1988), which is automatically terminated for the failure to timely pay the annual rental, may be reinstated under either 30 U.S.C. § 188(c) (1988), or 30 U.S.C. § 188(d) (1988).

Carol B. Rodgers, G. Leslie Buchner, 126 IBLA 117 (Apr. 29, 1993)

A class 1 petition for reinstatement of an oil and gas lease is properly granted where the record on appeal supports the lessee's claim of illness and demonstrates the requisite proximity and causality to justify the late payment of rental.

Marian L. Kleiner, 129 IBLA 216 (Apr. 28, 1994)

A petition for class I reinstatement of an oil and gas lease terminated by failure to timely pay rental was properly denied when the lessee sought to justify late payment by showing inefficient handling of his rental payment by the Postal Service; having chosen the means for delivery of payment, the lessee was required to bear the consequence of delayed delivery and irregular handling of the payment envelope by his chosen messenger.

Bernard S. White, 130 IBLA 324 (Sept. 12, 1994)

OIL AND GAS LEASES--Continued

RENTALS

When the Bureau of Land Management has determined that any part of the lands described in a noncompetitive oil and gas lease is within a known geologic structure, the lessee is required to pay increased rental of $2 per acre for the entire lease.

Western American Exploration Co., 112 IBLA 317 (Jan. 10, 1990)

Where, as a result of a court-ordered preliminary injunction and in accordance with 30 CFR 218.154(a), MMS issues an order suspending operations on an Outer Continental Shelf oil and gas lease and directs that no payment of rental will be required during the period of suspension, and the lease anniversary date falls within the period of such suspension, the subsequent termination of the suspension by MMS triggers the requirement of 30 CFR 218.154(c) that MMS compute the prorated rental due and notify the lessee thereof. In computing that prorated rental, MMS must credit advance rentals paid for the period of time operations were suspended against future rentals.

Union Oil Co. of California, 116 IBLA 67 (Sept. 5, 1990)

A noncompetitive oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law upon failure of a lessee to pay the full amount of the rental due on or before the anniversary date of the lease. However, a partial assignment of record title to acreage in a Federal oil and gas lease, filed by a qualified assignee prior to the lease anniversary date, may be approved where the annual rental for the segregated acreage in the assignment was tendered prior to the anniversary date, even though the base lease terminated for nonpayment of the full lease rental on the anniversary date of the lease.

In the absence of a clear indication that it is intended for the preservation of a specific parcel or parcels, a partial payment of rental should be attributed to the leasehold generally. Such partial payment

by an unapproved assignor may not be used to preserve the interests of parcels held by unapproved assignees in the absence of a clear indication that it was intended to be used to do so.

An unapproved assignor may not rely on BLM's approval of the assignment prior to the anniversary date in determining whether to submit rental for the entire leasehold. That is, where the assignor apparently submits less than full rental in the expectation that BLM would approve a pending assignment prior to the anniversary date (thereby reducing the rental due to be paid) he bears the risk that the assignment will not be approved prior to the anniversary date and that less than the full amount will be timely paid by the assignor and assignees.

Where the assignment of an oil and gas lease is pending before BLM, the assignor remains responsible for the performance of all obligations under the lease until the assignment has been approved, and BLM's failure to approve an assignment by the date the rental is due does not obviate the requirement the rental for the entire leasehold be paid on or before the anniversary date of the lease. The obligation to pay annual rental exists without regard to the fact that assignments of lease interests are pending, even though the assignments may ultimately be made effective retroactively to a date prior to the anniversary date.

Interior Reserves Corp., et al., 116 IBLA 73 (Sept. 5, 1990)

Under 30 U.S.C. § 188(b) (1988), termination of a lease having no well capable of producing oil or gas in paying quantities occurs automatically if the rental is not received on or before the anniversary date of the lease. Termination does not depend on or result from administrative action.

The provisions of 30 U.S.C. § 188(b) (1988), automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease became applicable to 20-year or renewal leases upon the first renewal after July 29, 1954,

either by force of law or by the lessee's execution of a renewal lease containing an automatic termination provision.

Cashing a late rental check for an oil and gas lease and depositing the funds in an unearned account does not constitute acceptance of rental payment or reinstate a terminated oil and gas lease.

Paul D. Lieb, Pardee Petroleum Corp., Ralph W. M. Keating, 116 IBLA 279 (Oct. 22, 1990)

It was error to apply sec. 10(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339(a) (1988), to diminish the amount of rental refund for rentals paid for periods of lease suspension. In accordance with 30 CFR 218.154(c) (1987), MMS must credit advance rentals paid for the period of time operations were suspended against rental accruing after termination of the suspension.

Tenneco Oil Co., 117 IBLA 120 (Dec. 3, 1990)

Shell Offshore, Inc., 117 IBLA 125 (Dec. 3, 1990)

30 U.S.C. § 188(b) (1988), and 43 CFR 3108.2-1(b) require that a notice of deficiency be sent by the Secretary to an oil and gas lessee whose rental payment is paid on or before the anniversary date of the lease but in an amount nominally deficient. Where the regulation requires that this notice be served by certified mail, return receipt requested, it is not unreasonable to look to the party asserting delivery to produce positive proof of such event, e.g., by producing a signed return receipt card.

Petrolex 84-1 Ltd., 118 IBLA 372 (Mar. 14, 1991)

OIL AND GAS LEASES--Continued

RENTALS--Continued

An oil and gas lease offer is properly rejected when the offer is deficient in the first year's rental by more than 10 percent. As the commingling, or transfer, of funds from one account to another without prior written permission is contrary to the orderly administration of the oil and gas leasing program, the offer must be rejected despite the fact that BLM held funds in other accounts to be returned to the offeror.

Stephen S. Lange, 119 IBLA 45 (Mar. 25, 1991)

Under sec. 31(b) of the MLA, as amended, oil and gas leases are subject to automatic termination by operation of law for failure to pay the annual rental in advance by the lease anniversary date. 30 U.S.C. § 188(b) (1988). The automatic termination provision does not apply to rental charges becoming due at a time other than the anniversary date due to the termination of a suspension of the lease.

Andrew Helal, 122 IBLA 325 (Mar. 11, 1992)

BLM properly holds an oil and gas lease issued pursuant to sec. 14 of the MLA, as amended, 30 U.S.C. § 223 (1988), on which there was no well capable of producing oil or gas in paying quantities, to have automatically terminated by operation of law where the annual rent was not paid on or before the lease anniversary date, even if the Department had earlier stated that it would apply the same rental erroneously tendered for another lease account, but had instead refunded the money prior to the anniversary date.

Under the provisions of the Act of Nov. 15, 1990, 104 Stat. 2802, an oil and gas lease issued under sec. 14 of the MLA, 30 U.S.C. § 223 (1988), which is automatically terminated for the failure to timely pay the annual rental, may be reinstated under either 30 U.S.C. § 188(c) (1988), or 30 U.S.C. § 188(d) (1988).

Carol B. Rodgers, G. Leslie Buchner, 126 IBLA 117 (Apr. 29, 1993)

OIL AND GAS LEASES--Continued

ROYALTIES

Generally

It is within the authority of the Department to interpret its own regulations, and its interpretation should be given great deference. Normally an interpretive ruling stating the accounting procedures to be used for royalty calculation may be given retroactive effect. However, when it appears from the record that: (1) for several years the lessee had applied an accounting procedure which conformed with a reasonable interpretation of the applicable regulations when calculating the royalty due for oil produced and removed from the lease; (2) the Department had accepted lessee's royalty accounting procedure for several years before issuing an interpretive ruling that required a different accounting procedure; (3) the new procedure was an abrupt departure from a well-established practice, and not an attempt to fill a void in an unsettled area of the law; and (4) the prejudice to the lessee affected by retroactive application of the new interpretation substantially outweighs the statutory interest and purposes sought to be protected, then the new MMS accounting procedure should be applied prospectively.

Sun Exploration & Production Co., 112 IBLA 373 (Jan. 19, 1990) 97 I.D. 1

MMS unfairly discriminates against a CO2 lessee in denying a deduction for that component of a pipeline tariff relating to Federal and state income taxes solely on the basis that such lessee is an affiliate of the pipeline operator.

Shell Western E & P, Inc., 112 IBLA 394 (Jan. 23, 1990)

A decision issued to the payor after audit regarding valuation of natural gas produced from certain leases asserting gas sold was not priced in accordance with the statutory ceiling price may be set aside and remanded where the record fails to indicate the affected lessees were apprised of the basis of the

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

revised valuation and afforded an opportunity to respond as required by the lease terms.

In the context of an appeal from a decision of MMS after audit assessing additional royalty on production from an oil and gas lease the issue is what, if any, additional royalty is due and owing to the lessor. The Board adheres to its holding in Shell Oil Co., 52 IBLA 74 (1981), and Mobil Oil Corp., 65 IBLA 295 (1982), that where an audit is made of royalty payments for an oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease revealed within the period of the audit.

Forest Oil Corp., 113 IBLA 30 (Jan. 30, 1990)
97 I.D. 11

In calculating the additional royalty owed under sec. 6(a)(9) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1335(a)(9), the Department must use the tax rates in effect in Texas and Louisiana on Aug. 7, 1953.

"Additional Royalty" under Sec. 6(a)(9) of the Outer Continental Shelf Lands Act, M-36968 (Aug. 31, 1989)
97 I.D. 49

When the purchaser of natural gas produced from Federal leases reimburses the lessee for severance taxes and ad valorem taxes pursuant to a contract for purchase and sale of the natural gas, the gross proceeds received from the leases by the lessee should include the tax reimbursements. Accordingly, it is proper for MMS to demand additional royalties when the royalty payments were based on a gross proceeds determination that excluded the severance tax reimbursements.

CIG Exploration, Inc., 113 IBLA 99 (Feb. 14, 1990)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

A regulation should be sufficiently clear that there is no basis for an oil and gas lessee's non-compliance with the regulation before that regulation is interpreted to the detriment of a lessee. If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of its Oil and Gas Payor Handbook, because that Handbook lacks the force and effect of law enjoyed by a statute or regulation.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

The procedural safeguards applicable to civil penalties assessed pursuant to 30 U.S.C. § 1719 (1982), do not apply to late reporting assessments levied pursuant to 30 CFR 218.40.

The party choosing the means of delivery of a document must accept the responsibility for and bear the consequences of that choice, including the possibility of delay or nondelivery.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

A royalty valuation letter issued by Geological Survey specifically addressing royalty computation for gas delivered under a particular contract from a specific Outer Continental Shelf oil and gas lease committed to a unit does not establish the royalty base for gas production for a well subsequently completed on the lease in a non-unitized formation.

Where Geological Survey issues a royalty valuation letter determining the proper method of computing royalties owed to the United States based on the assumption that the natural gas involved is subject to price control, but the gas has in fact been decontrolled, the letter provides no basis for the computation of the amount of royalty due the United States.

Where a company's gas production from a well on an Outer Continental Shelf oil and gas lease has been

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

valued by MMS on the basis of the highest prices paid for like-quality gas produced from other wells on the same lease, an assertion by that company that it has been treated unfairly because its gas production from the well has been valued differently than another company's production from the same well during the same period will be rejected based on MMS' explanation that it had not audited the royalty payments of the second company.

Amoco Production Co., 114 IBLA 42 (Apr. 3, 1990)

A Minerals Management Service decision dismissing an appeal of a royalty payment order as untimely will be reversed where it appears that the order was merely implementing a prior royalty valuation decision issued to the same lessee, covering the same production from the same leases, which was at the time the subject of a timely filed appeal.

Walter Van Norman, Jr., 114 IBLA 56 (Apr. 6, 1990)

Ordinarily royalty is computed on the value of the gas removed or sold from the lease. Where gas must be transported from the field to the point of first sale, the deduction of reasonable transportation costs is allowed. The Secretary of the Interior's authority to determine the value of production upon which royalty payments are made extends to determining the factors used in computing transportation allowances for royalty purposes.

Operating leases are a proper component of a transportation allowance for a CO2 pipeline which is required to transport production to market. A decision limiting operating costs to 10 percent of undepreciated investment when calculating the relevant transportation allowance may be set aside and remanded where the effect is to eliminate a substantial percentage of operating costs and no rational basis for such a limitation is given in the decision or contained in the record.

The allowance of a reasonable rate of return on depreciated assets has been upheld in computing a transportation allowance for production for which there

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

is no market in the field or at the wellhead. Application of a rate of return based on the prime interest rate at the time of the initial period for which the transportation allowance is calculated will be upheld as reasonable.

Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164 (June 28, 1990)

When computing the royalties for offshore oil and gas, the Minerals Management Service allows a transportation alowance for costs reasonably incurred in moving oil and gas from the point of offshore production to the first available market onshore. A transportation allowance may not be taken for the costs of storage, handling, and accounting incurred because it is necessary to accumulate sufficient condensate to meet a minimum volume required for delivery, as those costs are related to marketing the product, i.e., to accumulating a marketable quantity of the product.

TXP Operating Co., 115 IBLA 195 (July 3, 1990)

Farm tap gas, which is gas provided free to a royalty owner for structures on the land covered by such owner's oil and gas lease, is subject to royalty under 30 CFR 202.102 (1987).

Norfolk Energy Inc., 115 IBLA 265 (July 25, 1990)

The regulated ceiling price of gas under the Natural Gas Policy Act (NGPA) is a relevant factor in determining the value of the gas for royalty purposes. Where an assessment of additional royalty after audit is based on a failure of the producer to file a timely application for classification of the gas under sec. 102 of the NGPA (allowing a higher ceiling price), and where the record discloses an issue of material fact concerning whether the producer knew or should have known the gas would qualify for a higher ceiling price

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

at an earlier time, the case is properly referred for an evidentiary hearing.

Mobil Oil Corp., 115 IBLA 304 (Aug. 7, 1990)

Oil and gas lease royalty accounts are settled under rules in effect at the time charges at issue were incurred.

Where a 1987 audit discovered a discrepancy between sales and production volumes from an oil and gas lease had occurred in March 1985, MMS properly required the royalty rate to be calculated on actual production pursuant to the provision of 30 CFR 202.101 (1984).

An obligation to pay oil royalty for March 1985 using actual production to compute a royalty rate pursuant to 30 CFR 202.101 (1984) did not arise until 1987 when MMS ordered such payment to be made following an audit of the 1985 account.

Eighty-Eight Oil Co., 115 IBLA 386 (Aug. 16, 1990)

An MMS decision denying a transportation allowance is properly affirmed to the extent that the allowance deducts line losses attributed to the transportation of royalty natural gas from the wellhead of an Outer Continental Shelf oil and gas lease to an offshore delivery point.

A transportation allowance deducting a percentage for "gas consumed" may be allowable as a deduction for "lease-use" gas. Where the record is insufficient to determine whether circumstances warrant a "lease-use" gas deduction, a decision by MMS summarily denying the allowance will be set aside and the case remanded to MMS for consideration of the extent to which the transportation allowance represents "lease-use" gas.

Arco Oil & Gas Co., 115 IBLA 393 (Aug. 21, 1990)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

A party challenging a determination as to the value of gas or other hydrocarbons produced from a Federal lease must establish that the methodology used is in fact erroneous. An appellant who alleges that because of market forces contract prices lag behind spot market prices has not established the MMS practice of using the higher of the two prices (i.e., the greater of proceeds or the spot market price) is an erroneous methodology where the relevant regulation authorizes the use of posted prices to value production, but requires that the value shall never be less than the gross proceeds.

Normally an interpretive ruling stating the accounting procedures to be used for royalty calculation may be given retroactive effect. However, an exception exists when certain conditions are met. If (1) for several years the lessee had applied an accounting procedure which conformed with a reasonable interpretation of the applicable regulations when calculating the royalty due for products removed from the lease; (2) the Department had accepted the lessee's royalty accounting procedure for several years before issuing an interpretive ruling that required a different accounting procedure; (3) the new procedure was an abrupt departure from a well-established practice, and not an attempt to fill a void in an unsettled area of the law; and (4) the prejudice to the lessee affected by retroactive application of the new interpretation substantially outweighs the statutory interest and purposes sought to be protected, then the new MMS accounting procedure should be applied prospectively only.

Union Oil Co. of California, Union Exploration Partners, Ltd., 116 IBLA 8 (Aug. 24, 1990)

Although royalty underpayments are improper by definition and may, under some circumstances, subject the payor to civil and/or criminal penalties, the issue in the context of a royalty audit is what, if any, additional royalty is due and owing to the lessor. Where an audit is made of royalty payments for an oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease revealed within the period of the audit regardless of

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

the fact that the underpayments were intended to recoup the prior overpayments.

Forest Oil Corp. (On Reconsideration), 116 IBLA 176 (Sept. 26, 1990) 97 I.D. 239

Where natural gas produced from a Federal lease is sold under an arrangement where the buyer pays the maximum lawful price allowed under the Natural Gas Policy Act of 1978 and also reimburses the producer for severance taxes it paid to the State of Montana, both the maximum Natural Gas Policy Act price and the severance tax reimbursement together constitute "gross proceeds" received for the gas from the lease. The Minerals Management Service properly includes such severance tax reimbursements when computing the value of gas for royalty purposes.

Miami Oil Producers, Inc., 116 IBLA 345 (Oct. 30, 1990)

Where BLM issues a decision that gas may have been vented on a Federal oil and gas lease without prior authorization and indicates that royalty may be due for the vented gas, and where BLM issues an instruction memorandum adopting a significant change in the interpretation of BLM policy concerning determinations of whether gas vented from Federal and Indian leases is subject to royalty and directing BLM to review all prior determinations to conform them to the new policy, BLM's decision will be vacated and the case remanded for further review under the terms of the new policy.

C. C. Co., 116 IBLA 384 (Nov. 8, 1990)

MMS is required by law to assess interest charges on late royalty payments for oil and gas leasees which are not received by the due date. Where MMS seeks reconsideration of a Board decision reversing an order assessing late payment charges because of lack of evidence that the payments were untimely, and presents evidence conclusively showing that the lessee's payments were in fact untimely, the Board will vacate its

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

earlier decision and affirm the MMS order assessing late payment charges.

Dugan Production Corp. (On Reconsideration), 117 IBLA 153 (Dec. 13, 1990)

The Outer Continental Shelf Lands Act requires that royalties be paid on the amount or value of the production saved, removed, or sold and requires the Secretary to conduct the leasing program so as to assure receipt of fair market value. The Secretary has authority to determine the value of production upon which royalty payments are made.

When an oil and gas lessee has sold its natural gas and paid royalty thereon based on the price specified by sec. 104 of the Natural Gas Policy Act, 15 U.S.C. § 3314 (1988), and MMS subsequently assesses additional royalty based on the lessee's alleged failure to file a timely application for classification of the gas under sec. 102 of the Natural Gas Policy Act, 15 U.S.C. § 3312 (1988), which would have allowed a higher ceiling price, the issue is whether the lessee breached its duty to market the gas by failing to seek classification of the gas at an earlier time and the Board may refer the case for an evidentiary hearing on that issue.

A Federal oil and gas lease does not require notice and an opportunity to be heard prior to a decision to assess royalties based on a value of production which is higher than the price received by the lessee. The Department is not bound by the price reported by a lessee and has authority to determine for royalty purposes that the value of gas produced was different than the amount received by the lessee. A lessee is entitled to a reasoned and factual explanation supporting a decision setting a different value and an opportunity to challenge it and obtain review.

Phillips Petroleum Co., 117 IBLA 230 (Dec. 21, 1990)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

The discretionary authority conferred by 30 U.S.C. § 209 (1988), enables BLM to exercise prudent business judgment in considering whether to grant or deny an application for royalty reduction. Where BLM grants such a reduction "for the purpose of encouraging the greatest ultimate recovery of * * * oil, * * * and in the interest of conservation of natural resources," and where in its judgment "it is necessary to do so in order to promote development," BLM's determination will not be disturbed on appeal where it is amply supported by the facts of record and appellant has failed to show that the determination was either arbitrary, capricious, or an abuse of discretion.

State of Wyoming, 117 IBLA 316 (Jan. 24, 1991)

The holder of oil and gas leases issued for lands on the Outer Continental Shelf by the State of Louisiana and maintained under sec. 6 of the Outer Continental Shelf Lands Act must pay royalties in accordance with the provisions of the original State leases. Where the leases were issued on the 1942 Louisiana State lease form, which provides that the lessee pay to the lessor "sums equal to the value * * * at the well [of one-eighth of all gas produced and saved or utilized], provided no gathering or other charges are made chargeable to lessor," the lessee is not permitted to deduct transportation allowances from the amount on which royalty is calculated.

Exxon Co., U.S.A., 118 IBLA 30 (Feb. 21, 1991)

In valuing sour gas for royalty purposes, MMS erred in denying a transportation allowance for all reasonable costs incurred by a lessee in dehydrating the gas outside the gas field prior to its transportation to a processing plant where manufacture and further dehydration occur.

When evaluation of production is challenged, appellant must not merely show that the agency's methodology is susceptible to error, but that an error did, in fact, occur. The agency's limitation of a transportation

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

allowance will not be disturbed in the absence of evidence demonstrating error.

Exxon Corp., 118 IBLA 221 (Mar. 8, 1991) 98 I.D. 110

Assessments for the nonreporting and late reporting of royalties pursuant to 30 CFR 218.40 are properly distinguished from civil penalties assessed under sec. 109 of FOGRMA, 30 U.S.C. § 1719 (1988), and are not subject to the procedures required by that section.

ANR Production Co., 118 IBLA 338 (Mar. 12, 1991)

The inclusion in a transportation allowance for royalty oil of a return on capital assets based on the prime rate of interest may be sustained as reasonable, but where the date on which the prime rate is determined is inconsistent with prior applications of the rate upheld as reasonable, the case will be remanded to resolve the inconsistency.

Exxon Co., U.S.A., 119 IBLA 48 (Mar. 28, 1991)

When the purchaser of natural gas produced from Federal leases reimburses the lessee for State taxes pursuant to a contract for purchase and sale of the natural gas, gross proceeds received from the leases include the tax reimbursements. Accordingly, in computing the value of the gas produced from these leases, MMS properly determines that the gross proceeds to which the royalty rate applies include the purchase price plus the tax reimbursements and properly demands additional royalty and late payment charges where royalty payments were made using a value that excluded the tax reimbursements.

Where a lessee enjoys a contractual right to receive reimbursement for "all existing taxes levied on the gas produced and sold" under the contract, and where, for no apparent justifiabile reason, it fails to invoke this right, the lessee is properly held responsible for royalty as though the contractual provision had been invoked. Thus, in the absence of any showing

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

of justification, lessee was responsible for paying royalty on all reimbursements owed under the sales contract, regardless of whether lessee ever enforced its contractual rights by actually collecting the reimbursements.

BWAB, Inc., 121 IBLA 188 (Nov. 7, 1991)

The costs of "treatment" or other costs necessary to place the gas in marketable condition are not deductible or chargeable against the Federal royalty interest. It is irrelevant who performs the treatment or the activities necessary to place the gas in marketable condition, or that title may have passed from the Federal lessee prior to undertaking the activity necessary to place the gas in marketable condition. MMS' decision barring lessees from using an 88-percent price-reduction factor in the computation of royalty on natural gas will be affirmed where costs represented by the factor were incurred in the process of extraction of hydrogen sulfide (sweetening), which was necessary to place the natural gas in marketable condition.

Exxon Co., U.S.A., Chevron U.S.A., Inc., 121 IBLA 234 (Nov. 15, 1991) 98 I.D. 409

An operator and lessee have an affirmative duty to obtain the best possible price for the benefit of the royalty owner, consistent with reasonable business judgment. Therefore, when the contract under which the natural gas is being sold provides for payment at the highest obtainable ceiling price under the NGPA, 15 U.S.C. §§ 3301-3432 (1988), the operator or lessee has an affirmative duty to seek classification under the NGPA section affording the best possible price. If the operator or lessee fails to exercise due diligence in obtaining a classification affording a higher sales price, the royalty may properly be calculated as if the higher sales price had been paid.

MMS properly requires the payment of additional royalties where reimbursements for State production taxes made by the purchaser of natural gas produced from an onshore oil and gas lease were improperly excluded

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

from the value of that gas for royalty computation purposes.

In an audit of royalties on natural gas produced from an onshore oil and gas lease, MMS need not consider offsetting underpayments with overpayments if there is no substantive evidence that overpayments occurred or the extent of the overpayments. MMS may not disallow offset, however, when the basis for disallowing the offset is an unsupported assumption that an overpayment has already been recouped.

FMP Operating Co., 121 IBLA 328 (Dec. 13, 1991)

Where a lessee has a contractual right to receive reimbursement for ad valorem taxes levied by a state on gas produced and sold under the contract, MMS may properly determine that the value of production to which the royalty rate applies includes the purchase price plus the tax reimbursements, and it may collect additional royalty where royalty payments were made using a value that excluded the tax reimbursements.

Trigg Drilling Co., Inc., 122 IBLA 50 (Jan. 7, 1992)

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within DOI.

As a general rule, reasonable value for the purpose of calculating royalties due to the United States will be the highest price paid for the major portion of like quality products produced or sold from the same field or area or the gross proceeds actually received by the lessee, whichever is greater. When the lessee fails to receive the posted upper-tier price for the new oil produced from its leases because that oil was not timely certified as upper-tier oil, royalties based on the posted upper-tier price are due, notwithstanding the lessee's assertions that it did not have sufficient information to know the percentage of new oil subject to the upper-tier price; that it could not control the certification filing procedures that would have enabled it to obtain the upper-tier price; that it relied on the

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

unit operator to fulfill its responsibilities in this regard; and that it diligently pursued litigation against the unit operator to recover the upper-tier price which litigation was ultimately settled for far less than the posted price of the upper-tier oil.

Anadarko Petroleum Corp., 122 IBLA 141 (Feb. 3, 1992)

Proof that a Federal lease was being drained by a private lease and that complications during completion of a well on the lease required more than 30 days in order to complete initial testing justified allowance of flaring of gas from an oil well even though prior application to flare had not been sought.

There was insufficient evidence to establish that a Federal lease was being drained by a well on a private lease where no evidence was submitted to show that the Federal well experienced any decline in reservoir pressure when tested.

The burden to establish that there are engineering, geologic, or economic reasons to justify venting or flaring gas from an oil well rests with the lessee who appeals a decision that there has been avoidable waste as a result of such venting or flaring. Where no proof is offered by the lessee to support allegations that there was a danger of drainage, relief cannot be afforded. Arguments that assessment for avoidably lost gas were barred by laches or limitations of action cannot be considered favorably where the lessee was timely notified of an audit that indicated avoidable loss was occurring, even though subsequent review of the matter was protracted.

Proper application of IM 87-652 required that BLM evaluate whether, if an application to flare gas had been made for oil wells produced by the lessee prior to flaring, the application would have been entitled to approval on the merits.

Maxus Exploration Co., 122 IBLA 190 (Feb. 10, 1992)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

A Federal oil and gas lessee is under an obligation to assume the expenses of placing any gas produced and sold into "marketable condition." No deduction from royalty is allowed for the expenses of gathering and compressing gas required to place it in marketable condition regardless of whether these costs are paid directly by the lessee or by a third party. The price of gas sold at the wellhead which has been reduced from the price of gas in marketable condition by the costs of gathering the gas and compressing it as required for marketing to a pipeline purchaser does not establish the value of the gas in marketable condition.

R. E. Yarbrough & Co., 122 IBLA 217 (Feb. 21, 1992)

"Marketable condition rule." A Federal oil and gas lessee is under an obligation to assume the expenses of placing any gas produced and sold into "marketable condition." No deduction from royalty is allowed for the expenses of compressing gas required to place it in marketable condition regardless of whether these costs are paid directly by the lessee or by a third party. The price of gas sold at the wellhead which has been reduced from the price of gas in marketable condition by the costs of compressing it as required for marketing to a pipeline purchaser does not establish the value of the gas in marketable condition.

Beartooth Oil & Gas Co., 122 IBLA 267 (Mar. 3, 1992)

Assessments for the late reporting of royalties pursuant to 30 CFR 218.40 are properly distinguished from penalties assessed under sec. 109 of FOGRMA, 30 U.S.C. § 1719 (1988), and do not effectively increase the royalty rate designated in an oil and gas lease.

By choosing the method of delivery of its report of sales and royalty remittance (Form MMS-2014), the payor must accept the responsibility for and bear the consequences of that choice, including the possibility of delay in delivery or nondelivery of the report.

Linmar Petroleum Co., 123 IBLA 45 (May 6, 1992)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within the Department of the Interior.

Benson-Montin-Greer Drilling Corp., 123 IBLA 341 (July 15, 1992) 99 I.D. 115

A BLM decision that assumes all gas wells connected to a plant were connected because the production rates and distance to an existing pipeline were economically favorable, and therefore gas vented or flared was avoidably lost, will be set aside and remanded when the record is inadequate to determine whether it was uneconomic to capture the gas.

Western Production Co., 124 IBLA 111 (Sept. 21, 1992)

MMS properly required a Federal and Indian oil and gas lessee to review royalty accounts in order to determine whether royalty underpayment was caused by exclusion of state tax reimbursements from gross proceeds of sales of oil and gas.

The Federal and Indian lessee was properly required to compute and pay additional royalties where there was evidence of systematic exclusion of tax reimbursements in reporting production proceeds for royalty purposes.

BHP Petroleum (Americas) Inc., 124 IBLA 185 (Oct. 14, 1992)

Where applicable statutes and regulations require that the MMS value wet gas production from a Federal lease on the greater of the gross proceeds accruing to the lessee from the sale thereof or the aggregate value determined by the Secretary of all the commodities, including residue gas, a valuation determination that royalty shall be paid on the value of one-third of all

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

liquids extracted from the gas and 100 percent of the residue gas is properly upheld by the Director, MMS.

Kerr-McGee Corp., 125 IBLA 279 (Feb. 25, 1993)

Under 30 CFR 206.105(c), wet gas is properly valued using the aggregate value of all commodities, including residue gas. That is, MMS may properly determine the value to be the aggregate of the value of residue gas, NGLP, and sulfur, all of which were commodities obtained from the gas.

Under 30 CFR 206.106, a manufacturing allowance of up to two-thirds the value of entrained hydrocarbon liquids may be taken as a deduction from the royalty basis of those liquids. Thus, a deduction is allowable for costs of manufacture of such substances extracted from the gas produced from the leasehold, but there is a regulatory limit of two-thirds of the value of those substances.

A Federal oil and gas lessee has the duty to put gas produced from the lease in a marketable condition. That duty includes treating the gas to remove hydrogen sulfide, so that costs of such treatment are not deductible. It is irrelevant who performs the treatment or the activities necessary to place the gas in marketable condition, or that title may have passed from the Federal lessee prior to undertaking the activity necessary to place the gas in marketable condition.

Where wet gas was processed into residue gas and liquid hydrocarbons, but only a portion of residue gas was immediately sold, with the remainder being stored because there was not sufficient market demand, the unsold gas is properly valued as of the time it was removed from the leases, as there was a demand for gas and available supply at that time sufficient to accord the gas a fair market value upon which royalty could be calculated. Where MMS valued all of the residue gas, including the portion not immediately sold, at the price of that sold immediately, its valuation will be affirmed in the absence of a showing that MMS did not value the gas giving "due consideration * * * to the highest price paid for a part or for a majority of production of like quality in the same field, * * * to posted prices,

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

and to other relevant matters," as required by 30 CFR 206.105(c).

Where an audit of a Federal oil and gas lease extends through Sept. 1988, a decision by MMS calculating royalty based on regulations that were effective only through Mar. 1, 1988, is properly set aside and the matter remanded for consideration of whether the audit pertaining to this lease should have been terminated on Mar. 1, 1988, or whether amended regulations should have been applied to the balance of the period through Sept. 1988.

Where a lessee strongly suggests that the high percentage of hydrogen sulfide made transportation of the gas unduly expensive, MMS should allow the lessee the opportunity to justify a request that costs of removal of hydrogen sulfide may be deductible as a transportation allowance.

Apache Corp., 127 IBLA 125 (Aug. 24, 1993)

Where the purchaser of residue gas under a contract for the sale of all the residue gas in field reduces its purchases of that gas but still buys more than 50 percent of the residue gas in the field, MMS may properly value all the residue gas for royalty purposes at the price established in the contract for sale of that gas, even though the gas not taken under the contract is later sold at a lower price.

Ladd Petroleum Corp., 127 IBLA 163 (Aug. 27, 1993)

Regulations issued in 1986 limited an allowance for processing costs incurred by oil and gas royalty payors for gas produced during 1987 to two-thirds of the value of the product. Such lessees were not entitled to the benefit of later promulgated regulations providing a greater production allowance that applied only to production beginning on Mar. 1, 1988.

Exxon Co., U.S.A., 128 IBLA 22 (Nov. 9, 1993)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

MMS' demands for additional royalty on Federal offshore oil and gas leases are administrative actions that are not covered by 28 U.S.C. § 2415(a) (1988). Further, a lessee has a duty to compile and voluntarily chose to retain beyond 6 years, so that, notwithstanding the 6-year limit on recordkeeping imposed by 30 U.S.C. § 1713(b) (1988), MMS is not barred from making demands for payment of additional royalty where the lessee has retained relevant documents. The provisions of 30 U.S.C. § 1755 (1988), bar actions to recover penalties and, thus, do not relate to MMS demands for collection of additional royalty.

The offsetting of overpayments of royalty on Federal offshore oil and gas leases against underpayments of royalty is permitted only with the royalty account of a single lease after an official audit.

MMS is not barred from issuing a demand for additional royalty on a lease due to underpayment by a settlement agreement between MMS and various producers where the demand is not expressly included in the terms of that agreement, and where, in any event, there is evidence that MMS' contemporary interpretation of that agreement was that it did not bar it from asserting claims based on underpayments.

Chevron U.S.A., Inc., 129 IBLA 151 (Apr. 19, 1994)

The exception from royalty for gas used on a lease in producing operations does not serve to automatically exempt gas used to lift and, thus, produce oil from a well, which gas is subsequently vented without authorization, without regard to whether marketing the gas would have been economic.

The regulations require an operator to market all oil and gas production if economically feasible and to conduct operations in a manner to prevent avoidable loss of oil and gas. In adjudicating an application to vent gas used to produce oil from a well when gas production was formerly sold into a pipeline until disconnectd as uneconomic, the issue is whether the vented gas was

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

unavoidably lost in that the expenditures necessary to market such gas were not economically justified and that conservation of the gas, if required, would lead to the premature abandonment of recoverable oil reserves.

A decision to deny an application to vent gas used in the production of oil from an oil and gas lease will be reversed where a preponderance of the evidence shows that the gas was unavoidably lost in that recovery of the gas was not economically feasible.

Rife Oil Properties, Inc., 131 IBLA 357 (Dec. 30, 1994)
101 I.D. 161

Interest

An exception to late payment charges for royalty payments filed after the end of the month following the month in which the oil and gas is produced and sold may be recognized where the payor has filed a sufficient estimated payment in accordance with the instructions in the Payor Handbook. An estimated payment is made on Form-2014 and requires identification of the payor, the lease number, and the product code and selling arrangement number. An estimated payment may only be established initially for the month immediately preceding the month in which the report and payment are filed and, thereafter, the estimated balance is rolled over monthly to cover production and sales in succeeding months.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)
97 I.D. 74

The regulations found at 43 CFR 218.102(a) and 218.150(b) provide exceptions to the assessment of late payment charges when royalty payments are made after the end of the month following the month in which the oil and gas is produced and sold. The exception applies if the payor has filed a timely and sufficient estimated payment for the applicable lease account and each product type in accordance with the instructions in the MMS Oil & Gas Payor Handbook. MMS properly assesses late payment charges when a payor has not submitted an estimated payment for a specific lease

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Interest--Continued

or product type, even if the total of the estimated payments attributable to the payor exceeds the total royalties due for production from all of the payor's leases.

Exxon Co., U.S.A., 115 IBLA 62 (June 14, 1990)

Pursuant to the lease terms and the applicable regulation, 30 CFR 218.50, royalty payments are required to be made by the last day of the month following production. Late payment charges will be assessed where payments are made after the due date. However, the regulations found at 43 CFR 218.102(a) and 218.150(b) establish exceptions to late payment charges for royalty payments made after the end of the month following the month in which the oil and gas is produced and sold where the payor has filed estimated payments in accordance with the instructions in the MMS Oil & Gas Payor Handbook. Where a payor fails to provide estimated payments at the lease level and fails to provide estimated payments by specific product codes on the MMS-2014 form, MMS properly assesses late payment charges. This charge is appropriate even though the total amount of all the estimated payments made by the payor for its leases exceeds the total amount of royalties due for all of the payor's leases, including those for which no estimated payment has been established.

Exxon Co., U.S.A., 115 IBLA 81 (June 19, 1990)

Pursuant to sec. 111 of the Federal Oil & Gas Royalty Management Act of 1982, 30 U.S.C. § 1721 (1982), MMS is authorized to assess a higher interest rate for late payment of oil and gas royalties than it had previously been authorized to assess; therefore, for time periods prior to passage of the Federal Oil and Gas Royalty Management Act of 1982, MMS may assess only the lower, previously authorized interest rate.

Shell Offshore Inc., 115 IBLA 205 (July 3, 1990)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Interest--Continued

Pursuant to the lease terms and the applicable regulation, 30 CFR 218.50, royalty payments are required to be made by the last day of the month following production. Late payment charges will be assessed where payments are made after the due date. However, the regulations found at 43 CFR 218.102(a) and 218.150(b) establish exceptions to late payment charges for royalty payments made after the end of the month following the month in which the oil and gas is produced and sold where the payor has filed estimated payments in accordance with the instructions in the MMS Oil & Gas Payor Handbook. Where a payor fails to provide estimated payments at the lease level, and fails to identify estimated payments by specific product codes on the MMS-2014 form, MMS properly assesses late payment charges. This charge is appropriate even though the total amount of all the estimated payments made by the payor for its leases exceeds the total amount of royalties due for all of the payor's leases, including those for which no estimated payment has been established.

Exxon Co., U.S.A., 117 IBLA 199 (Dec. 21, 1990)

An assessment of late payment charges for months in which a royalty payor underpaid royalties for natural gas produced and sold from an offshore oil and gas lease will be reversed where MMS approved a refund request for overpayment made during a specific time period including those months; the lease royalty account had a net surplus each month during the period; and the payments all occurred for a single lease.

Pogo Producing Co., 121 IBLA 270 (Nov. 18, 1991)

MMS is authorized to impose a late payment charge when it determines that a royalty payor has failed to pay timely the proper amount of royalty due on the value of the production of wet gas.

Phillips Petroleum Co., Phillips 66 Natural Gas Co., 121 IBLA 278 (Nov. 19, 1991)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Interest--Continued

Where royalty payments due on Federal oil and gas leases are not received by the Department on the date that such payments are due, or are less than the amount due, the Department is required by statute to charge interest on such late payments or underpayments. The MLA provides that interest charges collected on late payments under FOGRMA shall be paid into the Treasury of the United States, and that 50 percent thereof shall be paid by the Secretary of the Treasury to the State within the boundaries of which the leased land or deposits are located. The statute clearly contemplates that the lessee must pay all royalties, including those that will ultimately be paid to the State, into the U.S. Treasury. The Board of Land Appeals is bound to follow such statute and is not at liberty to consider whether interest may be forgiven based upon equitable considerations.

Wexpro Co., 122 IBLA 1 (Dec. 26, 1991)

Under provision of Departmental regulation 30 CFR 206.152(j), it is a defense to a claim for late payment interest charges that a lessee exercised reasonable business judgment when payment was initially made, albeit that future events caused a deficit in the payment to occur. While 30 CFR 206.152(j) was not in effect in 1986 when the payment at issued was made, it is Departmental policy to give effect to policy changes in pending cases when to do so would not operate to the detriment of any party.

If a Federal lessee contends that the policy established by 30 CFR 206.152(j) should be applied to determine whether late payment charges are owed for royalty payments made before contract modification increased product valuation, the lessee must document that reasonable measures were timely taken to obtain settlement. The burden to show entitlement to the benefit of the regulation rests with the lessee, and the fact that a favorable settlement was ultimately reached is not enough, alone, to establish that reasonable measures were timely taken so as to excuse late payment charges, where payment at the lower rate continued for 3 years pending resolution of the valuation dispute.

Anadarko Petroleum Corp., 123 IBLA 361 (July 21, 1992)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Interest--Continued

Under 30 CFR 218.54, MMS is authorized to assess a late payment (interest) charge if royalty payments for oil and gas leases are unpaid or underpaid on the date the amounts are due. Under 30 CFR 218.50(a), royalty payments are normally due at the end of the month after the month in which the oil and/or gas is produced and sold. However, where a judicial decision is rendered holding that a higher price for certain OCS gas may be retroactively collected, the date the additional royalty on the retroactive payment is due is properly determined by using the date the operator applied with FERC for an amendment of its certificates authorizing collection of the higher price for many of its other leases, in the absence of a convincing showing that it was reasonably prevented from doing so.

OXY, USA, Inc., 123 IBLA 383 (Aug. 5, 1992)

Where late payment of royalty on a lease results from a mistake by a Federal offshore lessee in paying between two separate lease accounts, MMS properly assesses a late payment charge although the second lease account was overpaid by the amount of the underpayment on the first lease.

Columbia Gas Development Corp., 123 IBLA 395 (Aug. 7, 1992)

Under 30 CFR 218.54, MMS is authorized to assess a late payment interest charge if royalty payments for oil and gas leases are unpaid or underpaid on the date the amounts are due. Under 30 CFR 218.50(a), royalty payments are normally due at the end of the month following the month in which the oil and/or gas is produced and sold, and MMS properly rejects an argument that royalty on additional proceeds resulting from retroactive price adjustments is not due until the lessee receives the additional payment from its purchaser.

Oxy USA Inc., 125 IBLA 308 (Mar. 18, 1993)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Interest--Continued

MMS properly requires the holder of a Federal onshore oil and gas lease to pay interest on late royalty payments made for a royalty obligation that arose prior to the enactment of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701-1757 (1988).

Miami Oil Producers, Inc., 125 IBLA 313 (Mar. 23, 1993)

MMS is required by 30 CFR 218.54(a) and 30 CFR 218.150(c) to assess interest for late payment of royalties from the date the royalties were due until the date such payment is received in the appropriate MMS accounting office. Such a fee is properly assessed where late payment of royalties is due to erroneous withholding of royalty funds for internal revenue payments.

When the presumption of regularity supporting the official acts of public officers in the discharge of their duties conflicts with the presumption that documents properly mailed are duly delivered, greater weight is accorded to the presumption of regularity. Thus, when Government files do not indicate that a document was received, an appellant must show that it was, in fact, actually received.

Marathon Oil Co., 128 IBLA 168 (Feb. 3, 1994)

Natural Gas Liquid Products

The Procedure Paper on Natural Gas Liquid Products Valuation, developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1982).

Since, unless otherwise expressly provided, all royalty payments are accepted subject to audit, a subsequent determination that additional royalties are due does not give rise to a question of retroactive application of a new rule if the determination that a

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

deficiency exists was made under the regulation applicable at the time that the payment was originally made.

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Cities Service Oil & Gas Corp., 113 IBLA 255 (Mar. 9, 1990)

Where Government acceptance of the tender of royalties is made subject to post audit, the mere recomputation of royalty payments due to the Government to correctly reflect fair market value of NGLPs does not constitute imposition of a penalty or give rise to an issue of retroactive application of a new rule.

A lessee's allegation that its method of valuing production from oil and gas leases is as effective at determining fair market value as the method utilized by MMS is not an adequate basis for reversal of a decision assessing additional royalties.

When, in accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, utilization of spot market prices is the proper methodology to value production and the lessee's price for natural gas liquid products is less than the minimum yardstick value, it is improper for MMS to use the average of the high and low prices in the yardstick range to determine the value of production. The yardstick minimum should be the price employed in such a situation.

Shell Offshore Inc., 115 IBLA 205 (July 3, 1990)

When, in accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, utilization of spot market prices is the proper methodology to value production and the lessee's price for natural gas liquid products is less than the minimum yardstick value, it is

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

improper for MMS to use the average of the high and low prices in the yardstick range to determine the value of production. The yardstick minimum should be the price employed in such a situation.

A party challenging a determination as to the value of gas or other hydrocarbons produced from a Federal lease must establish that the methodology used is in fact erroneous. An appellant who alleges that because of market forces contract prices lag behind spot market prices has not established the MMS practice of using the higher of the two prices (i.e., the greater of proceeds or the spot market price) is an erroneous methodology where the relevant regulation authorizes the use of posted prices to value production, but requires that the value shall never be less than the gross proceeds.

Natural gas liquid products processed in Louisiana may properly be valued according to spot market prices for similar products in Texas.

Union Oil Co. of California, Union Exploration Partners, Ltd., 116 IBLA 8 (Aug. 24, 1990)

The "Procedure Paper on Natural Gas Liquid Products Valuation," developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1988).

Since, unless otherwise expressly provided, all royalty payments are accepted subject to audit, a subsequent determination that additional royalties are due does not give rise to a question of retroactive application of a new rule if the determination that a deficiency exists was made under the regulation applicable at the time that the payment was originally made.

Where it is MMS policy to accept the Department of Energy ceiling prices for natural gas liquid products as representing fair market value for royalty purposes in certain instances, and MMS has followed that policy

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

in a number of cases, its refusal in another case to accept those ceiling prices in favor of the monthly average spot market prices must be deemed arbitrary and capricious.

Where an oil and gas lessee sells natural gas liquid products pursuant to a non-arm's-length contract at a price below the "yardstick" valuation as derived from the "Procedure Paper on Natural Gas Liquid Products Valuation," royalty is properly assessed at the "yardstick" valuation unless the lessee can affirmatively show that its non-arm's-length contract had characteristics similar to arm's-length contracts entered into at the same time, in the same general area, and for the same product.

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Shell Offshore Inc., 116 IBLA 246 (Oct. 17, 1990)

Since, pursuant to the provisions of 30 CFR 206.152(a)(2) (1987), the reasonable allowance for the costs of processing natural gas liquid products was, as a general matter, to be based on "actual plant costs," the fact that other lessees were permitted a greater allowance is a legal irrelevancy so long as each lessee's allowance is based on its actual plant costs.

Where the calculation of a processing allowance involves consideration of a profit factor based on the sales values of natural gas liquid products, and where it is necessary to provide a separate extraction and fractionation allowance, the profit factor is properly computed only once in the combined extraction/fractionation allowance computation.

Where the determination of the processing allowance to be permitted for natural gas liquid products requires the separate determination of an extraction and fractionation allowance, these two allowances are

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

properly added together to arrive at the combined processing allowance.

The "Procedure Paper on Natural Gas Liquid Products Valuation," developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1988).

Since, unless otherwise expressly provided, all royalty payments are accepted subject to audit, a subsequent determination that additional royalties are due does not give rise to a question of retroactive application of a new rule if the determination that a deficiency exists was made under the regulation applicable at the time the payment was originally made.

In the absence of acceptance of a lessee's royalty valuation as conclusive by an official authorized to bind the Department on such matters, the fact that the office of Inspector General may have conducted an audit of payments made on a lessee's behalf does not prevent the duly authorized officials from thereafter timely reviewing the lessee's original valuation and determining that royalty is still owing.

Where it is MMS policy to accept DOE ceiling prices for natural gas liquid products as representing fair market value for royalty purposes in certain instances, and MMS has followed that policy in a number of cases, its refusal in another case to accept those ceiling prices in favor of the monthly average spot market price must be deemed arbitrary and capricious.

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Cities Service Oil & Gas Corp., 117 IBLA 17 (Nov 26, 1990) 97 I.D. 243

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

MMS' Procedure Paper concerning valuation of NGLP for royalty purposes was not required to be promulgated as a regulation because it does not constitute a substantive rule of law, as it neither creates law nor changes established policy. Rather, it simply clarifies the methodology for applying the factors set forth in 30 CFR 206.150 (1985), providing internal guidance for how this authority should be exercised.

The interpretation announced by MMS in its Procedure Paper concerning valuation of NGLP did not constitute a sudden change in policy such that its application violated appellant's due process rights and was arbitrary and capricious.

When MMS adopts an agency-wide interpretation that is reasonable and consistent with the law, the Board will affirm application of that interpretation. MMS' Procedure Paper concerning valuation of NGLP comports with 30 CFR 206.150 (1985), and MMS' reliance on it does not render its actions arbitrary and capricious.

Where the Department's regulations gave fair notice that royalty was due on NGLP, and in the absence of any well-established practice at odds with that announced in a Procedure Paper concerning valuation of NGLP at the time a party paid the royalties on NGLP, there is no bar to retroactive application of the Procedure Paper.

Where a party fails to provide an offer of proof regarding arm's-length contracts for NGLP in effect during the period at issue comparing its contract with the characteristics of arm's-length contracts, the yardstick price is properly applied in lieu of the non-arm's-length contract price. The contract price, even if applied, is subject to correction to remove impermissible deductions for manufacturing costs and location differential.

In valuing NGLP for royalty computation purposes, where the NGLP was sold under a non-arm's-length contract not shown to be comparable to arm's-length contracts that represent market value, MMS may properly use published spot market prices to establish value. However, the Board will set aside an MMS decision instructing a lessee (where the reported price falls below the lowest spot

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

market price) to use the average spot market price instead of the lowest spot market price.

Phillips Petroleum Co., 117 IBLA 255 (Jan. 10, 1991)

MMS may properly require a lessee selling unprocessed casinghead gas at the wellhead pursuant to an arm's-length "percentage-of-proceeds" contract to value such gas for royalty purposes at an amount equal to one-third of the value of natural gas liquids plus the full value of residue gas.

Amoco Production, Inc., 126 IBLA 124 (Apr. 30, 1993)

Where applicable regulations require that MMS value wet gas production from a Federal lease on the greater of the gross proceeds accruing to the lessee from the sale thereof or the aggregate value determined by the Secretary of all the commodities, including residue gas, a valuation determination that royalty shall be paid on the value of one-third of all liquids extracted from the gas and 100 percent of the residue gas must be affirmed.

Walter Van Norman, Jr., 126 IBLA 375 (July 1, 1993)

Under 30 CFR 206.105(c), wet gas is properly valued using the aggregate value of all commodities, including residue gas. That is, MMS may properly determine the value to be the aggregate of the value of residue gas, NGLP, and sulfur, all of which were commodities obtained from the gas.

Under 30 CFR 206.106, a manufacturing allowance of up to two-thirds the value of entrained hydrocarbon liquids may be taken as a deduction from the royalty basis of those liquids. Thus, a deduction is allowable for costs of manufacture of such substances extracted from the gas produced from the leasehold, but there is a

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

regulatory limit of two-thirds of the value of those substances.

Apache Corp., 127 IBLA 125 (Aug. 24, 1993)

MMS may properly require a royalty payor selling unprocessed wet gas at the wellhead pursuant to arm's-length percentage-of-proceeds contracts to value such gas for royalty purposes at an amount equal to one-third of the value of the liquids extracted from the gas and 100 percent of the value of the residue gas where that amount exceeds the gross proceeds accruing to the royalty payor.

Ladd Petroleum Corp., 127 IBLA 163 (Aug. 27, 1993)

MMS properly refused to include the cost of gas that was not processed into liquid products at the Henry plant as a factor to be used in determining a processing allowance for products produced at the plant.

Texaco, Inc., 130 IBLA 320 (Sept. 8, 1994)

Payments

A royalty payor who has been assigned the duty to make royalty payments for production from an oil and gas lease on behalf of co-lessees and who has notified MMS of acceptance of this responsibility by filing a payor information form may be held liable for royalties due under the terms of the lease.

Forest Oil Corp., 113 IBLA 30 (Jan. 30, 1990)
97 I.D. 11

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Payments--Continued

Where a Federal lessee is required to pay royalty for part of a lease on a sliding scale at a higher rate than 12-1/2 percent, the part paying at the higher rate is considered an entirety for purposes of royalty calculation, and gross production from a producing well on that portion is properly used to determine the sliding-scale royalty rate.

Conoco, Inc., 113 IBLA 47 (Jan. 30, 1990)

The offsetting of overpayments against underpayments of royalty on natural gas production from an offshore oil and gas lease may only take place after an official audit and within the royalty account of a single lease. Offsetting between leases is not permitted.

Union Exploration Partners, Ltd., 113 IBLA 186 (Feb. 15, 1990)

An exception to late payment charges for royalty payments filed after the end of the month following the month in which the oil and gas is produced and sold may be recognized where the payor has filed a sufficient estimated payment in accordance with the instructions in the Payor Handbook. An estimated payment is made on Form-2014 and requires identification of the payor, the lease number, and the product code and selling arrangement number. An estimated payment may only be established initially for the month immediately preceding the month in which the report and payment are filed and, thereafter, the estimated balance is rolled over monthly to cover production and sales in succeeding months.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)
97 I.D. 74

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Payments--Continued

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Cities Service Oil & Gas Corp., 113 IBLA 255 (Mar. 9, 1990)

The regulations found at 43 CFR 218.102(a) and 218.150(b) provide exceptions to the assessment of late payment charges when royalty payments are made after the end of the month following the month in which the oil and gas is produced and sold. The exception applies if the payor has filed a timely and sufficient estimated payment for the applicable lease account and each product type in accordance with the instructions in the MMS Oil & Gas Payor Handbook. MMS properly assesses late payment charges when a payor has not submitted an estimated payment for a specific lease or product type, even if the total of the estimated payments attributable to the payor exceeds the total royalties due for production from all of the payor's leases.

Exxon Co., U.S.A., 115 IBLA 62 (June 14, 1990)

Pursuant to the lease terms and the applicable regulation, 30 CFR 218.50, royalty payments are required to be made by the last day of the month following production. Late payment charges will be assessed where payments are made after the due date. However, the regulations found at 43 CFR 218.102(a) and 218.150(b) establish exceptions to late payment charges for royalty payments made after the end of the month following the month in which the oil and gas is produced and sold where the payor has filed estimated payments in accordance with the instructions in the MMS Oil & Gas Payor Handbook. Where a payor fails to provide estimated payments at the lease level and fails to provide estimated payments by specific product codes on the MMS-2014 form, MMS properly assesses late payment charges. This charge is appropriate even though the total amount of all the estimated payments made by the payor for its leases exceeds the total amount of royalties due for all of

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Payments--Continued

the payor's leases, including those for which no estimated payment has been established.

Exxon Co., U.S.A., 115 IBLA 81 (June 19, 1990)

Pursuant to the lease terms and the applicable regulation, 30 CFR 218.50, royalty payments are required to be made by the last day of the month following production. Late payment charges will be assessed where payments are made after the due date. However, the regulations found at 43 CFR 218.102(a) and 218.150(b) establish exceptions to late payment charges for royalty payments made after the end of the month following the month in which the oil and gas is produced and sold where the payor has filed estimated payments in accordance with the instructions in the MMS Oil & Gas Payor Handbook. Where a payor fails to provide estimated payments at the lease level, and fails to identify estimated payments by specific product codes on the MMS-2014 form, MMS properly assesses late payment charges. This charge is appropriate even though the total amount of all the estimated payments made by the payor for its leases exceeds the total amount of royalties due for all of the payor's leases, including those for which no estimated payment has been established.

Exxon Co., U.S.A., 117 IBLA 199 (Dec. 21, 1990)

A finding that a lessee must pay the United States for the full value of vented gas that was avoidably lost from 1980 to 1984 is reversed, because 43 CFR 3162.7-1(d), issued in Oct. 1984, changed Departmental policy to require that compensation for avoidably lost gas shall be limited to payment of the royalty value of gas so vented. Because the 1984 regulation changed the prior policy, which had been to assess vented gas at full value, affected lessees who would benefit by the amended rule are allowed the benefit of the change.

Mobil Exploration & Producing U.S., Inc., 119 IBLA 76 (Apr. 5, 1991) 98 I.D. 207

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Payments--Continued

Where more than 6 years have passed between the payment of Federal oil and gas royalty (and the generation of relevant documentation concerning the royalty) and the institution of an audit concerning the timeliness of the royalty payments, the time for the lessee to maintain records concerning the royalty has expired under 30 U.S.C. § 1713(b) (1988).

Where a lessee's successor in interest asserts that a lessee's admitted late payment of royalty was excused because the lessee was unaware that royalty in kind was no longer being taken and that royalty in value payments were therefore due, but the Government is able to show by contemporary evidence that the lessee did receive timely notice of the termination of the royalty in kind contract, MMS' decision imposing late payment charges for the lessee's failure to pay royalty timely is properly affirmed.

Marathon Oil Co., 119 IBLA 345 (June 18, 1991)

An assessment of late payment charges for months in which a royalty payor underpaid royalties for natural gas produced and sold from an offshore oil and gas lease will be reversed where MMS approved a refund request for overpayment made during a specific time period including those months; the lease royalty account had a net surplus each month during the period; and the payments all occurred for a single lease.

Pogo Producing Co., 121 IBLA 270 (Nov. 18, 1991)

When the record does not confirm that a lessee has been assigned or assumed legal responsibility for making royalty payments on behalf of co-lessees, an MMS decision directing the lessee to recalculate the royalties for all co-lessees will be set aside and the case remanded for recalculation by the appropriate party or parties.

Phillips Petroleum Co., Phillips 66 Natural Gas Co., 121 IBLA 278 (Nov. 19, 1991)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Payments--Continued

Current law requires that compensation for avoidably lost gas is to be limited to payment of royalty value.

Maxus Exploration Co., 122 IBLA 190 (Feb. 10, 1992)

MMS may properly require a Federal gas lessee to furnish a report derived from information in corporate records concerning royalty payments, even if some of the documents needed to produce the report are over 6 years old.

Discovery of an anomaly in royalty reporting arising during refund proceedings on a Federal lease provided a reasonable foundation for an investigation into the possibility that other similar errors had also occurred.

MMS may properly require a Federal gas lessee to furnish a report concerning identified payment errors to be prepared from corporate royalty payment records. If regulations currently in effect do not require a payor to research and analyze payment records and report specified reporting errors, special orders providing adequate guidance for reporting will provide a foundation that permits the required report to be completed.

Amoco Production Co., 123 IBLA 278 (June 18, 1992)

"Unavoidably lost." Notice to Lessees and Operators 4A, Part II.C.(2), provides that gas escaping in blowouts must be considered "unavoidably lost," subject to specified exceptions, among which is the failure of the operator to take all reasonable measures to prevent or control the loss. When, before a blowout occurred, the operator failed to pressure-test well casing contrary to a provision of the Federal permit under which the well was entered, an assessment for avoidably lost gas under provisions of NTL-4A was proper because the operator had not taken all reasonable measures to prevent gas loss that occurred after the blowout was controlled.

Chuska Energy Co., 123 IBLA 321 (July 9, 1992)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Payments--Continued

A lessee cannot generally avoid its responsibility to make timely payment to the Government of royalties because of difficulties in obtaining payments from and/or disputes with the purchaser, where there is no evidence indicating that the purchaser was not legally required to make the payment. Where the purchaser initially asserted that terms of its contract barred collection by the lessee of additional monies, but eventually capitulated and paid not only those additional monies to the lessee, but also late payment charges dating back to its receipt of the lessee's initial bill, the lessee may not avoid payment of late payment charges to the Government.

OXY, USA, Inc., 123 IBLA 383 (Aug. 5, 1992)

FERC Order No. 94 reimbursements paid to a lessee by a pipeline purchaser of gas from OCS oil and gas leases for certain production-related expenses, not included in the ceiling price for delivered gas, may be considered part of the lessee's gross proceeds for purposes of calculation of royalties. A request for a refund of royalties paid on such reimbursements may be properly denied.

Pogo Producing Co., 124 IBLA 76 (Sept. 9, 1992)

Sec. 102(a) of FOGRMA, 30 U.S.C. § 1712(a) (1988), requires a lessee to notify the Secretary of the assignment of the obligation to pay royalty. Sec. 3(7) of FOGRMA, 30 U.S.C. § 1702(7) (1988), defines lessee as including any person who has been assigned an obligation to make a royalty or other payment required by a lease. Under secs. 102(a) and 3(7) of FOGRMA, for a person who holds no interest in a lease to be liable for the lessee's royalty payments, the lessee and the person must have agreed to an assignment of the obligation to pay royalty, and notice of that assignment or either evidence of or notice of an assignment, and filing a PIF, without more, does not render the person filing it a lessee under sec. 3(7) of FOGRMA, 30 U.S.C. § 1702(7)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Payments--Continued

(1988). There must be a document assigning the obligation to make royalty payments or a contract or agreement stating this obligation.

The assignment of the obligation to make royalty payments is not related to an assignment of a lease or an interest in a lease that must be approved by BIA under 25 CFR 212.22.

The making of royalty payments and the filing of PIFs are not sufficient evidence to indicate an intent to be bound as an agent by lessees' obligation to pay royalty.

Mesa Operating Ltd Partnership, 125 IBLA 28 (Dec. 31, 1992) 99 I.D. 272

Where applicable regulations require that MMS value wet gas production from a Federal lease on the greater of the gross proceeds accruing to the lessee from the sale thereof or the aggregate value determined by the Secretary of all the commodities, including residue gas, a valuation determination that royalty shall be paid on the value of one-third of all liquids extracted from the gas and 100 percent of the residue gas must be affirmed.

Walter Van Norman, Jr., 126 IBLA 375 (July 1, 1993)

The offsetting of royalty overpayments against underpayments from an offshore oil and gas lease may only take place after an official audit and within the royalty account of a single lease. Offsetting between leases is not permitted.

Where a policy to restrict the offset of royalty overpayments against underpayments is the product of adjudication, the notice and comment procedures of 5 U.S.C. § 553 (1988), are not required.

Union Exploration Partners, Ltd., 127 IBLA 220 (Sept. 23, 1993)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Payments--Continued

Acting under authority provided by sec. 103 of FOGRMA, MMS properly required production of sales contracts and exchange agreements needed to ascertain whether gross proceeds from sales of Federal crude oil exceeded the value reported by the Federal lessee from a transfer between affiliated corporations that was not an arms-length transaction.

Santa Fe Energy Products Co., 127 IBLA 265 (Sept. 28, 1993)

In the absence of a regulation and a PIF explicitly stating that filing the form constitutes the assumption of the lessee's obligation to pay royalty by the person filing it, a document evidencing the person's agreement to accept this responsibility is necessary.

A division order may constitute evidence that the obligation to pay royalty has been assigned.

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

An attempt by MMS to assess a lessee with additional royalties based upon an alleged violation of a provision of the lease and reporting regulations in effect in 1980 and 1981 will be overturned where the record shows that although the lessee underreported volumes of royalty-in-kind oil, resulting in underbilling of the Government's contract refiner, the lessee did, in fact, deliver all required royalty-in-kind oil to or on behalf of the refiner during the period in question.

Texaco, Inc., 129 IBLA 46 (Mar. 23, 1994)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Payments--Continued

FERC Order No. 94 reimbursements paid to a lessee by a pipeline purchaser for gas for certain production-related expenses, not included in the ceiling price for delivered gas, are properly considered part of the gross proceeds for purposes of calculation of royalties.

Even where a lessee obtains FERC Order No. 94 reimbursements for transportation of gas, the amount of the allowance properly granted is limited to the actual cost of the transportation of the gas which may not be coincidental with the reimbursement received.

OXY USA Inc., 129 IBLA 285 (May 20, 1994)

Valuation standards established for crude oil not transferred by a Federal lessee under an arm's-length contract were governed by Departmental regulation 30 CFR 206.102(c), which required a producer who did not have arm's-length sales or post prices to use an arithmetic average of third-party posted prices for like quality oil in the same field to calculate royalty.

Shell Oil Co., 130 IBLA 93 (Aug. 1, 1994)

A demand by MMS directed to an oil and gas lessee for additional royalty payments based on the underreporting of the volume of royalty-in-kind crude oil delivered to a purchaser during the period from Jan. 1, 1977, through May 31, 1982, will be reversed where the record establishes that the lessee did, in fact, deliver the correct volume of oil to the purchaser.

A demand by MMS directed to an oil and gas lessee for additional royalty payments based on the miscategorization of royalty-in-kind crude oil delivered to a purchaser during a period of price controls will be affirmed where the record establishes that the effect of this miscategorization was to deprive the Government of the percentage of the full value of the production to which it was entitled.

ARCO Oil & Gas Co., 131 IBLA 299 (Dec. 2, 1994)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Processing Allowance

Pursuant to 30 CFR 250.67(a)(2) (1978) MMS is authorized to utilize a value determined to be a reasonable allowance for the cost of processing natural gas liquid products, with a maximum of two-thirds, unless a greater allowance is in the interest of conservation. The determination is to be based upon regional plant practices, costs, and other pertinent factors.

Federal lessees are required to bear the costs of putting oil and gas into marketable condition. Expenses incurred in storage and transportation beyond the point of first potential market are properly excluded from a lessee's manufacturing allowance despite allegations that the expenses are an "integral part" of plant operations.

MMS must provide a lessee with an adequate basis for accepting or appealing a determination of the manufacturing allowance to be utilized in royalty calculation. An MMS decision must be supported by a rational basis which is stated in the written decision and supported by the record.

Union Oil Co. of California, Union Exploration Partners, Ltd., 116 IBLA 8 (Aug. 24, 1990)

Where a sour gas stream is processed by a lessee to yield methane, nitrogen, CO_2, sulfur, and helium, and MMS limits a processing allowance to two-thirds of the value of nitrogen, CO_2, and sulfur and denies any deduction against the value of methane, a residue gas, the agency decision will be reversed upon a showing that the allowance does not approximate the lessee's reasonable costs of manufacture. For onshore production occurring prior to Mar. 1, 1988, no basis exists in these circumstances to deny a deduction against the value of residue gas.

Exxon Corp., 118 IBLA 221 (Mar. 8, 1991) 98 I.D. 110

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Processing Allowance--Continued

The term "treatment," as identified in 30 CFR 250.42 (1987), is the removal or extraction of chemical impurities or contaminants that must be removed in order for the gas to be of marketable quality or to place the gas in a marketable condition. "Sour gas" is gas contaminated by hydrogen sulfide or other sulphur compounds, which must be removed before the gas can be used for commercial and domestic purposes. The sulphur contaminants are not liquid hydrocarbons, so that their removal is not "processing" under 30 CFR 206.152 (1987). Removing the hydrogen sulfide (sweetening the gas) is "treatment" within the meaning of the regulations.

Exxon Co., U.S.A., Chevron U.S.A., Inc., 121 IBLA 234 (Nov. 15, 1991) 98 I.D. 409

Under 25 CFR 211.13 and 30 CFR 206.106 (1986), the processing allowance for royalty on products from wet gas is determined on the basis of actual costs, not to exceed two-thirds of the value of the produced liquids.

Phillips Petroleum Co., Phillips 66 Natural Gas Co., 121 IBLA 278 (Nov. 19, 1991)

The regulations in 25 CFR Part 226 do not authorize a gas lessee to deduct allowances from royalties owing to the Osage Tribe.

ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 228 (Mar. 8, 1993)

Under 30 CFR 206.106, a manufacturing allowance of up to two-thirds the value of entrained hydrocarbon liquids may be taken as a deduction from the royalty basis of those liquids. Thus, a deduction is allowable for costs of manufacture of such substances extracted from the gas produced from the leasehold, but there is a regulatory limit of two-thirds of the value of those

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Processing Allowance--Continued

substances.

A Federal oil and gas lessee has the duty to put gas produced from the lease in a marketable condition. That duty includes treating the gas to remove hydrogen sulfide, so that costs of such treatment are not deductible. It is irrelevant who performs the treatment or the activities necessary to place the gas in marketable condition, or that title may have passed from the Federal lessee prior to undertaking the activity necessary to place the gas in marketable condition.

Apache Corp., 127 IBLA 125 (Aug. 24, 1993)

Regulations issued in 1986 limited an allowance for processing costs incurred by oil and gas royalty payors for gas produced during 1987 to two-thirds of the value of the product. Such lessees were not entitled to the benefit of later promulgated regulations providing a greater production allowance that applied only to production beginning on Mar. 1, 1988.

Exxon Co., U.S.A., 128 IBLA 22 (Nov. 9, 1993)

MMS properly refused to include the cost of gas that was not processed into liquid products at the Henry plant as a factor to be used in determining a processing allowance for products produced at the plant.

Texaco, Inc., 130 IBLA 320 (Sept. 8, 1994)

STIPULATIONS

An assignee of an oil and gas lease agrees to be bound by the terms and conditions of the lease as issued, including any stipulations consented to by the lessee as a condition of leasing. Accordingly, an appeal by an assignee of stipulations consented to by the lessee, his predecessor-in-interest, is properly denied.

Texaco Inc., 115 IBLA 369 (Aug. 15, 1990)

OIL AND GAS LEASES--Continued

STIPULATIONS--Continued

Where a party executes stipulations to an oil and gas lease and yet challenges those stipulations stating that the lease will not be accepted if the stipulations are approved, such action is constructed as an execution under protest.

Where initial action has not been taken to deny or sustain protests against execution of stipulations to an oil and gas lease but the record establishes reasons for establishing stipulations as required and it is clear the protests would be denied if remanded for further review, the appeals may be adjudicated on their merits despite the absence of a formal rejection of the protests.

After the effective date of the Federal Onshore Oil and Gas Leasing Reform Act of 1987, the Department lacks authority to reject lease stipulations recommended by the Secretary of Agriculture. For actions taken to require lease stipulations before the effective date of the Act, however, prior regulations require review of such stipulations by the Department.

Where an oil and gas lessee fails to show error in decisions imposing stipulations to oil and gas leases, the decisions are affirmed.

Liberty Petroleum Corp., 118 IBLA 214 (Mar. 7, 1991)

Where the record establishes that oil and gas leasing recommendations contained in an applicable land and RMP adopted by the FS were subject to revision upon site-specific examination and the FS, pursuant to such an examination, consents to leasing lands formerly designated as unavailable or as available for leasing with NSO restrictions, objections to a decision by BLM to issue leases in reliance on the FS recommendations will be rejected where the party objecting fails to show that the FS site-specific analysis was, in any way, flawed.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

OIL AND GAS LEASES--Continued

STOCK-RAISING HOMESTEAD ACT OF 1916

An operator of an oil and gas lease is responsible for reclamation of land leased for oil and gas purposes, even after expiration of the lease and even where the surface estate is privately owned. Such reclamation includes the restoration of any area within the lease boundaries disturbed by lease operations to the condition in which it was found prior to surface-disturbing activities.

Glen Morgan, 122 IBLA 36 (Jan. 7, 1992)

SUSPENSIONS

BLM properly denies an oil and gas lease operator's request for the suspension of the automatic elimination provisions of a unit agreement where more than 10 percent of working interest owners has not consented to the suspension at the time of the request. To determine whether there has been the necessary consent, BLM properly takes into account any assignments it has approved effective as of the date of the request, despite the operator's contention that such assignments were not effective because the parties thereto had not notified the operator at the time the request for suspension was made in accordance with the unit operating agreement.

Piute Energy Co., 116 IBLA 1 (Aug. 23, 1990)

Where, as a result of a court-ordered preliminary injunction and in accordance with 30 CFR 218.154(a), MMS issues an order suspending operations on an Outer Continental Shelf oil and gas lease and directs that no payment of rental will be required during the period of suspension, and the lease anniversary date falls within the period of such suspension, the subsequent termination of the suspension by MMS triggers the requirement of 30 CFR 218.154(c) that MMS compute the prorated rental due and notify the lessee thereof. In computing that prorated rental, MMS must credit advance rentals paid for the period of time operations were suspended against future rentals.

Union Oil Co. of California, 116 IBLA 67 (Sept. 5, 1990)

OIL AND GAS LEASES--Continued

SUSPENSIONS--Continued

It was error to apply sec. 10(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339(a) (1988), to diminish the amount of rental refund for rentals paid for periods of lease suspension. In accordance with 30 CFR 218.154(c) (1987), MMS must credit advance rentals paid for the period of time operations were suspended against rental accruing after termination of the suspension.

Tenneco Oil Co., 117 IBLA 120 (Dec. 3, 1990)

Shell Offshore, Inc., 117 IBLA 125 (Dec. 3, 1990)

A suspension of a lease in order to allow more time for the drilling of a well cannot be authorized under 30 U.S.C. § 209 (1988), because a suspension under that section does not allow any lease activity. Nor can such a suspension be authorized under 30 U.S.C. § 226(f) (1988), when there is neither production nor a well capable of production. Where BLM has issued decisions purporting to grant suspensions and extensions of leases that are unauthorized by law, the decisions are ultra vires and have no legal effect.

Ruby Drilling Co., 119 IBLA 210 (May 8, 1991)

The Secretary of the Interior and those authorized to act on his behalf have the discretionary authority to suspend operations and production under any oil or gas lease for conservation purposes, including the prevention of environmental damage. Where the record indicates that an EA prepared for drilling operations on an oil and gas lease located within both a ESA and an area of critical environmental concern failed to consider this option in evaluating the proposal to drill, the decision approving drilling operations will be set aside and the case will be remanded to permit consideration of whether, under this discretionary authority, operations under the lease should be suspended.

Southern Utah Wilderness Alliance et al., 127 IBLA 331 (Oct. 19, 1993) 100 I.D. 370

OIL AND GAS LEASES--Continued

TERMINATION

A decision denying a petition for reinstatement of a noncompetitive oil and gas lease filed pursuant to 30 U.S.C. § 188(c) (1982), will be reversed on appeal where appellant has established that she was ill at the time the payment was due, and that such illness was the proximate cause of the late payment.

Sandra Lewis, 113 IBLA 174 (Feb. 14, 1990)

For class II reinstatement, the lessee must tender the back rental and royalty at the increased rates accruing from the date of termination, together with a petition for reinstatement within 60 days from the date of receipt of the Notice of Termination. Submission of back rental that is deficient may only be cured during the 60-day period allowed for filing for reinstatement.

William F. Corkran, 114 IBLA 76 (Apr. 10, 1990)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of a lease on which there is no well capable of producing oil and gas in paying quantities, the lease automatically terminates by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the lessee can show that the failure to timely pay was either not due to a lack of reasonable diligence or was justifiable.

An unsigned check is not a negotiable instrument pursuant to the Uniform Commerical Code and where such a check is submitted to MMS in payment of the annual rental for an oil and gas lease such submission does not constitute timely payment within the meaning of 30 U.S.C. § 188(b) (1982). MMS has no affirmative obligation to attempt to negotiate an unsigned check since, by definition, such an unsigned check is not a negotiable instrument.

Burton/Hawks, Inc., 115 IBLA 143 (June 28, 1990)

OIL AND GAS LEASES--Continued

TERMINATION--Continued

A noncompetitive oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law upon failure of a lessee to pay the full amount of the rental due on or before the anniversary date of the lease. However, a partial assignment of record title to acreage in a Federal oil and gas lease, filed by a qualified assignee prior to the lease anniversary date, may be approved where the annual rental for the segregated acreage in the assignment was tendered prior to the anniversary date, even though the base lease terminated for nonpayment of the full lease rental on the anniversary date of the lease.

An unapproved assignor may not rely on BLM's approval of the assignment prior to the anniversary date in determining whether to submit rental for the entire leasehold. That is, where the assignor apparently submits less than full rental in the expectation that BLM would approve a pending assignment prior to the anniversary date (thereby reducing the rental due to be paid) he bears the risk that the assignment will not be approved prior to the anniversary date and that less than the full amount will be timely paid by the assignor and assignees.

Where the assignment of an oil and gas lease is pending before BLM, the assignor remains responsible for the performance of all obligations under the lease until the assignment has been approved, and BLM's failure to approve an assignment by the date the rental is due does not obviate the requirement the rental for the entire leasehold be paid on or before the anniversary date of the lease. The obligation to pay annual rental exists without regard to the fact that assignments of lease interests are pending, even though the assignments may ultimately be made effective retroactively to a date prior to the anniversary date.

Where the record titleholder of an oil and gas lease fails to request reinstatement within the time allowed, reinstatement is not authorized under governing statutory and regulatory provisions, and the termination of the lease becomes final. BLM must refuse to approve any pending assignments, as there is no lease interest left to be assigned.

Interior Reserves Corp., et al., 116 IBLA 73 (Sept. 5, 1990)

OIL AND GAS LEASES--Continued

TERMINATION--Continued

Under 30 U.S.C. § 188(b) (1988), termination of a lease having no well capable of producing oil or gas in paying quantities occurs automatically if the rental is not received on or before the anniversary date of the lease. Termination does not depend on or result from administrative action.

The provisions of 30 U.S.C. § 188(b) (1988), automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease became applicable to 20-year or renewal leases upon the first renewal after July 29, 1954, either by force of law or by the lessee's execution of a renewal lease containing an automatic termination provision.

BLM has no authority to grant Class I reinstatement of an oil and gas lease under 30 U.S.C. § 188(c) (1988), if the rental amount is not submitted within 20 days after the anniversary date.

Cashing a late rental check for an oil and gas lease and depositing the funds in an unearned account does not constitute acceptance of rental payment or reinstate a terminated oil and gas lease.

Class II reinstatement under 30 U.S.C. § 188(d) (1988), is expressly limited to oil and gas leases "issued pursuant to section 226(b) or (c) of this title." There is no authority under sec. 188(d) to reinstate terminated 20-year or renewal leases issued pursuant to 30 U.S.C. § 223 (1988).

Paul D. Lieb, Pardee Petroleum Corp., Ralph W. M. Keating, 116 IBLA 279 (Oct. 22, 1990)

A decision disapproving a pending partial assignment of an oil and gas lease will be affirmed if, prior to approval of the partial assignment, the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date, and the assignee had not tendered the rental for the lands described in the partial assignment prior to the anniversary date.

Martin Faley, 116 IBLA 398 (Nov. 14, 1990)

OIL AND GAS LEASES--Continued

TERMINATION--Continued

Where, following receipt of a 60-day notice from BLM that it does not regard an oil and gas lease as containing a well capable of producing hydrocarbons in paying quantities, the operator or lessee of such lease in an extended term by reason of production fails to present any evidence establishing the well's current potential production to produce the lease, the lease is properly declared to have terminated on account of the cessation of production.

Great Plains Petroleum, Inc., 117 IBLA 130 (Dec. 3, 1990)

30 U.S.C. § 188(b) (1988), and 43 CFR 3108.2-1(b) require that a notice of deficiency be sent by the Secretary to an oil and gas lessee whose rental payment is paid on or before the anniversary date of the lease but in an amount nominally deficient. Where the regulation requires that this notice be served by certified mail, return receipt requested, it is not unreasonable to look to the party asserting delivery to produce positive proof of such event, e.g., by producing a signed return receipt card.

Petrolex 84-1 Ltd., 118 IBLA 372 (Mar. 14, 1991)

Where a noncompetitive oil and gas lessee fails to pay annual rental on or before the anniversary date of the lease and no oil or gas is being produced on the lease, the lease automatically terminates by operation of law. BLM may reinstate the lease pursuant to 43 CFR 3108.2-2(a) if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Where BLM approves an assignment of record title in an oil and gas lease to a party on May 12, well in advance of the June 1 anniversary date of the lease, lessee's assertion that she was unable to ascertain whether the assignment had been approved and where to mail the rental payment does not establish that the failure to pay rental timely was justified where she admits that she knew of the approval on or prior to the due date for the payment.

Sybil W. Taylor, 120 IBLA 193 (July 30, 1991)

OIL AND GAS LEASES--Continued

TERMINATION--Continued

Pursuant to 30 U.S.C. § 188(b) (1988), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1988), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment on the lease anniversary date does not constitute reasonable diligence in the absence of a postmark on or before the lease anniversary date (or if the office is closed on the anniversary date, the next day on which the office is open) as required by the regulation at 43 CFR 3108.2-2(a).

Karl Mladinich, Victor Votaw, 120 IBLA 391 (Sept. 30, 1991)

Under sec. 31(b) of the MLA, as amended, oil and gas leases are subject to automatic termination by operation of law for failure to pay the annual rental in advance by the lease anniversary date. 30 U.S.C. § 188(b) (1988). The automatic termination provision does not apply to rental charges becoming due at a time other than the anniversary date due to the termination of a suspension of the lease.

Andrew Helal, 122 IBLA 325 (Mar. 11, 1992)

Pursuant to 30 U.S.C. § 188(b) (1988), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1988), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to pay rent timely is neither justifiable nor demonstrative of reasonable diligence.

OIL AND GAS LEASES--Continued

TERMINATION--Continued

Therefore, a petition for reinstatement under 30 U.S.C. § 188(c) (1988), must be rejected.

Albert F. Porfilio, 123 IBLA 138 (May 22, 1992)

When a competitive oil and gas lease fails to pay annual rental on or before the anniversary date of its lease on which there is no well capable of producing oil or gas in paying quantities, the lease automatically terminates by operation of law. The Department's regulation at 43 CFR 3103.1-2(2) provides that second-year and subsequent rentals are to be paid to MMS at its Royalty Management Program/BRASS in Denver, Colorado. Payment sent to BLM's Wyoming State Office will not constitute a proper tender of rental.

Petro Resources, Inc., 123 IBLA 310 (June 26, 1992)

An oil and gas lease in its extended term by reason of production which embraces a well capable of producing oil or gas in paying quantities expires by operation of law when production ceases and, thereafter, the lessee fails to produce the well upon 60 days' notice to place the well in production. Termination of the lease by operation of law in such circumstances is properly distinguished from cancellation of an oil and gas lease for violation of the lease terms, regulations, or statutes. No judicial action is required to effect termination by operation of law.

An oil and gas lease in its extended term by reason of production which embraces a well capable of producing oil or gas in paying quantities expires by operation of law when production ceases and, thereafter, the lessee fails to produce the well upon 60 days' notice to place the well in production. Termination of the lease in such circumstances occurs by operation of law and does not involve any judicial or administrative proceeding. Accordingly, the termination of the lease does not involve an action or proceeding against the debtor or an act to obtain property of the debtor which would be barred by the automatic stay provided by the Bankruptcy Code, 11 U.S.C. § 362(a) (1988), upon the filing of a petition in bankruptcy.

OIL AND GAS LEASES--Continued

TERMINATION--Continued

Confirmation by the bankruptcy court of a plan of reorganization under Chapter 11 of the Bankruptcy Code is binding on both the debtor and the creditors. Although BLM has the authority by regulation to increase the amount of bond coverage required of an oil and gas operator, an order of the bankruptcy court confirming the plan of reorganization of a Federal oil and gas lessee which expressly bars an increase in bond coverage as a condition of production is binding on the Department in the absence of modification thereof. A finding that an oil and gas lease in its extended term by reason of production terminated automatically for failure to produce lease wells within 60 days of notice to do so will be remanded where production was conditioned upon increased bond coverage expressly barred by order of the bankruptcy court.

Great Western Petroleum & Refining Co., 124 IBLA 16 (Aug. 19, 1992)

BLM properly denies a petition for class I reinstatement of an oil and gas lease which terminated automatically by operation of law for failure to pay the rental on or before the lease anniversary date where the lessee, having paid the full rental within 20 days following the anniversary date, fails to establish that the failure to timely pay the rental was justified or not due to a lack of reasonable diligence.

Gilbert & Bonnie Sockwell, 125 IBLA 150 (Jan. 21, 1993)

Where a Federal oil and gas lease is in an extended term owing to production from wells on the lease, where BLM has given notice under 43 CFR 3107.2-2 to the lessee that those wells are no longer capable of production and allows 60 days to rework the wells, drill a new well on the leasehold, or submit justification that the lease is capable of producing in paying quantities, and where no remedial action has been taken, BLM properly issues a decision declaring that the lease has terminated by cessation of production and returns unapproved pending applications for approval of assignments of interests in that lease.

Samuel Gary Jr. & Associates, Inc., 125 IBLA 223 (Feb. 5, 1993)

OIL AND GAS LEASES--Continued

TERMINATION--Continued

BLM properly holds an oil and gas lease issued pursuant to sec. 14 of the MLA, as amended, 30 U.S.C. § 223 (1988), on which there was no well capable of producing oil or gas in paying quantities, to have automatically terminated by operation of law where the annual rent was not paid on or before the lease anniversary date, even if the Department had earlier stated that it would apply the same rental erroneously tendered for another lease account, but had instead refunded the money prior to the anniversary date.

Carol B. Rodgers, G. Leslie Buchner, 126 IBLA 117 (Apr. 29, 1993)

A class 1 petition for reinstatement of an oil and gas lease is properly granted where the record on appeal supports the lessee's claim of illness and demonstrates the requisite proximity and causality to justify the late payment of rental.

Marian L. Kleiner, 129 IBLA 216 (Apr. 28, 1994)

Where an Indian oil and gas lease held by production has been deemed by BIA to have terminated due to lack of production, BLM properly requires the lessee of record to plug and abandon wells on the leased land.

Cross Creek Corp., 131 IBLA 32 (Sept. 29, 1994)

TWENTY-YEAR LEASES

The provisions of 30 U.S.C. § 188(b) (1988), automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease became applicable to 20-year or renewal leases upon the first renewal after July 29, 1954, either by force of law or by the lessee's execution of a renewal lease containing an automatic termination provision.

Class II reinstatement under 30 U.S.C. § 188(d) (1988), is expressly limited to oil and gas leases "issued pursuant to section 226(b) or (c) of this

OIL AND GAS LEASES--Continued

TWENTY-YEAR LEASES--Continued

title." There is no authority under sec. 188(d) to reinstate terminated 20-year or renewal leases issued pursuant to 30 U.S.C. § 223 (1988).

Paul D. Lieb, Pardee Petroleum Corp., Ralph W. M. Keating, 116 IBLA 279 (Oct. 22, 1990)

UNIT AND COOPERATIVE AGREEMENTS

Where a Federal lessee is required to pay royalty for part of a lease on a sliding scale at a higher rate than 12-1/2 percent, the part paying at the higher rate is considered an entirety for purposes of royalty calculation, and gross production from a producing well on that portion is properly used to determine the sliding-scale royalty rate.

Conoco, Inc., 113 IBLA 47 (Jan. 30, 1990)

Where a unit operator seeks to have certain acreage treated as if it had been subject to a unit agreement on the basis that the lessee, the unit operator, and BLM operated on the assumption that the tract had been fully committed to the unit in 1983, BLM properly determined the tract had not been effectively committed to the unit until the necessary paperwork documenting full commitment of all working interest owners had been filed with BLM in 1986.

Woods Petroleum Corp., 113 IBLA 190 (Feb. 21, 1990)

Departmental regulations at 43 CFR Part 3160 governing onshore oil and gas operations apply to gas produced from private leases which participate with Federal and/or Indian leases under a unit agreement approved by the Department's authorized officer. Accordingly, a unit operator is required to measure all gas produced and submit monthly production reports for production from such leases under 43 CFR 3162.7-3 and 3162.4-3(d), respectively, to aid BLM in accounting for royalties due for the Federal and/or Indian leases.

Norfolk Energy Inc., 115 IBLA 265 (July 25, 1990)

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS--Continued

BLM properly denies an oil and gas lease operator's request for the suspension of the automatic elimination provisions of a unit agreement where more than 10 percent of working interest owners has not consented to the suspension at the time of the request. To determine whether there has been the necessary consent, BLM properly takes into account any assignments it has approved effective as of the date of the request, despite the operator's contention that such assignments were not effective because the parties thereto had not notified the operator at the time the request for suspension was made in accordance with the unit operating agreement.

Piute Energy Co., 116 IBLA 1 (Aug. 23, 1990)

A determination by the Bureau of Land Management to deny a proposal for an explanatory unit will not be set aside where there has not been a definite showing that the decision was in error. A difference in opinion on the interpretation of available information is not sufficient to show error.

Benson-Montin-Greer Drilling Corp., 118 IBLA 8 (Feb. 14, 1991)

A suspension of a lease in order to allow more time for the drilling of a well cannot be authorized under 30 U.S.C. § 209 (1988), because a suspension under that section does not allow any lease activity. Nor can such a suspension be authorized under 30 U.S.C. § 226(f) (1988), when there is neither production nor a well capable of production. Where BLM has issued decisions purporting to grant suspensions and extensions of leases that are unauthorized by law, the decisions are ultra vires and have no legal effect.

Ruby Drilling Co., 119 IBLA 210 (May 8, 1991)

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS--Continued

To the extent that a unit operator is delegated with all rights of the working interest owners with respect to allocation of production, receipt by the unit operator of a notice by BLM accepting the unit operator's determination that a well completion is noncommercial constitutes constructive service of that notice on the working interest owners.

Where, under a joint Federal/State unit agreement, authority for the approval of a noncommerciality determination is vested in the authorized officer, the New Mexico Land Commissioner, or the New Mexico Conservation Commission, depending upon whether the well in question is completed on Federal, State, or private land, respectively, a notice that BLM is filing a noncommerciality determination for a well not located on Federal land "for the record" does not constitute an appealable decision under 43 CFR 4.410.

Global Natural Resources Corp., 121 IBLA 286 (Nov. 22, 1991)

A decision assessing an operator $2,500 for failure to file an APD with BLM shall be vacated where the well at issue is a development well directionally drilled from unitized fee lands and completed in unitized Federal lands, and the operator has received an approved APD from the appropriate state body.

Chevron U.S.A. Inc., 128 IBLA 146 (Jan. 13, 1994)

A proposal for vertical contraction of the Bogle Flats Unit Area could not be approved without amendment of a provision of the unit agreement that was inconsistent with the proposal because it prohibited exclusion from the unit of any part of a legal subdivision included in a participating area; since amendment of the agreement required the consent of all parties to the agreement in order to be effective, it could not be accomplished over the objection of one of the parties, and BLM therefore properly refused to approve the proposed contraction of the unit.

Chevron U.S.A. Inc., 130 IBLA 1 (July 5, 1994)

OIL AND GAS LEASES--Continued

UNITIZATION

While the authorized officer was clearly possessed of the authority under sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), to precondition approval of a unitization agreement involving a pre-FLPMA oil and gas lease upon acceptance of the application of the nonimpairment standard to lands within a WSA, where he failed to do so the Board will not retroactively impose this condition on leased lands within a WSA.

Since no express or implied rights of access arise upon issuance of a Federal oil and gas lease, the approval of the committal of a pre-FLPMA lease to a unit plan subsequent to the adoption of sec. 603(c) of FLPMA does not alter the application of the nonimpairment standard in determining whether access to the lease across other lands within the unit may be permitted.

Southern Utah Wilderness Alliance et al., 127 IBLA 331 (Oct. 19, 1993) 100 I.D. 370

A proposal for vertical contraction of the Bogle Flats Unit Area could not be approved without amendment of a provision of the unit agreement that was inconsistent with the proposal because it prohibited exclusion from the unit of any part of a legal subdivision included in a participating area; since amendment of the agreement required the consent of all parties to the agreement in order to be effective, it could not be accomplished over the objection of one of the parties, and BLM therefore properly refused to approve the proposed contraction of the unit.

Chevron U.S.A. Inc., 130 IBLA 1 (July 5, 1994)

WELL CAPABLE OF PRODUCTION

A decision holding an oil and gas lease to have expired at the end of its extended term will be affirmed in the absence of a well capable of producing oil or gas in paying quantities. Where a well on the leasehold has been found not capable of production in paying quantities as of the end of the primary term of the lease in a prior decision affirmed by the Board on appeal, a subsequent decision on remand finding the lease to have expired at the end of its extended term will be affirmed in the absence of evidence of further

OIL AND GAS LEASES--Continued

WELL CAPABLE OF PRODUCTION--Continued

development of the well during the extended term of the lease.

Jim's Water Service, Inc., 114 IBLA 1 (Mar. 29, 1990)

Where, following receipt of a 60-day notice from BLM that it does not regard an oil and gas lease as containing a well capable of producing hydrocarbons in paying quantities, the operator or lessee of such lease in an extended term by reason of production fails to present any evidence establishing the well's current potential production to produce the lease, the lease is properly declared to have terminated on account of the cessation of production.

Great Plains Petroleum, Inc., 117 IBLA 130 (Dec. 3, 1990)

Where a Federal oil and gas lease is in an extended term owing to production from wells on the lease, where BLM has given notice under 43 CFR 3107.2-2 to the lessee that those wells are no longer capable of production and allows 60 days to rework the wells, drill a new well on the leasehold, or submit justification that the lease is capable of producing in paying quantities, and where no remedial action has been taken, BLM properly issues a decision declaring that the lease has terminated by cessation of production and returns unapproved pending applications for approval of assignments of interests in that lease.

Samuel Gary Jr. & Associates, Inc., 125 IBLA 223 (Feb. 5, 1993)

OIL SHALE

GENERALLY

Where patents issued pursuant to the Act of July 17, 1914, as amended, reserve "all oil and gas and all shale or other rock valuable as a source of petroleum," that reservation is properly held to include

OIL SHALE--Continued

GENERALLY--Continued

sodium which occurs as an integral component of the reserved oil shale rock.

Shell Western E&P, Inc., 119 IBLA 125 (Apr. 22, 1991)

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS

GENERALLY

A decision to proceed with a timber sale will not be disturbed on appeal where it has not been established that there was a failure to consider relevant matters of environmental concern, such as impacts on soils, water quality, and wildlife, or that the decision was unsupported by the record or contrary to law or fact.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)

NONMINERAL ENTRIES AND DISPOSALS

A protest against an exchange of public for private land made pursuant to sec. 206 of FLPMA was properly denied when it was not established, as alleged, that the exchange would violate the Oregon and California Railroad and Reconveyed Coos Bay Grant Lands Act, statutory and regulatory requirements establishing minimum allowable value for exchange lands, or adversely affect local economies directly concerned with the exchange, or contravene the public interest. An allegation that a timber processor would be competitively disadvantaged by an exchange of a timbered tract to another timber company is found to be sufficient to establish standing to appeal from a denial of a protest against the proposed exchange but insufficient to establish that the exchange was not in the interest of the United States.

Swanson-Superior Forest Products, Inc., 127 IBLA 379 (Oct. 27, 1993)

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS--Continued

PERMITS

Use of a road on Oregon and California lands for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

Larry D. Olson, 126 IBLA 229 (May 24, 1993)

RIGHTS-OF-WAY

Use of a road on Oregon and California lands for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

Larry D. Olson, 126 IBLA 229 (May 24, 1993)

TIMBER SALES

Allowing the harvesting of timber on O&C lands does not violate the broad principle of multiple-use management governing BLM's actions under the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. §§ 1701-1784 (1988), where such land is, instead, to be managed for permanent forest production pursuant to the Act of Aug. 28, 1937, as amended, 43 U.S.C. §§ 1181a-1181f (1988).

Oregon Natural Resources Council, 116 IBLA 355 (Nov. 5, 1990)

The O&C Act makes clear that the primary use of O&C lands is for timber production to be managed in conformity with the principle of sustained yield. BLM did not err in construing the O&C Act as establishing timber production as the dominant use, notwithstanding the provisions of FLPMA calling for multiple use.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

OUTER CONTINENTAL SHELF LANDS ACT
(See also Oil & Gas Leases)

GENERALLY

The Outer Continental Shelf Lands Act requires that royalties be paid on the amount or value of the production saved, removed, or sold and requires the Secretary to conduct the leasing program so as to assure receipt of fair market value. The Secretary has authority to determine the value of production upon which royalty payments are made.

Phillips Petroleum Co., 117 IBLA 230 (Dec. 21, 1990)

When a royalty payor alleged that a request for a refund under sec. 10 of the OCSLA, 43 U.S.C. § 1339 (1988), was timely filed with the proper MMS office, but failed to corroborate timely receipt by MMS of the request by other evidence, MMS properly found that the agency's datestamp on the refund request proved that it was late.

Chevron U.S.A. Inc., 127 IBLA 96 (July 27, 1993)

OIL AND GAS LEASES

A royalty payor who has been assigned the duty to make royalty payments for production from an oil and gas lease on behalf of co-lessees and who has notified MMS of acceptance of this responsibility by filing a payor information form may be held liable for royalties due under the terms of the lease.

A decision issued to the payor after audit regarding valuation of natural gas produced from certain leases asserting gas sold was not priced in accordance with the statutory ceiling price may be set aside and remanded where the record fails to indicate the affected lessees were apprised of the basis of the revised valuation and afforded an opportunity to respond as required by the lease terms.

In the context of an appeal from a decision of MMS after audit assessing additional royalty on production from an oil and gas lease the issue is what, if any, additional royalty is due and owing to the lessor. The Board adheres to its holding in Shell Oil Co., 52 IBLA 74 (1981), and Mobil Oil Corp., 65 IBLA 295 (1982), that where an audit is made of royalty payments for an

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease revealed within the period of the audit.

Forest Oil Corp., 113 IBLA 30 (Jan. 30, 1990)
97 I.D. 11

In calculating the additional royalty owed under sec. 6(a)(9) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1335(a)(9), the Department must use the tax rates in effect in Texas and Louisiana on Aug. 7, 1953.

"Additional Royalty" under Sec. 6(a)(9) of the Outer Continental Shelf Lands Act, M-36968 (Aug. 31, 1989)
97 I.D. 49

The procedural safeguards applicable to civil penalties assessed pursuant to 30 U.S.C. § 1719 (1982), do not apply to late reporting assessments levied pursuant to 30 CFR 218.40.

The party choosing the means of delivery of a document must accept the responsibility for and bear the consequences of that choice, including the possibility of delay or nondelivery.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

The Procedure Paper on Natural Gas Liquid Products Valuation, developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1982).

Since, unless otherwise expressly provided, all royalty payments are accepted subject to audit, a subsequent determination that additional royalties are due does not give rise to a question of retroactive application of a new rule if the determination that a deficiency exists was made under the regulation applicable at the time that the payment was originally made.

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Cities Service Oil & Gas Corp., 113 IBLA 255 (Mar. 9, 1990)

A royalty valuation letter issued by Geological Survey specifically addressing royalty computation for gas delivered under a particular contract from a specific Outer Continental Shelf oil and gas lease committed to a unit does not establish the royalty base for gas production for a well subsequently completed on the lease in a non-unitized formation.

Where Geological Survey issues a royalty valuation letter determining the proper method of computing royalties owed to the United States based on the assumption that the natural gas involved is subject to price control, but the gas has in fact been decontrolled, the letter provides no basis for the computation of the amount of royalty due the United States.

Where a company's gas production from a well on an Outer Continental Shelf oil and gas lease has been valued by MMS on the basis of the highest prices paid for like-quality gas produced from other wells on the same lease, an assertion by that company that it has been treated unfairly because its gas production from the well has been valued differently than another company's production from the same well during the same period will be rejected based on MMS' explanation that it had not audited the royalty payments of the second company.

Amoco Production Co., 114 IBLA 42 (Apr. 3, 1990)

When computing the royalties for offshore oil and gas, the Minerals Management Service allows a transportation alowance for costs reasonably incurred in moving oil and gas from the point of offshore production to the first available market onshore. A transportation allowance may not be taken for the costs of storage, handling, and accounting incurred because it is necessary to accumulate sufficient condensate to meet a minimum volume required for delivery, as those costs

are related to marketing the product, i.e., to accumulating a marketable quantity of the product.

TXP Operating Co., 115 IBLA 195 (July 3, 1990)

Where Government acceptance of the tender of royalties is made subject to post audit, the mere recomputation of royalty payments due to the Government to correctly reflect fair market value of NGLPs does not constitute imposition of a penalty or give rise to an issue of retroactive application of a new rule.

A lessee's allegation that its method of valuing production from oil and gas leases is as effective at determining fair market value as the method utilized by MMS is not an adequate basis for reversal of a decision assessing additional royalties.

When, in accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, utilization of spot market prices is the proper methodology to value production and the lessee's price for natural gas liquid products is less than the minimum yardstick value, it is improper for MMS to use the average of the high and low prices in the yardstick range to determine the value of production. The yardstick minimum should be the price employed in such a situation.

Shell Offshore Inc., 115 IBLA 205 (July 3, 1990)

The regulated ceiling price of gas under the Natural Gas Policy Act (NGPA) is a relevant factor in determining the value of the gas for royalty purposes. Where an assessment of additional royalty after audit is based on a failure of the producer to file a timely application for classification of the gas under sec. 102 of the NGPA (allowing a higher ceiling price), and where the record discloses an issue of material fact concerning whether the producer knew or should have known the gas would qualify for a higher ceiling price at an earlier time, the case is properly referred for an evidentiary hearing.

Mobil Oil Corp., 115 IBLA 304 (Aug. 7, 1990)

An MMS decision denying a transportation allowance is properly affirmed to the extent that the allowance deducts line losses attributed to the transportation of royalty natural gas from the wellhead of an Outer Continental Shelf oil and gas lease to an offshore delivery point.

A transportation allowance deducting a percentage for "gas consumed" may be allowable as a deduction for "lease-use" gas. Where the record is insufficient to determine whether circumstances warrant a "lease-use" gas deduction, a decision by MMS summarily denying the allowance will be set aside and the case remanded to MMS for consideration of the extent to which the transportation allowance represents "lease-use" gas.

Arco Oil & Gas Co., 115 IBLA 393 (Aug. 21, 1990)

When, in accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, utilization of spot market prices is the proper methodology to value production and the lessee's price for natural gas liquid products is less than the minimum yardstick value, it is improper for MMS to use the average of the high and low prices in the yardstick range to determine the value of production. The yardstick minimum should be the price employed in such a situation.

A party challenging a determination as to the value of gas or other hydrocarbons produced from a Federal lease must establish that the methodology used is in fact erroneous. An appellant who alleges that because of market forces contract prices lag behind spot market prices has not established the MMS practice of using the higher of the two prices (i.e., the greater of proceeds or the spot market price) is an erroneous methodology where the relevant regulation authorizes the use of posted prices to value production, but requires that the value shall never be less than the gross proceeds.

Natural gas liquid products processed in Louisiana may properly be valued according to spot market prices for similar products in Texas.

Pursuant to 30 CFR 250.67(a)(2) (1978) MMS is authorized to utilize a value determined to be a reasonable allowance for the cost of processing natural gas liquid products, with a maximum of two-thirds,

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

unless a greater allowance is in the interest of conservation. The determination is to be based upon regional plant practices, costs, and other pertinent factors.

Federal lessees are required to bear the costs of putting oil and gas into marketable condition. Expenses incurred in storage and transportation beyond the point of first potential market are properly excluded from a lessee's manufacturing allowance despite allegations that the expenses are an "integral part" of plant operations.

MMS must provide a lessee with an adequate basis for accepting or appealing a determination of the manufacturing allowance to be utilized in royalty calculation. An MMS decision must be supported by a rational basis which is stated in the written decision and supported by the record.

Union Oil Co. of California, Union Exploration Partners, Ltd., 116 IBLA 8 (Aug. 24, 1990)

Where, as a result of a court-ordered preliminary injunction and in accordance with 30 CFR 218.154(a), MMS issues an order suspending operations on an Outer Continental Shelf oil and gas lease and directs that no payment of rental will be required during the period of suspension, and the lease anniversary date falls within the period of such suspension, the subsequent termination of the suspension by MMS triggers the requirement of 30 CFR 218.154(c) that MMS compute the prorated rental due and notify the lessee thereof. In computing that prorated rental, MMS must credit advance rentals paid for the period of time operations were suspended against future rentals.

Union Oil Co. of California, 116 IBLA 67 (Sept. 5, 1990)

Although royalty underpayments are improper by definition and may, under some circumstances, subject the payor to civil and/or criminal penalties, the issue in the context of a royalty audit is what, if any, additional royalty is due and owing to the lessor. Where an audit is made of royalty payments for an oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

revealed within the period of the audit regardless of the fact that the underpayments were intended to recoup the prior overpayments.

Forest Oil Corp. (On Reconsideration), 116 IBLA 176 (Sept. 26, 1990) 97 I.D. 239

The "Procedure Paper on Natural Gas Liquid Products Valuation," developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1988).

Since, unless otherwise expressly provided, all royalty payments are accepted subject to audit, a subsequent determination that additional royalties are due does not give rise to a question of retroactive application of a new rule if the determination that a deficiency exists was made under the regulation applicable at the time that the payment was originally made.

Where it is MMS policy to accept the Department of Energy ceiling prices for natural gas liquid products as representing fair market value for royalty purposes in certain instances, and MMS has followed that policy in a number of cases, its refusal in another case to accept those ceiling prices in favor of the monthly average spot market prices must be deemed arbitrary and capricious.

Where an oil and gas lessee sells natural gas liquid products pursuant to a non-arm's-length contract at a price below the "yardstick" valuation as derived from the "Procedure Paper on Natural Gas Liquid Products Valuation," royalty is properly assessed at the "yardstick" valuation unless the lessee can affirmatively show that its non-arm's-length contract had characteristics similar to arm's-length contracts entered into at the same time, in the same general area, and for the same product.

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Shell Offshore Inc., 116 IBLA 246 (Oct. 17, 1990)

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

Since, pursuant to the provisions of 30 CFR 206.152(a)(2) (1987), the reasonable allowance for the costs of processing natural gas liquid products was, as a general matter, to be based on "actual plant costs," the fact that other lessees were permitted a greater allowance is a legal irrelevancy so long as each lessee's allowance is based on its actual plant costs.

Where the calculation of a processing allowance involves consideration of a profit factor based on the sales values of natural gas liquid products, and where it is necessary to provide a separate extraction and fractionation allowance, the profit factor is properly computed only once in the combined extraction/fractionation allowance computation.

Where the determination of the processing allowance to be permitted for natural gas liquid products requires the separate determination of an extraction and fractionation allowance, these two allowances are properly added together to arrive at the combined processing allowance.

The "Procedure Paper on Natural Gas Liquid Products Valuation," developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1988).

Since, unless otherwise expressly provided, all royalty payments are accepted subject to audit, a subsequent determination that additional royalties are due does not give rise to a question of retroactive application of a new rule if the determination that a deficiency exists was made under the regulation applicable at the time the payment was originally made.

In the absence of acceptance of a lessee's royalty valuation as conclusive by an official authorized to bind the Department on such matters, the fact that the office of Inspector General may have conducted an audit of payments made on a lessee's behalf does not prevent the duly authorized officials from thereafter timely reviewing the lessee's original valuation and determining that royalty is still owing.

Where it is MMS policy to accept DOE ceiling prices for natural gas liquid products as representing fair market value for royalty purposes in certain instances, and MMS has followed that policy in a number of cases, its refusal in another case to accept those

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

ceiling prices in favor of the monthly average spot market price must be deemed arbitrary and capricious.

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Cities Service Oil & Gas Corp., 117 IBLA 17 (Nov 26, 1990) 97 I.D. 243

It was error to apply sec. 10(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339(a) (1988), to diminish the amount of rental refund for rentals paid for periods of lease suspension. In accordance with 30 CFR 218.154(c) (1987), MMS must credit advance rentals paid for the period of time operations were suspended against rental accruing after termination of the suspension.

Tenneco Oil Co., 117 IBLA 120 (Dec. 3, 1990)

Shell Offshore, Inc., 117 IBLA 125 (Dec. 3, 1990)

When an oil and gas lessee has sold its natural gas and paid royalty thereon based on the price specified by sec. 104 of the Natural Gas Policy Act, 15 U.S.C. § 3314 (1988), and MMS subsequently assesses additional royalty based on the lessee's alleged failure to file a timely application for classification of the gas under sec. 102 of the Natural Gas Policy Act, 15 U.S.C. § 3312 (1988), which would have allowed a higher ceiling price, the issue is whether the lessee breached its duty to market the gas by failing to seek classification of the gas at an earlier time and the Board may refer the case for an evidentiary hearing on that issue.

Phillips Petroleum Co., 117 IBLA 230 (Dec. 21, 1990)

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

MMS' Procedure Paper concerning valuation of NGLP for royalty purposes was not required to be promulgated as a regulation because it does not constitute a substantive rule of law, as it neither creates law nor changes established policy. Rather, it simply clarifies the methodology for applying the factors set forth in 30 CFR 206.150 (1985), providing internal guidance for how this authority should be exercised.

The interpretation announced by MMS in its Procedure Paper concerning valuation of NGLP did not constitute a sudden change in policy such that its application violated appellant's due process rights and was arbitrary and capricious.

When MMS adopts an agency-wide interpretation that is reasonable and consistent with the law, the Board will affirm application of that interpretation. MMS' Procedure Paper concerning valuation of NGLP comports with 30 CFR 206.150 (1985), and MMS' reliance on it does not render its actions arbitrary and capricious.

Where the Department's regulations gave fair notice that royalty was due on NGLP, and in the absence of any well-established practice at odds with that announced in a Procedure Paper concerning valuation of NGLP at the time a party paid the royalties on NGLP, there is no bar to retroactive application of the Procedure Paper.

Where a party fails to provide an offer of proof regarding arm's-length contracts for NGLP in effect during the period at issue comparing its contract with the characteristics of arm's-length contracts, the yardstick price is properly applied in lieu of the non-arm's-length contract price. The contract price, even if applied, is subject to correction to remove impermissible deductions for manufacturing costs and location differential.

In valuing NGLP for royalty computation purposes, where the NGLP was sold under a non-arm's-length contract not shown to be comparable to arm's-length contracts that represent market value, MMS may properly use published spot market prices to establish value. However, the Board will set aside an MMS decision instructing a lessee (where the reported price falls below the lowest spot market price) to use the average spot market price instead of the lowest spot market price.

Phillips Petroleum Co., 117 IBLA 255 (Jan. 10, 1991)

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

The inclusion in a transportation allowance for royalty oil of a return on capital assets based on the prime rate of interest may be sustained as reasonable, but where the date on which the prime rate is determined is inconsistent with prior applications of the rate upheld as reasonable, the case will be remanded to resolve the inconsistency.

Exxon Co., U.S.A., 119 IBLA 48 (Mar. 28, 1991)

The term "treatment," as identified in 30 CFR 250.42 (1987), is the removal or extraction of chemical impurities or contaminants that must be removed in order for the gas to be of marketable quality or to place the gas in a marketable condition. "Sour gas" is gas contaminated by hydrogen sulfide or other sulphur compounds, which must be removed before the gas can be used for commercial and domestic purposes. The sulphur contaminants are not liquid hydrocarbons, so that their removal is not "processing" under 30 CFR 206.152 (1987). Removing the hydrogen sulfide (sweetening the gas) is "treatment" within the meaning of the regulations.

The costs of "treatment" or other costs necessary to place the gas in marketable condition are not deductible or chargeable against the Federal royalty interest. It is irrelevant who performs the treatment or the activities necessary to place the gas in marketable condition, or that title may have passed from the Federal lessee prior to undertaking the activity necessary to place the gas in marketable condition. MMS' decision barring lessees from using an 88-percent price-reduction factor in the computation of royalty on natural gas will be affirmed where costs represented by the factor were incurred in the process of extraction of hydrogen sulfide (sweetening), which was necessary to place the natural gas in marketable condition.

Exxon Co., U.S.A., Chevron U.S.A., Inc., 121 IBLA 234 (Nov. 15, 1991) 98 I.D. 409

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

FERC Order No. 94 reimbursements paid to a lessee by a pipeline purchaser of gas from OCS oil and gas leases for certain production-related expenses, not included in the ceiling price for delivered gas, may be considered part of the lessee's gross proceeds for purposes of calculation of royalties. A request for a refund of royalties paid on such reimbursements may be properly denied.

Pogo Producing Co., 124 IBLA 76 (Sept. 9, 1992)

REFUNDS

In the context of an appeal from a decision of MMS after audit assessing additional royalty on production from an oil and gas lease the issue is what, if any, additional royalty is due and owing to the lessor. The Board adheres to its holding in Shell Oil Co., 52 IBLA 74 (1981), and Mobil Oil Corp., 65 IBLA 295 (1982), that where an audit is made of royalty payments for an oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease revealed within the period of the audit.

Forest Oil Corp., 113 IBLA 30 (Jan. 30, 1990)
97 I.D. 11

The offsetting of overpayments against underpayments of royalty on natural gas production from an offshore oil and gas lease may only take place after an official audit and within the royalty account of a single lease. Offsetting between leases is not permitted.

Union Exploration Partners, Ltd., 113 IBLA 186 (Feb. 15, 1990)

The Board adheres to its determination that the 2-year period afforded by 43 U.S.C. § 1339(a) (1982), in which an oil and gas lessee may seek a refund of a royalty overpayment commences to run upon the making of the payment for which a refund is requested.

"Request for repayment." In order to constitute a "request for repayment" within the meaning of

OUTER CONTINENTAL SHELF LANDS ACT--Continued

REFUNDS--Continued

43 U.S.C. § 1339(a) (1982), a document must, at a minimum, affirmatively seek a repayment of royalties tendered with respect to a specific lease.

No Government official has authority to waive the 2-year statutory time limit established by 43 U.S.C. § 1339(a) (1982), for filing a refund request for overpayment of royalties.

Conoco Inc., 114 IBLA 28 (Apr. 3, 1990)

An assessment of late payment charges for months in which a royalty payor underpaid royalties for natural gas produced and sold from an offshore oil and gas lease will be reversed where MMS approved a refund request for overpayment made during a specific time period including those months; the lease royalty account had a net surplus each month during the period; and the payments all occurred for a single lease.

Pogo Producing Co., 121 IBLA 270 (Nov. 18, 1991)

Sec. 10 of the OCSLA, 43 U.S.C. § 1339 (1988), authorizes the issuance of refunds for royalty overpayments only where the request for a refund is made within 2 years of the date that the overpayment is received.

Hamilton Brothers Oil Co., 123 IBLA 299 (June 8, 1992)

OXY USA Inc., 125 IBLA 7 (Dec. 10, 1992)

Sec. 10 of the OCSLA, 43 U.S.C. § 1339 (1988), authorizes the issuance of refunds for royalty overpayments only where the request for a refund is filed within 2 years of the making of the payment.

Shell Offshore Inc., 124 IBLA 206 (Oct. 22, 1992)

OUTER CONTINENTAL SHELF LANDS ACT--Continued

REFUNDS--Continued

A protective claim for a refund of royalties that does not state the reasons why a refund is sought, i.e., that does not state why the lessee believes royalties have been paid in excess of that required by law, is not a request for repayment within the meaning of sec. 10 of the OSCLA, 43 U.S.C. § 1339 (1988).

Mesa Operating Ltd Partnership, 125 IBLA 1 (Dec. 10, 1992)

At the time that sec. 10 of the OCSLA, 43 U.S.C. § 1339, was enacted, Congress could not have contemplated that a routinized, automated process later would be established by rule under OCSLA's authority for adjusting transportation and processing allowances for relatively small amounts. Recoupments that result from adjustments to transportation and processing allowances under the procedure prescribed in the regulations are within the intent of Congress in enacting sec. 10, and this category of transactions should not be regarded as subject to sec. 10.

Applicability of Sec. 10 of the Outer Continental Shelf Lands Act, M-36977 (Jan. 15, 1993) 100 I.D. 418

When a royalty payor alleged that a request for a refund under sec. 10 of the OCSLA, 43 U.S.C. § 1339 (1988), was timely filed with the proper MMS office, but failed to corroborate timely receipt by MMS of the request by other evidence, MMS properly found that the agency's datestamp on the refund request proved that it was late.

Chevron U.S.A. Inc., 127 IBLA 96 (July 27, 1993)

The offsetting of royalty overpayments against underpayments from an offshore oil and gas lease may only take place after an official audit and within the royalty account of a single lease. Offsetting between leases is not permitted.

Where a policy to restrict the offset of royalty overpayments against underpayments is the product of

OUTER CONTINENTAL SHELF LANDS ACT--Continued

REFUNDS--Continued

adjudication, the notice and comment procedures of 5 U.S.C. § 553 (1988), are not required.

Union Exploration Partners, Ltd., 127 IBLA 220 (Sept. 23, 1993)

Sec. 10(c) of OCSLA, 43 U.S.C. § 1339(a) (1988), authorizes the issuance of refunds for royalty overpayments only where the request for a refund is made within 2 years of the date that the overpayment is made. A subsequent court ruling on the liability of Federal lessees for royalty on take-or-pay proceeds will not extend the statutory time for filing a request for refund.

Sec. 10(a) of OCSLA, 43 U.S.C. § 1339(a) (1988), expressly bars the Department from paying interest on refunds for royalty overpayments.

Amerada Hess Corp., 128 IBLA 94 (Dec. 13, 1993)

STATE LEASES

Generally

The holder of oil and gas leases issued for lands on the Outer Continental Shelf by the State of Louisiana and maintained under sec. 6 of the Outer Continental Shelf Lands Act must pay royalties in accordance with the provisions of the original State leases. Where the leases were issued on the 1942 Louisiana State lease form, which provides that the lessee pay to the lessor "sums equal to the value * * * at the well [of one-eighth of all gas produced and saved or utilized], provided no gathering or other charges are made chargeable to lessor," the lessee is not permitted to deduct transportation allowances from the amount on which royalty is calculated.

Exxon Co., U.S.A., 118 IBLA 30 (Feb. 21, 1991)

PATENTS OF PUBLIC LANDS

GENERALLY

A railroad patent to the State of Michigan describing "all of section one" does not convey an unsurveyed island within the meander lines of a lake, whether navigable or non-navigable, located within sec. 1, and the United States may properly survey such island.

Northern Michigan Exploration Co., 114 IBLA 177 (Apr. 23, 1990) 97 I.D. 171

When locations and lines established by an official Government survey are identified, they are conclusive, and the corner of a Government subdivision is where the United States surveyors in fact established it, whether such location is right or wrong. Where, as a result of two independent surveys, a hiatus was created between the south line of one township and the north line of the adjoining township, such hiatus was not included in patents to lands in either township but remains public land subject to survey.

Joie Osgood, 117 IBLA 204 (Dec. 21, 1990)

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and the actual water line is deemed to be the omitted land and the property of the United States.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

PATENTS OF PUBLIC LANDS--Continued

GENERALLY--Continued

A patentee takes title to land described in his patent, as surveyed on the ground at the time of patent. A successor-in-interest to a portion of land conveyed will not be permitted to overturn the dependent resurvey of the boundaries of the patent on the basis that the description in the patent encompassed other or different land than the land intended to be patented.

Lorna L. Boykin, Reynold L. Allgood, 130 IBLA 301 (Aug. 31, 1994)

CORRECTIONS

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has the authority to correct factual errors in patent documents at any time correction is deemed necessary or appropriate. However, only mistakes of fact may be corrected, not mistakes of law, and where a patent holder applies to have a patent corrected to eliminate an easement, that application was not erroneously included in the patent on the basis of a mistake of fact.

BLM has the authority to initiate and make corrections to a patent on its own motion, if all existing owners agree. Where the State of Alaska has an interest in the patent due to the inclusion of an easement for its benefit and, as such, is a concerned administrative agency, its objection to the reduction of the width of the easement in the patent precludes BLM from changing the patent on its own motion.

Lloyd Schade, State of Alaska, 116 IBLA 203 (Oct. 4, 1990)

The authority to amend conveyancing documents described at 43 U.S.C. § 1746 (1988), and 43 CFR Subpart 1865, does not include authority to amend a tentative approval which legislatively conveyed selected land to the State of Alaska, unless the State requests the amendment or concurs.

Northwest Alaska Pipeline Co. (On Reconsideration III), 9 OHA 143 (Mar. 24, 1992)

PATENTS OF PUBLIC LANDS--Continued

CORRECTIONS--Continued

To show entitlement under 43 U.S.C. § 1746 (1988), to the extraordinary remedy of correction of a mineral patent, an applicant must show both that there was an error in fact that requires correction and that considerations of equity and justice favor such correction. A purchaser of a tax deed to a mineral patent failed to make a sufficient showing to warrant correction of the patent when the evidence offered to show error in the patent was inconclusive and he failed to show that equity favored granting his application.

Frank L. Lewis, 127 IBLA 307 (Oct. 7, 1993)

EFFECT

Upon issuance of a mineral patent for a mining claim in a wilderness area in a National Forest, fee simple title to the land described in the patent passes to the patentee. The land is private land, no longer subject to the mining laws, and the Bureau of Land Management has no authority to entertain challenges to regulation of surface uses of other land under Forest Service jurisdiction.

Virgil Horn, Marcella Horn, 117 IBLA 10 (Nov. 21, 1990)

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

Where the description of land in a patent issued under the Act of Mar. 3, 1851, 9 Stat. 631, differs from the description used in the decree of confirmation, the description in the patent controls over the description in the decree of confirmation, particularly where the

PATENTS OF PUBLIC LANDS--Continued

EFFECT--Continued

initial Mexican concession was determined to be a grant of quantity rather than a grant of description.

State of California et al., 121 IBLA 73 (Oct. 28, 1991)
98 I.D. 321

When a patent is issued, title to the lands is transferred from the United States, and the Department of the Interior no longer has jurisdiction to adjudicate the right of private parties to the land.

Eddie S. Beroldo, Robert L. Miller, Jo Ann Miller, 123 IBLA 156 (May 28, 1992)

RESERVATIONS

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has the authority to correct factual errors in patent documents at any time correction is deemed necessary or appropriate. However, only mistakes of fact may be corrected, not mistakes of law, and where a patent holder applies to have a patent corrected to eliminate an easement, that application was not erroneously included in the patent on the basis of a mistake of fact.

BLM has the authority to initiate and make corrections to a patent on its own motion, if all existing owners agree. Where the State of Alaska has an interest in the patent due to the inclusion of an easement for its benefit and, as such, is a concerned administrative agency, its objection to the reduction of the width of the easement in the patent precludes BLM from changing the patent on its own motion.

Lloyd Schade, State of Alaska, 116 IBLA 203 (Oct. 4, 1990)

PATENTS OF PUBLIC LANDS--Continued

RESERVATIONS--Continued

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

Where patents issued pursuant to the Act of July 17, 1914, as amended, reserve "all oil and gas and all shale or other rock valuable as a source of petroleum," that reservation is properly held to include sodium which occurs as an integral component of the reserved oil shale rock.

Shell Western E&P, Inc., 119 IBLA 125 (Apr. 22, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)
98 I.D. 398

Under Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), gravel is a mineral reserved to the U.S. by sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1988). When an Indian tribe receives title to minerals reserved under this provision, it receives title to the reserved gravel.

Sampsel J. Bitz v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 286 (Apr. 6, 1993)

PATENTS OF PUBLIC LANDS--Continued

SUITS TO CANCEL

The Department is barred by provision of 43 U.S.C. § 1166 (1988), from challenging the sufficiency of a patent issued to the widow of a homestead entryman in 1881, since more than 6 years have passed after the patent issued.

George H. Ruth, Robert E. Tudor, 121 IBLA 31 (Oct. 10, 1991)

The Department may consider a request to reinstate a relinquished Native allotment application for land which has been either patented or made part of an interim conveyance to a Native corporation. If the record shows that the possibility exists that the applicant involuntarily and unknowingly relinquished the application in whole or in part, or was fraudulently induced to do so, he is entitled an evidentiary hearing. If the relinquishment was not knowing and voluntary or was fraudulently procured, the Department may reinstate the application to adjudicate its validity prior to recommending the instigation of judicial proceedings to cancel conflicting interests in the land.

Heir of Frank Hobson (On Reconsideration), 120 IBLA 66 (Oct. 25, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)
98 I.D. 398

PAYMENTS
(See also Accounts)

GENERALLY

A company check for oil and gas lease bid deposit is not an acceptable form of remittance under 43 CFR 3120.4-1 (1987), which requires remittances to be submitted in the form specified in the competitive sale notice, where that notice requires bidders to submit a bid deposit "by guaranteed remittance, i.e., cash, cashier's check, or money order."

Gulf States Petroleum, Inc., 113 IBLA 55 (Jan. 31, 1990)

MMS is authorized to impose a late payment charge when it determines that a royalty payor has failed to pay timely the proper amount of royalty due on the value of the production of wet gas.

Phillips Petroleum Co., Phillips 66 Natural Gas Co., 121 IBLA 278 (Nov. 19, 1991)

Where royalty payments due on Federal oil and gas leases are not received by the Department on the date that such payments are due, or are less than the amount due, the Department is required by statute to charge interest on such late payments or underpayments. The MLA provides that interest charges collected on late payments under FOGRMA shall be paid into the Treasury of the United States, and that 50 percent thereof shall be paid by the Secretary of the Treasury to the State within the boundaries of which the leased land or deposits are located. The statute clearly contemplates that the lessee must pay all royalties, including those that will ultimately be paid to the State, into the U.S. Treasury. The Board of Land Appeals is bound to follow such statute and is not at liberty to consider whether interest may be forgiven based upon equitable considerations.

Wexpro Co., 122 IBLA 1 (Dec. 26, 1991)

PAYMENTS--Continued

GENERALLY--Continued

Under provision of Departmental regulation 30 CFR 206.152(j), it is a defense to a claim for late payment interest charges that a lessee exercised reasonable business judgment when payment was initially made, albeit that future events caused a deficit in the payment to occur. While 30 CFR 206.152(j) was not in effect in 1986 when the payment at issued was made, it is Departmental policy to give effect to policy changes in pending cases when to do so would not operate to the detriment of any party.

If a Federal lessee contends that the policy established by 30 CFR 206.152(j) should be applied to determine whether late payment charges are owed for royalty payments made before contract modification increased product valuation, the lessee must document that reasonable measures were timely taken to obtain settlement. The burden to show entitlement to the benefit of the regulation rests with the lessee, and the fact that a favorable settlement was ultimately reached is not enough, alone, to establish that reasonable measures were timely taken so as to excuse late payment charges, where payment at the lower rate continued for 3 years pending resolution of the valuation dispute.

Anadarko Petroleum Corp., 123 IBLA 361 (July 21, 1992)

PHOSPHATE LEASES AND PERMITS
(See also Mineral Leasing Act)

GENERALLY

A BLM decision denying as untimely a protest of the approval of a phosphate prospecting permit application without any no-surface occupancy stipulations will be affirmed where approval occurred by decision 3 years prior to the filing of the protest, the appellant had knowledge of the approval, and the appellant did not appeal the earlier approval.

Chevron Chemical Co., F.S. Industries, Ltd., 131 IBLA 132 (Oct. 25, 1994)

POTASSIUM LEASES AND PERMITS
(See also Mineral Leasing Act)

LEASES

Readjustment of a potassium lease is an event that occurs at the end of the lease term and may signal new minimum royalty requirements, depending upon regulations in force at the time of readjustment.

A decision to readjust the annual minimum royalty payable for a potassium lease to $3 per acre will be affirmed where the regulation in effect at readjustment provided for a minimum $3 royalty for leases readjusted after the effective date of the regulation. For leases readjusted before the effective date of the regulation authorizing the $3 rate however, the royalty was correctly set at $2, as provided by regulations then in effect.

Texasgulf, Inc., 114 IBLA 66 (Apr. 6, 1990)

ROYALTIES

It is proper for MMS to assess the full amount of the minimum royalty in lieu of production from a potassium lease for the calendar year in which the lease relinquishment was filed, without pro-rata reduction.

Earth Sciences, Inc., 123 IBLA 369 (July 23, 1992)

POWERSITE LANDS

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened certain powersites to entry under the mining laws. Mining claims located after the enactment of that legislation are properly made subject to its restrictions.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

POWERSITE LANDS--Continued

Where Congress has provided in 16 U.S.C. § 818 (1982), that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to 43 U.S.C. § 1610 (1982), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

North Coast Development Co., 115 IBLA 301 (Aug. 6, 1990)

Conveyance of lands previously withdrawn under the authority of sec. 24 of the Federal Power Act, 16 U.S.C. § 818 (198), to a Native village pursuant to a selection made under the provisions provided by sec. 24 (1988), was subject to reservations provided by sec. 24 of the Federal Power Act.

Alaska Power Administration, 119 IBLA 301 (June 11, 1991)

The Secretary has determined that lands involved in powersites were withdrawn by sec. 11(a)(1) of ANSCA, 43 U.S.C. § 1610(a)(1) (1988), and are selectable by Native corporations without the reservation provided under sec. 24 of the Federal Power Act, 16 U.S.C. § 818 (1988). This determination applies to lands within previously opened powersites and to land remaining in powersite withdrawals when ANCSA was enacted.

Alaska Power Administration (On Reconsideration), 123 IBLA 109 (May 18, 1992)

Locators of claims on land opened under 30 U.S.C. § 621(a) (1988), have been required by 30 U.S.C. § 623 (1988), to file copies of their location notices with BLM within 1 year after Aug. 11, 1955, for all locations previously made, or within 60 days of location for locations thereafter made.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1988), authorizes the location and patent of mining claims on public lands withdrawn for

POWERSITE LANDS--Continued

power purposes. However, the Department may hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land and may issue an order providing for one of the following three alternatives: (1) a complete prohibition on placer mining; (2) permission to engage in placer mining upon the condition that the locator shall restore the surface of the claim; or (3) a general permission to engage in placer mining.

Where a copy of the notice of location of a mining claim on land withdrawn for powersite purposes was not recorded with BLM within the time prescribed by 30 U.S.C. § 623 (1988), a notice of intent from BLM to conduct a hearing under sec. 621(b) will not be considered untimely if the notice of intent was issued within 60 days after receipt of some affirmative acknowledgement by the owner of the claim that the claim was subject to that provision of the Act.

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1988), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits from other uses.

In making a determination whether placer mining operations would substantially interfere with other uses of powersite lands, the party who seeks to restrict or prohibit placer mining bears the initial burden of presenting a prima facie case. The burden then shifts to the mining claimant to overcome the case so proved by a preponderance of the evidence.

United States v. Phyrne Brown, 124 IBLA 247 (Nov. 2, 1992)

BLM properly declared placer mining claims partially null and void ab initio that included land which, at the time of location, was subject to a license for a power project under a powersite withdrawal and was therefore closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, as amended, 30 U.S.C. § 621(a) (1988).

Bob & Kayla Alejandre, 125 IBLA 104 (Jan. 12, 1993)

POWERSITE LANDS--Continued

Evidence produced at a hearing held pursuant to the MCRRA, 30 U.S.C. § 621 (1988), established that placer mining on land subject to a powersite withdrawal would interfere with recreational use of the land and that the benefits of mining were outweighed by the benefits derived from recreational use; an order prohibiting placer mining on the claim was therefore properly entered.

United States v. Robert G. McEwen, 129 IBLA 99 (Apr. 7, 1994)

A mining claim located on land within an outstanding preliminary permit issued pursuant to the Federal Power Act is properly declared null and void ab initio.

Charles Q. Cassella et al., 130 IBLA 338 (Sept. 13, 1994)

PRACTICE BEFORE THE DEPARTMENT
(See also Rules of Practice)

GENERALLY

Practice before the Board of Land Appeals is controlled by 43 CFR 1.3. An appeal brought by a person who does not qualify to practice under one of the provisions is subject to dismissal. The person filing an appeal has the responsibility of showing that he is qualified under the regulation.

Robert A. Perkins, 119 IBLA 375 (June 28, 1991)

PERSONS QUALIFIED TO PRACTICE

An appeal brought by a person who does not qualify to practice under 43 CFR 1.3 is subject to dismissal. A person filing an appeal has the responsibility of showing that he is qualified under the regulation to represent the appellant.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)

PRACTICE BEFORE THE DEPARTMENT--Continued

PERSONS QUALIFIED TO PRACTICE--Continued

An appeal brought by a person who has not shown that he is qualified under 43 CFR 1.3 to represent the party issued and adversely affected by a trespass notice is properly dismissed.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

Practice before the Interior Board of Land Appeals is controlled by 43 CFR 1.3. To the extent it is brought by a person who does not fall within any of the categories of persons authorized to practice by 43 CFR 1.3, an appeal is subject to dismissal.

High Plains Petroleum Corp., 125 IBLA 24 (Dec. 29, 1992)

A notice of appeal signed by an individual on behalf of other parties (two associations and two individuals) is not a valid notice of appeal as to those other parties unless the signer is authorized to represent them. Where the signer is neither an attorney, an officer in the associations, nor a family member of the individuals, the signer does not meet the criteria allowing her to practice before the Department on their behalf, and the notice of appeal is properly dismissed as to the parties that she is not authorized to represent.

Audubon Society of Portland et al., 128 IBLA 370 (Mar. 11, 1994)

PRIVATE LAND CLAIMS

GENERALLY

Where the description of land in a patent issued under the Act of Mar. 3, 1851, 9 Stat. 631, differs from the description used in the decree of confirmation, the description in the patent controls over the description in the decree of confirmation, particularly where the

PRIVATE LAND CLAIMS--Continued

GENERALLY--Continued

initial Mexican concession was determined to be a grant of quantity rather than a grant of description.

State of California et al., 121 IBLA 73 (Oct. 28, 1991) 98 I.D. 321

PROPERTY BOARD OF SURVEY

GENERALLY

Interior Department employees are bound by the provisions of the Departmental Manual regardless of a lack of actual notice. A lack of knowledge of a provision in the Departmental Manual making employees liable for Government property loss or damage caused by negligence will not preclude a finding of liability where otherwise supported by the record.

In the Matter of Joseph Hoffman, 10 OHA 40 (June 30, 1993)

ADMINISTRATIVE PROCEDURES

Where no material facts are at issue, a plenary, adversary administrative hearing is unnecessary.

In the Matter of Dennis E. Hutchison, 10 OHA 56 (June 30, 1993)

JURISDICTION

An appeal from a Property Board of Survey decision within the Interior Department finding an employee liable for loss or damage to Government property caused by his negligence is properly reviewed by an Ad Hoc Appeals Board within OHA pursuant to the regulations at 43 CFR 4.700-4.704.

In the Matter of Joseph Hoffman, 10 OHA 40 (June 30, 1993)

PROPERTY BOARD OF SURVEY--Continued

JURISDICTION--Continued

Effective Sept. 23, 1992, appeals of a Board of Survey's finding of simple or gross negligence are decided by an Ad Hoc Board of Appeals in OHA. A motion to dismiss a proposed debt collection and to cancel a hearing for failure to satisfy the provisions of 370 DM 550,10.7J is properly denied where no effort to recover a debt by salary offset has been made by the Department. Only those appeals specifically reserved to the Debt Collection Act, 5 U.S.C. § 5514 (1988), are processed under 370 DM 550.

In the Matter of Marco V. Ricciardi, 10 OHA 78 (June 30, 1993)

NEGLIGENCE

Missing Property

Simple negligence is defined at 410 DM 114-60.812-1 as an act or omission of an employee who fails to exercise the degree of care, precaution, attention, and vigilance necessary to protect the interests of the Government or the failure to exercise that degree of care which a prudent person would exercise under like circumstances.

A finding of negligence is not supported by a record which shows that a pair of binoculars was lost by a BLM soils scientist during field work in thick vegetation, and such binoculars had been looped through a grommet in the employee's vest.

In the Matter of Dennis E. Hutchison, 10 OHA 56 (June 30, 1993)

Personal Property Release No. 92-07 requires a Board of Survey, in assembling a case record for appeal, to give particular attention to evidence of the standard of conduct found to be breached. A decision finding a law enforcement officer negligent for taking inadequate security measures in storing a revolver, later stolen, will be set aside when the record contains no evidence of the standard found to be breached. A finding of

PROPERTY BOARD OF SURVEY--Continued

NEGLIGENCE--Continued

Missing Property--Continued

negligence must be supported by logical written determinations.

In the Matter of Thomas F. Wharton, 10 OHA 67 (June 30, 1993)

Motor Vehicle

Under the terms of the Departmental Manual, Interior Department employees may be liable for property loss or damage caused by failure to exercise the degree of care which a prudent person would exercise under like circumstances. In the absence of mitigating factors, the driver of a vehicle who backs into a parked vehicle may be held liable for actual damage limited to the amount of $200.

In the Matter of Joseph Hoffman, 10 OHA 40 (June 30, 1993)

An individual who starts the ignition of a pickup truck while standing outside the cab of the vehicle, thereby causing the pickup to lurch backwards and be damaged, is negligent and is properly held liable for such damage, as limited by 410 DM 114-60.812-6(b).

In the Matter of Michael P. Ramirez, 10 OHA 51 (June 30, 1993)

Regulation 410 DM 114-60.812-1(b)(2) defines negligence as an act or omission of an employee who fails to exercise the degree of care, precaution, attention, and vigilance necessary for protecting the interests of the Government or the failure to exercise that degree of care which a prudent person would exercise under like circumstances.

An officer of the U.S. Park Police whose Force vehicle strikes a gate stop post while making a "K" turn onto the road shoulder in an effort to avoid a

PROPERTY BOARD OF SURVEY--Continued

NEGLIGENCE--Continued

Motor Vehicle--Continued

parked vehicle blocking the Force vehicle will not be found negligent when the officer had checked to see whether such turn could be made and the size and color of the gate stop post and the poor illumination of the area reduced the visibility of such post.

Lawrence J. McNally, 10 OHA 72 (June 30, 1993)

Regulation 410 DM 114-60.812-1(b)(2) defines negligence as an act or omission of an employee who fails to exercise the degree of care, precaution, attention, and vigilance necessary for protecting the interests of the Government or the failure to exercise that degree of care which a prudent person would exercise under like circumstances.

An officer of the U.S. Park Police who backs a motor vehicle into a utility pole will not be found negligent where such action occurred in the course of his duties under conditions of darkness, constant rain, lack of illumination, and possible design hazard, and it appears that the officer was exercising reasonable care in his driving when impact with the utility pole occurred.

In the Matter of Marco V. Ricciardi, 10 OHA 78 (June 30, 1993)

PUBLIC LANDS
(See also Accretion, Avulsion, Boundaries, Reliction, Surveys of Public Lands)

GENERALLY

An island, whether located in navigable or nonnavigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

Mr. & Mrs. Thomas J. Dekker, 114 IBLA 302 (May 10, 1990)

PUBLIC LANDS--Continued

GENERALLY--Continued

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and the actual water line is deemed to be the omitted land and the property of the United States.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

The Secretary of the Interior is authorized and obligated to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States. An island, whether located in navigable or nonnavigable waters, that is omitted from a public land survey remains public land and may be surveyed and disposed of by the United States.

In determining whether a land mass was an island omitted from an original public land survey, the inquiry focuses on the existance and condition of the land at the time of the original survey. Evidence concerning its condition at later times is relevant only to the extent it reflects on the status of the land at the critical time.

Exxon Corp., et al. v. Bureau of Land Management, 118 IBLA 38 (Feb. 21, 1991)

The decision to sell mineral materials is discretionary. When BLM considers relevant factors and concludes that removal of boulders from an area classified as Category I desert tortoise habitat would cause adverse impacts on the tortoise habitat which cannot be mitigated, BLM may properly reject an application for sale of the boulders.

Glenn B. Sheldon, 128 IBLA 188 (Feb. 8, 1994)

PUBLIC LANDS--Continued

GENERALLY--Continued

A BLM decision rejecting a protest of issuance of an oil and gas lease based on asserted ownership of the oil and gas rights will be affirmed where the public land records reflect title did not pass out of Federal ownership until 1964 when patent issued under the Color of Title Act, as amended, 43 U.S.C. §§ 1068-1068b (1988), reserving the oil and gas rights to the United States.

Esmer French, 129 IBLA 301 (May 24, 1994)

ADMINISTRATION

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

Imposition of an assessment to compel compliance with regulations implementing the Mineral Leasing Act is an exercise of the Department's regulatory power which is not stayed by the filing of a bankruptcy petition by an oil and gas lessee or operator.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

An appellant bears the burden of showing error in a BLM decision denying approval of a mining plan of operations. Unsubstantiated allegations of error do not satisfy this burden.

The fact that BLM does not intend to propose a WSA for inclusion in the wilderness system does not alter BLM's obligation to manage lands within the WSA in a manner that will not impair the land's suitability for preservation as wilderness. BLM must continue to manage the land under the nonimpairment standard established by statute until the lands are removed from the WSA.

A BLM determination that a proposed plan of operations for mining activities on unpatented mining claims located within a WSA would impair the area's suitability

PUBLIC LANDS--Continued

ADMINISTRATION--Continued

for inclusion in the wilderness system is sufficient reason for denying approval of the proposed mining plan.

Robert L. Baldwin, Sr., & E. Rose Baldwin, 116 IBLA 84 (Sept. 17, 1990)

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

A BLM decision to implement a RMP by reintroducing pronghorn antelope onto public lands pursuant to a cooperative agreement with the State will be affirmed on appeal if the decision is based on a consideration of all relevant factors, including the threat of damage to adjacent private land resources, and is supported by the record, absent a showing of clear reasons for modification or reversal.

Lands of Sierra, Inc., 125 IBLA 15 (Dec. 17, 1992)

PUBLIC LANDS--Continued

ADMINISTRATION--Continued

A BLM decision to implement a management plan by closing part of a road on public lands in a recreation area to motor vehicle use in order to promote other recreational activities beyond the closure point will be affirmed where the decision was made after a reasoned analysis of all relevant factors, including the impact of closure on the human environment and alternatives to closure, and where the decision is supported by the record, and there has been no showing of compelling reasons for modification or reversal of the decision.

Larry Griffin, 126 IBLA 304 (June 15, 1993)

When the boundary of a WSA excluding mining operations conducted before Oct. 21, 1976, is uncertain, it is appropriate to set aside the portion of a BLM decision requiring reclamation of slopes in the mined area and remand the matter for a delineation of the boundary.

Ceminex, Ltd., 129 IBLA 64 (Mar. 25, 1994)

A BLM decision to implement a wild and scenic river management plan including a FONSI decision will be affirmed on appeal if the decision is based on a consideration of all relevant factors, including an evaluation of the impacts on fisheries resources, is supported by the record, and accords with statutory directives, absent a showing of clear reasons for modification or reversal.

A party challenging a FONSI finding must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Steamboaters, Oregon Rivers Council & Oregon Trout, Inc., Douglas County (Intervenor), 131 IBLA 223 (Nov. 17, 1994)

PUBLIC LANDS--Continued

ADMINISTRATION--Continued

A BLM decision notifying a claimant that continued occupancy of mining claims is unauthorized, requiring reclamation of the site, and demanding the removal of a mobile home, generators, and other personal property from mining claims because the property is located within a WSA is properly affirmed where the IMP provides that any temporary impacts must be removed and reclaimed by June 30, 1989, the date the Secretary was scheduled to send his recommendation on that WSA to the President.

Virgil Schuette, 131 IBLA 332 (Dec. 22, 1994)

CLASSIFICATION

The Federal District Court injunction issued in National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), cert. granted sub nom., Lujan v. National Wildlife Federation, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990) (No. 89-640), is without effect as to land for which BLM issued a purported Oct. 29, 1981, termination of classification, when the classification had in fact automatically terminated pursuant to sec. 4 of the Classification and Multiple Use Act of 1964 prior to the effective date of the injunction.

Pursuant to the Classification and Multiple Use Act of 1964 the segregative effect of a disposal classification for a tract of land larger than 2,500 acres terminated automatically 2 years after publication of the notice of proposed classification, unless a continuance was obtained. This Board will not apply the "notation" or "tract book" rule in a manner which thwarts this clear congressional intent.

Phelps Dodge Corp., 115 IBLA 214 (July 3, 1990)

A BLM decision declaring lode mining claims null and void ab initio because they were located on land withdrawn by the President on Oct. 12, 1910, pursuant to sec. 1 of the Act of June 25, 1910, ch. 421, 36 Stat. 847, will be reversed if it cannot be shown that the claims were located solely for nonmetalliferous minerals.

A BLM decision declaring lode mining claims null and void ab initio because they were located on land

PUBLIC LANDS--Continued

CLASSIFICATION--Continued

subject to a Nov. 23, 1910, GLO coal-land classification order will be set aside if BLM has not afforded the claimant an opportunity to dispute the coal-land classification.

Jonathan Z. Herod et al., 121 IBLA 339 (Dec. 13, 1991)

BLM properly rejected a desert land entry application for lands that were classified unsuitable for agricultural development by a final order of the Secretary of the Interior.

Keith P. Gunderson, 127 IBLA 16 (July 12, 1993)

DISPOSALS OF

Generally

The Federal District Court injunction issued in National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), cert. granted sub nom., Lujan v. National Wildlife Federation, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990) (No. 89-640), is without effect as to land for which BLM issued a purported Oct. 29, 1981, termination of classification, when the classification had in fact automatically terminated pursuant to sec. 4 of the Classification and Multiple Use Act of 1964 prior to the effective date of the injunction.

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Phelps Dodge Corp., 115 IBLA 214 (July 3, 1990)

PUBLIC LANDS--Continued

DISPOSALS OF--Continued

Generally--Continued

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and the actual water line is deemed to be the omitted land and the property of the United States.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

The Secretary of the Interior has the discretionary authority to grant an application to purchase public lands under the Recreation and Public Purposes Act, 43 U.S.C. §§ 869 to 869-4 (1988). A decision rejecting such an application for land to be used as a bicycle rest area will be set aside where BLM fails to provide a rational basis for its determination that the proposed use of the land as shown in the development and management plans for the project does not justify disposal of the land to appellant.

The City of Chico, 119 IBLA 136 (Apr. 23, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)
98 I.D. 398

PUBLIC LANDS--Continued

JURISDICTION OVER

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

The Tribal aboriginal title of the Western Shoshone has been extinguished pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 1055 (1946).

Western Shoshone Nat'l Council, 130 IBLA 69 (July 26, 1994)

LEASES AND PERMITS

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

RIPARIAN RIGHTS

An unsurveyed island, whether located in navigable or non-navigable waters, remains public domain, does not pass with the bed under the water to a state upon statehood or convey with a grant of riparian land, and may be surveyed and disposed of by the United States.

Northern Michigan Exploration Co., 114 IBLA 177 (Apr. 23, 1990) 97 I.D. 171

PUBLIC LANDS--Continued

RIPARIAN RIGHTS--Continued

An island, whether located in navigable or non-navigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

Mr. & Mrs. Thomas J. Dekker, 114 IBLA 302 (May 10, 1990)

The Secretary of the Interior is authorized and obligated to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States. An island, whether located in navigable or nonnavigable waters, that is omitted from a public land survey remains public land and may be surveyed and disposed of by the United States.

In determining whether a land mass was an island omitted from an original public land survey, the inquiry focuses on the existance and condition of the land at the time of the original survey. Evidence concerning its condition at later times is relevant only to the extent it reflects on the status of the land at the critical time.

Exxon Corp., et al. v. Bureau of Land Management, 118 IBLA 38 (Feb. 21, 1991)

SPECIAL USE PERMITS

"Providing an unauthorized trip." Where the holder of a special recreation permit for commercial use of a wild and scenic river, during the 1987 period of regulated use of the river, put boats into the water on the day of a scheduled river trip, but did not load passengers and begin the scheduled trip downriver until 2 days later, the trip was unauthorized as that term is used by an operating plan governing such excursions.

The holder of a special recreation permit for commercial use on a wild and scenic river may be required to forfeit two scheduled trips where it is established the permittee provided an unauthorized trip by starting a trip on an unscheduled date without reporting his

PUBLIC LANDS--Continued

SPECIAL USE PERMITS--Continued

departure as required by an operating plan made part of his permit.

Galand Haas, 114 IBLA 198 (Apr. 24, 1990)

If a party protests and refuses to comply with a requirement that is found to be incorrect on review, he is not subject to sanctions for not complying. Thus, where a special use permittee refuses to pay use fees and demands a deduction, he is not subject to sanctions for failure to pay timely if BLM allows his request for deduction.

A decision by BLM to suspend special use permits will be affirmed where a special use permittee violates the terms of his permit by failing to provide BLM with timely trip logs containing relevant trip data and by failing to report in writing an accident in which a person suffered an injury requiring medical attention beyond first aid, and where the permit expressly provides for suspension of the permits and the procedural steps set out in the stipulation and substantially followed.

A BLM decision suspending yearly special use permits issued for commercial river rafting is properly reversed insofar as it purports to affect a period beyond the expiration date of the permits.

Patrick G. Blumm, dba Rio Grande Rapid Transit, 116 IBLA 321 (Oct. 29, 1990)

A party seeking a waiver of fees due for a special recreation permit is not barred from receiving the waiver simply because it is engaged in "commercial use" as that term is defined in the regulations. Rather, the party may receive the waiver if it meets the criteria set out in 43 CFR 8372.4(c)(1) and (2).

Pacific Crest Outward Bound School, 117 IBLA 309 (Jan. 23, 1991)

PUBLIC LANDS--Continued

SPECIAL USE PERMITS--Continued

Issuance of a special recreation permit for off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impact to cultural resources was carefully considered, routes were altered accordingly, and protective stipulations were attached to the permit.

A finding of no significant environmental impact associated with a special recreation use permit for an off-road vehicle tour may be affirmed where the record establishes that BLM took a "hard look" at the environmental impacts of the activity authorized by the permit, considered reasonable alternatives, and applied mitigating measures to avoid significant adverse environmental impacts.

Owen Severance et al., 118 IBLA 381 (Mar. 15, 1991)

The issuance of special use permits is discretionary, and BLM may properly reject a permit application for an organized off-road motorcycle event when there is evidence that the event would result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the impacted public lands.

American Motorcycle Ass'n, District 37, 119 IBLA 196 (May 7, 1991)

BLM properly refused to accept an assignment of record title to an oil and gas lease filed on a form previously declared obsolete by the Director, BLM, by notice published in the Federal Register pursuant to Departmental regulation 43 CFR 3106.4-1.

E. Barger Miller, III, 120 IBLA 177 (July 26, 1991)

PUBLIC LANDS--Continued

SPECIAL USE PERMITS--Continued

The regulations governing special recreation permits do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. A decision by a BLM Area Office adversely affecting a party to a case is subject to immediate appeal to the Board of Land Appeals under 43 CFR 4.410(a).

The issuance of a special recreation use permit is discretionary, and, where necessary to avoid adverse impacts on wildlife, BLM may restrict use on the Rio Grande River during the period it is revising a management plan for the river, by issuing a limited number of special recreation permits. Where appellant does not show that the authorized officer's decision was unreasonable, BLM's decision will be affirmed.

Patrick G. Blumm, dba Rio Grande Rapid Transit, 121 IBLA 169 (Oct. 31, 1991)

The Board will not substitute its judgment for that of the duly authorized BLM official exercising discretion to reject a special recreation permit application on the ground that it conflicts with BLM objectives, responsibilities, or program for management of the public lands involved where the facts of record support the decision. However, where two criminal convictions which were substantially relied upon as a basis for the BLM decision are reversed on appeal subsequent to the BLM decision, and the record contains little factual detail of the basis for rejection, the case is properly remanded.

Red Rock Hounds, Inc., 123 IBLA 314 (June 29, 1992)

The number of passenger days allocated to a holder of a commercial special recreation permit was properly reduced from 200 to 190 days for lack of use under a permit provision establishing a mechanism whereby past performance was to be used to fix passenger allocations.

Colorado River & Trail Expeditions, Inc., 123 IBLA 374 (July 23, 1992)

PUBLIC LANDS--Continued

SPECIAL USE PERMITS--Continued

Under sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), and the implementing regulations in 43 CFR Subpart 2920, BLM has discretion to reject a proposal for use of lands which conflicts with BLM policy for management of the public lands involved. BLM properly rejects a proposal for a permit authorizing the use of assault weapons on public lands where such rejection is based on the State Director's IM. No. CA-90-155 in which he establishes a policy of closing BLM lands in California to the possession of assault weapons as defined by State law.

Where, under the authority of the Secretary of the Interior to issue permits pursuant to sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), and 43 CFR Subpart 2920, BLM rejects a proposal for a permit authorizing the use of assault weapons on public lands based on the State Director's IM No. CA-90-155 in which he establishes a policy of closing BLM land in California to the possession of assault weapons as defined by State law, on challenging that determination must provide compelling reasons for modification or reversal. Failure to do so will result in the determination being affirmed on appeal when it is supported by the record.

Organized Sportsmen of Lassen County, 124 IBLA 325 (Nov. 6, 1992)

Where, in an appeal of a decision to issue an outfitter and guide permit to a third party for the 1990 season, the appellant seeks to raise issues relating to the original issuance in 1987 of such a permit to the third party in 1987, such a challenge is barred by the doctrine of administrative finality.

The issuance of a special recreation use permit to conduct commercial outfitter and guide services on public land is discretionary, and the Department may accept or reject a permit application in furtherance of the objectives, responsibilities, and programs for management of the public lands involved. In light of this discretionary authority, BLM may use such restrictions as deemed necessary, including the imposition of a moratorium on the issuance of such permits

PUBLIC LANDS--Continued

SPECIAL USE PERMITS--Continued

while it is developing a management plan for outfitter and guide services.

Keith Rush dba Rush's Lakeview Ranch, Kevin Rush, 125 IBLA 346 (Mar. 29, 1993)

BLM has the discretionary authority under 43 U.S.C. § 1732(b) (1988), and 43 CFR Subpart 8372 to issue special recreation use permits for commercial float boating operations and to set permit conditions. There must be a compelling reason for modification or reversal of an exercise of this discretionary authority, and the Board will affirm a decision exercising this authority if the decision is not arbitrary, capricious, or an abuse of discretion.

BLM may limit commercial jet back service during the peak summer use period to protect public safety. The fact that BLM was contemplating revisions to the recreation management plan concerning commercial jet back services when the restrictions were imposed did not render the imposition arbitrary, capricious, or an abuse of discretion.

The Exodus Corp., 126 IBLA 1 (Apr. 1, 1993)

Issuance of a special recreation permit for off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impacts were carefully considered and protective stipulations and mitigating measures were applied to avoid significant adverse environmental impacts.

Eastern Sierra Audubon Society, 126 IBLA 222 (May 21, 1993)

Issuance of a special recreation permit is discretionary, and BLM properly rejects an application for a permit for an organized off-road motorcycle event when there is evidence that the event could result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives,

PUBLIC LANDS--Continued

SPECIAL USE PERMITS--Continued

responsibilities, or programs for the public lands involved.

Checker Motorcycle Club, 126 IBLA 251 (June 1, 1993)

The regulations governing special land-use permits, 43 CFR Part 2920, do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. A decision by a BLM Area Manager refusing to renew a land-use permit is subject to immediate appeal by the permittee to the Board of Land Appeals under 43 CFR 4.410(a).

Carl S. Hansen, 130 IBLA 369 (Sept. 15, 1994)

PUBLIC RECORDS
(See also Administrative Procedure, Confidential Information)

Pursuant to the Classification and Multiple Use Act of 1964 the segregative effect of a disposal classification for a tract of land larger than 2,500 acres terminated automatically 2 years after publication of the notice of proposed classification, unless a continuance was obtained. This Board will not apply the "notation" or "tract book" rule in a manner which thwarts this clear congressional intent.

Phelps Dodge Corp., 115 IBLA 214 (July 3, 1990)

PUBLIC SALES

GENERALLY

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the

PUBLIC SALES--Continued

GENERALLY--Continued

meander line, and title to lands lying between the meander line and the actual water line is deemed to be the omitted land and the property of the United States.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

SALES UNDER SPECIAL STATUTES

The O'Konski Act is a remedial Act intended to correct a recognized error resulting from fraudulent or grossly erroneous cadastral surveys and allows those Wisconsin property owners who have, since Jan. 21, 1953, been in good faith and in peaceful and open possession of lands lying between the originally determined meander line and the actual meander line an opportunity to acquire omitted lands in the same manner as the land would have been acquired if the original survey had been accurate. Being remedial, the O'Konski Act should be liberally construed in favor of those entitled to its benefits.

To qualify under the O'Konski Act, the applicant must show that the land lying between the originally determined meander line and the actual meander line was held in good faith and in peaceful, adverse possession prior to Jan. 21, 1953. A break in the chain of title prior to Jan. 21, 1953, will not be a basis for rejection of an O'Konski application, so long as there has been no break in chain of title since that date.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

Applicants who timely showed that they were owners of land in Wisconsin lying along a meander line, subsequently resurveyed, who held down lands between the original meander and the water shown on the later survey and have, since Jan. 21, 1953, held the land in good faith and peaceful adverse possession, were entitled to purchase it under the Act of Aug. 24, 1954, known as the O'Konski Act, 43 U.S.C. § 1221 (1988).

Victor A. Markunas, Victoria E. Markunas, 119 IBLA 70 (Apr. 1, 1991)

RAILROAD GRANT LANDS

Pursuant to 43 CFR 2631.1, the Department may require applicants for patent under the Transportation Act of 1940 to provide specific proof of transfer of title.

"Innocent purchaser for value." The phrase "innocent purchaser for value" appearing in the Transportation Act of 1940 does not refer to a subjective state of mind, but indicates instead the absence of knowledge of mineral character of land sold by a land grant railroad.

Lands may be mineral in character even though there has been no discovery of a valuable mineral on the land itself: external conditions may give mineral character to a tract. In railroad grant lands cases, mineral character is to be determined as of the time when the land was covered by the railroad.

Southern Pacific Transportation Co., Eugene F. Snow, & Lloyd D. Hayes, 118 IBLA 78 (Feb. 27, 1991)

RECLAMATION HOMESTEADS
(See also Homesteads (Ordinary))

Where BLM determines, prior to the filing of satisfactory reclamation final proof, that land within a reclamation homestead entry is valuable for oil and gas, the entryman may petition for reclassification of the land as not valuable for oil and gas in accordance with 43 CFR 2093.3(d). If that petition is denied, the entryman is to be offered the opportunity to request a hearing. At such a hearing, the entryman has the burden of showing that the land is not valuable for oil and gas.

Jaye W. & Linda L. Johnson, 124 IBLA 196 (Oct. 20, 1992)

RECLAMATION LANDS
(See also Irrigation Claims, Rights-of-Way)

GENERALLY

The lands listed as subject to lease under the "Hardrock Minerals Leasing" regulations at 43 CFR 3560.3 and 43 CFR Part 3580 are the only areas which have been made subject to hardrock mineral leasing as a result of either the exercise of Secretarial discretion or Congressional directive. BLM may properly reject an application for a prospecting permit for hardrock minerals when the lands described in the application are not subject to the issuance of a hardrock mineral lease.

William Bade, 112 IBLA 312 (Jan. 10, 1990)

The Act of Mar. 14, 1940 requires BOR to further both irrigation and tribal fishing uses of the Bull Lake Reservoir. However, the 1940 Act also requires that inconsistencies between tribal uses and reservoir purposes must be resolved to permit fulfillment of the reservoir purposes.

Where there is no reserved water right for maintenance of pool elevations in Bull Lake Reservoir, the Shoshone and Arapohoe Tribes cannot require BOR to maintain a particular reservoir level.

Bureau of Reclamation Responsibilities in Operating Bull Lake Reservoir, M-36973 (Feb. 21, 1992) 100 I.D. 185

RECREATION AND PUBLIC PURPOSES ACT

Although 43 CFR 2912.1-1(c) appears to provide that notice and an opportunity for a hearing are only available to a recreation and public purpose lessee when BLM is contemplating termination of the lease for an inconsistent use, but not where there is nonuse, the preamble to the final promulgation of 43 CFR 2912.1-1(c) clearly indicates that the Department intended that notice and opportunity for a hearing be extended to the lessee where termination is sought for inconsistent use or for nonuse.

The purpose of providing a person with notice and an opportunity for a hearing prior to termination of a recreation and public purpose lease is to guarantee that

RECREATION AND PUBLIC PURPOSES ACT--Continued

person's right to due process prior to finalization of the action of termination. The "opportunity for a hearing" does not mean, however, that in all cases the Department must conduct a factfinding hearing. A hearing is not required in the absence of assertions of fact which, if proved true, would entitle the person to the relief sought.

Dona Ana Board of County Commissioners, 116 IBLA 108 (Sept. 18, 1990)

The Secretary of the Interior has the discretionary authority to grant an application to purchase public lands under the Recreation and Public Purposes Act, 43 U.S.C. §§ 869 to 869-4 (1988). A decision rejecting such an application for land to be used as a bicycle rest area will be set aside where BLM fails to provide a rational basis for its determination that the proposed use of the land as shown in the development and management plans for the project does not justify disposal of the land to appellant.

The City of Chico, 119 IBLA 136 (Apr. 23, 1991)

Terms and conditions may be imposed in a Recreation and Public Purposes Act lease for the proper development of the land, for the protection of Federal property, and for the protection of the public interest. 43 CFR 2912.1-1(b). The public interest includes use of the public lands in a manner that does not unreasonably interfere with adjacent private uses.

Where BLM denies a protest against the relocation of a road and approves an amendment of the approved plan of development for a lease issued under the Recreation and Public Purposes Act to relocate the road, holding that dust from the relocated road will not unreasonably interfere with private use of adjacent lands for growing produce, its decisions are properly set aside and remanded where the record indicates that dust from the relocated road may render produce grown on adjacent private lands unmarketable. On remand, BLM should consider approving the amendment subject to a conditional protective stipulation that would require additional action to be taken to reduce dust from the road (such as

RECREATION AND PUBLIC PURPOSES ACT--Continued

using a dust retarding agent or sprinkling) only if it is shown that produce is being damaged by dust.

Lloyd & Sue Heger, 121 IBLA 321 (Dec. 10, 1991)

It is proper for BLM to reject an application to amend an existing F&PP lease to permit substantial expansion of a solid-waste management station for collection of household refuse for transfer to a sanitary landfill because the intended expansion is contrary to existing BLM policy restricting authorization of sites for solid-waste disposal and related purposes to FLPMA sales and exchanges pending implementation of the R&PP Amendment Act of 1988, P.L. 100-648, 102 Stat. 3813.

Clark County, Nevada, 123 IBLA 150 (May 28, 1992)

REGULATIONS
(See also Administrative Procedure)

GENERALLY

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

Provision of 43 CFR 2803.1-2 allows a rental increase to be paid in graduated increments with the full amount of the increase being deferred until the third year after the increase is effective. This provision only applies, however, where there was payment at a lower rate. It does not apply where there was never a lower rental rate, nor can a rental deposit be considered to have been a rental rate for purposes of obtaining the delayed increase allowed by the regulation.

Keith P. Carpenter (On Reconsideration), 113 IBLA 27 (Jan. 30, 1990)

REGULATIONS--Continued

GENERALLY--Continued

A regulation should be sufficiently clear that there is no basis for an oil and gas lessee's noncompliance with the regulation before that regulation is interpreted to the detriment of a lessee. If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of its Oil and Gas Payor Handbook, because that Handbook lacks the force and effect of law enjoyed by a statute or regulation.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations, and reliance on allegedly incomplete or inaccurate information provided by Federal employees cannot create any rights not authorized by law.

Magness Petroleum Corp., 113 IBLA 214 (Feb. 23, 1990)

A right-of-way rental rate schedule which employed county-wide values for calculating fair market value according to use was correctly used to calculate rental for an electric power transmission line right-of-way in conformity with provisions of 43 CFR Part 2800.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)

One who deals with the Government is presumed to know the applicable laws and regulation, and the United States cannot be bound or estopped by an act of its officers or agents if to estop the Government would undermine the correct enforcement of a particular statute or regulation.

Thomas L. Sawyer, 114 IBLA 135 (Apr. 18, 1990)

REGULATIONS--Continued

GENERALLY--Continued

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Jack Hammer dba Hammer Oil Co., 114 IBLA 340 (May 22, 1990)

Imposition of an assessment to compel compliance with regulations implementing the Mineral Leasing Act is an exercise of the Department's regulatory power which is not stayed by the filing of a bankruptcy petition by an oil and gas lessee or operator.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

Payment of the balance of the bonus bid at a competitive lease sale is properly construed as timely where payment is received by BLM on the seventh working day after the lease sale within the time allowed by both the regulations in effect at the time of the sale and the proposed regulations promulgated prior to the sale.

Earl M. Cranston, 115 IBLA 230 (July 12, 1990)

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid.

Linda Mashunkashey Kays v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 431 (Sept. 17, 1990)

Mildred Frazier v. Acting Portland Area Director, Bureau of Indian Affairs, 21 IBIA 11 (Oct. 8, 1991)

Diedre Wilson v. Acting Portland Area Director, Bureau of Indian Affairs, 21 IBIA 188 (Feb. 14, 1992)

REGULATIONS--Continued

GENERALLY--Continued

A change in regulations governing the acquisition of lands in trust status should not be applied retroactively to a matter pending before the Bureau of Indian Affairs when the person affected detrimentally relied upon the policy and procedures that were in place at the time the trust acquisition was approved.

Georgiana Kautz v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 305 (Apr. 18, 1991)

BLM properly refused to accept an assignment of record title to an oil and gas lease filed on a form previously declared obsolete by the Director, BLM, by notice published in the Federal Register pursuant to Departmental regulation 43 CFR 3106.4-1.

E. Barger Miller, III, 120 IBLA 177 (July 26, 1991)

The Departmental regulation applicable to payment to the United States for logging road use, 43 CFR 2812.5-2(b), provides that where a right-of-way permittee receives a right to use a road constructed or acquired by the United States, which is under the administrative jurisdiction of BLM, the permittee will be required to pay a fee the amount of which is to be determined by the authorized officer. Where BLM denies a request that certain roads utilized for timber hauling be designated as tie roads and, thus, exempt from the payment of fees, that decision will be affirmed where the record shows that it was based on a reasoned analysis of the facts made with due regard for the public interest, and the permittee fails to show error in BLM's determination.

Northwest Timber Affiliates, Inc., 121 IBLA 42 (Oct. 22, 1991)

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional or a duly promulgated Departmental regulation invalid.

Estates of Evan Gillette, Sr., & Lizzie Gillette/Yellow Bird/Bellanger/Paint/Bedell, aka Elizabeth Burdell, 22 IBIA 133 (June 18, 1992)

REGULATIONS--Continued

GENERALLY--Continued

Although a BIA Director has authority to place a Superintendent's decision into immediate effect under 25 CFR 2.6(a), an Area Director does not have authority to make his or her own decision final for the Department when Departmental regulations provide a right of appeal to the Board of Indian Appeals.

Dean Wallace v. Aberdeen Area Director, Bureau of Indian Affairs, 26 IBIA 150 (Aug. 2, 1994)

A specific provision in BIA program regulations will normally supersede a general regulation dealing with the same subject.

Friends of the Wild Swan v. Portland Area Director, Bureau of Indian Affairs, 27 IBIA 8 (Nov. 14, 1994)

Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1374, 1378-79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual payment of the claim rental fee as required by the Act shall conclusively constitute an abandonment of the unpatented mining claim, millsite, or tunnel site. Failure to pay the fee in accordance with the Act and implementing regulations results in a conclusive presumption of abandonment. Neither the claimant's lack of actual knowledge of the statutory requirement to pay rental fees nor BLM's failure to advise the claimant of that statutory requirement excuses the claimant's lack of compliance with the rental fee requirement since all persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Lester W. Pullen, 131 IBLA 271 (Nov. 23, 1994)

REGULATIONS--Continued

GENERALLY--Continued

Knowledge acquired by an agent in the course of his activities pursuant to the agency is properly imputed to the principal. Similarly, since all persons dealing with the Government are presumed to have knowledge of duly promulgated rules and regulations, both an agent and the principal are properly charged with knowledge of both the terms and applicability of Onshore Oil and Gas Order No. 2.

Conley P. Smith Oil Producers, 131 IBLA 313 (Dec. 13, 1994)

APPLICABILITY

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

A regulation should be sufficiently clear that there is no basis for an oil and gas lessee's non-compliance with the regulation before that regulation is interpreted to the detriment of a lessee. If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of its Oil and Gas Payor Handbook, because that Handbook lacks the force and effect of law enjoyed by a statute or regulation.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

Imposition of an assessment to compel compliance with regulations implementing the Mineral Leasing Act is an exercise of the Department's regulatory power which is not stayed by the filing of a bankruptcy petition by an oil and gas lessee or operator.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

REGULATIONS--Continued

APPLICABILITY--Continued

Under the regulations governing bonds for oil and gas geophysical exploration, liability for a particular oil and gas geophysical exploration operation automatically terminates by operation of law on the 91st day following the filing of a notice of completion of oil and gas exploration operations if BLM fails to notify the party filing the notice within 90 days of the filing that all terms and conditions have been met or that additional action is required to rehabilitate the lands. Where BLM fails to provide such notice and a number of years later seeks to collect on the nationwide oil and gas geophysical exploration bond for the costs of correcting improperly plugged shot holes, the regulation precludes such collection.

Insurance Co. of North America, 120 IBLA 384 (Sept. 25, 1991)

Where an audit of a Federal oil and gas lease extends through Sept. 1988, a decision by MMS calculating royalty based on regulations that were effective only through Mar. 1, 1988, is properly set aside and the matter remanded for consideration of whether the audit pertaining to this lease should have been terminated on Mar. 1, 1988, or whether amended regulations should have been applied to the balance of the period through Sept. 1988.

Apache Corp., 127 IBLA 125 (Aug. 24, 1993)

BINDING ON THE SECRETARY

Challenges to the validity of a national rule promulgated by the Secretary under the Surface Mining Control and Reclamation Act of 1977 may only be brought to the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1982). The Board of Land Appeals does not have jurisdiction to rule on such a challenge. The Board is bound by a duly promulgated regulation of the Secretary and is not authorized to declare it invalid.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

REGULATIONS--Continued

BINDING ON THE SECRETARY--Continued

The Department of the Interior is bound by its own properly promulgated regulations which have the force and effect of law.

Kiowa Tribe v. Acting Anadarko Area Director, Bureau of Indian Affairs, 19 IBIA 157 (Jan. 22, 1991)

FORCE AND EFFECT AS LAW

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

ANR Production Co., 118 IBLA 338 (Mar. 12, 1991)

The intent of the proviso in a modified Federal coal lease that it is issued pursuant and subject to the terms and provisions of the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), and to all regulations of the Secretary of the Interior then in force or subsequently promulgated and to make them "a part hereof," is to incorporate future regulations, even though inconsistent with those in effect at the time of a modification of the lease under the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 203 (1982), and even though to do so creates additional obligations or burdens for the lease.

AMCA Coal Leasing, Inc. (On Reconsideration), 114 IBLA 246 (May 8, 1990)

The Department of the Interior is bound by its own properly promulgated regulations which have the force and effect of law.

Kiowa Tribe v. Acting Anadarko Area Director, Bureau of Indian Affairs, 19 IBIA 157 (Jan. 22, 1991)

REGULATIONS--Continued

FORCE AND EFFECT AS LAW--Continued

Proper application of IM 87-652 required that BLM evaluate whether, if an application to flare gas had been made for oil wells produced by the lessee prior to flaring, the application would have been entitled to approval on the merits.

Maxus Exploration Co., 122 IBLA 190 (Feb. 10, 1992)

Where pipelines on a Federal oil and gas lease (described by the lessee as "lateral lines") move lease production to a central accumulation point on each lease; where each such line connects directly to a gas well and brings gas by separate individual lines to a central point where the gas is delivered into a single line; and where the primary function of the lines is gathering, they are properly considered "gathering lines" under 43 CFR 2880.0-5(k).

It is incumbent upon BLM to examine the facts and circumstances of individual cases to determine where the point of delivery from production facilities to the transportation pipeline actually is. A decision by BLM establishing the point of delivery as the "approved production accounting measurement point" at the wellhead will be set aside where the record does not establish that delivery took place at that point.

Enron Oil & Gas Co., 122 IBLA 224 (Feb. 26, 1992)
99 I.D. 20

An agency may establish a rule of law by adjudication. If such a rule has not been established by adjudication, then, in order for it to have the force and effect of law and be binding on the agency as well as the public, it must be a substantive rule affecting individual rights and obligations that has been issued by the agency pursuant to statutory authority and promulgated in accordance with the rulemaking requirements of the APA, 5 U.S.C. § 553 (1988), or other procedural requirements imposed with Congress.

Robert S. Glenn, DeLoyd Cazier, 124 IBLA 104 (Sept. 17, 1992)

REGULATIONS--Continued

FORCE AND EFFECT AS LAW--Continued

A specific reference in duly promulgated regulations to the applicability of a section of the BIA Manual allows that section to be relied on, used, and cited as precedent by the agency in cases arising under those regulations.

Friends of the Wild Swan v. Portland Area Director, Bureau of Indian Affairs, 27 IBIA 8 (Nov. 14, 1994)

INTERPRETATION

It is within the authority of the Department to interpret its own regulations, and its interpretation should be given great deference. Normally an interpretive ruling stating the accounting procedures to be used for royalty calculation may be given retroactive effect. However, when it appears from the record that: (1) for several years the lessee had applied an accounting procedure which conformed with a reasonable interpretation of the applicable regulations when calculating the royalty due for oil produced and removed from the lease; (2) the Department had accepted lessee's royalty accounting procedure for several years before issuing an interpretive ruling that required a different accounting procedure; (3) the new procedure was an abrupt departure from a well-established practice, and not an attempt to fill a void in an unsettled area of the law; and (4) the prejudice to the lessee affected by retroactive application of the new interpretation substantially outweighs the statutory interest and purposes sought to be protected, then the new MMS accounting procedure should be applied prospectively.

Sun Exploration & Production Co., 112 IBLA 373 (Jan. 19, 1990)
97 I.D. 1

A regulation should be sufficiently clear that there is no basis for an oil and gas lessee's noncompliance with the regulation before that regulation is interpreted to the detriment of a lessee. If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of its Oil and Gas

REGULATIONS--Continued

INTERPRETATION--Continued

Payor Handbook, because that Handbook lacks the force and effect of law enjoyed by a statute or regulation.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

While during the pendency of an appeal from a decision of the Minerals Management Service dismissing an appeal as untimely, the regulations are amended to provide that a delay in filing a notice of appeal to the Director, Minerals Management Service, will be waived if the notice of appeal is filed not later than 10 days after it was required to be filed and it is determined that the notice of appeal was transmitted to the proper office before the end of the time required for filing by 30 CFR 290.3(a)(1), the Board may, in the absence of intervening rights of others or prejudice to the interests of the United States, apply the amendment to pending cases.

Conoco, Inc., 115 IBLA 105 (June 27, 1990)

Oil and gas lease royalty accounts are settled under rules in effect at the time charges at issue were incurred.

Where a 1987 audit discovered a discrepancy between sales and production volumes from an oil and gas lease had occurred in March 1985, MMS properly required the royalty rate to be calculated on actual production pursuant to the provision of 30 CFR 202.101 (1984).

An obligation to pay oil royalty for March 1985 using actual production to compute a royalty rate pursuant to 30 CFR 202.101 (1984) did not arise until 1987 when MMS ordered such payment to be made following an audit of the 1985 account.

An alleged conflict between Departmental oil and gas regulations and a policy guideline used by MMS to govern royalty administration failed to establish a foundation for a claim of equitable estoppel where no factual or legal conflict was shown to exist between the regulations and the guideline so as to establish the claimed misrepresentation by Federal employees.

Eighty-Eight Oil Co., 115 IBLA 386 (Aug. 16, 1990)

REGULATIONS--Continued

INTERPRETATION--Continued

Normally an interpretive ruling stating the accounting procedures to be used for royalty calculation may be given retroactive effect. However, an exception exists when certain conditions are met. If (1) for several years the lessee had applied an accounting procedure which conformed with a reasonable interpretation of the applicable regulations when calculating the royalty due for products removed from the lease; (2) the Department had accepted the lessee's royalty accounting procedure for several years before issuing an interpretive ruling that required a different accounting procedure; (3) the new procedure was an abrupt departure from a well-established practice, and not an attempt to fill a void in an unsettled area of the law; and (4) the prejudice to the lessee affected by retroactive application of the new interpretation substantially outweighs the statutory interest and purposes sought to be protected, then the new MMS accounting procedure should be applied prospectively only.

Union Oil Co. of California, Union Exploration Partners, Ltd., 116 IBLA 8 (Aug. 24, 1990)

Although 43 CFR 2912.1-1(c) appears to provide that notice and an opportunity for a hearing are only available to a recreation and public purpose lessee when BLM is contemplating termination of the lease for an inconsistent use, but not where there is nonuse, the preamble to the final promulgation of 43 CFR 2912.1-1(c) clearly indicates that the Department intended that notice and opportunity for a hearing be extended to the lessee where termination is sought for inconsistent use or for nonuse.

Dona Ana Board of County Commissioners, 116 IBLA 108 (Sept. 18, 1990)

Rejection by BLM of an acquired lands oil and gas lease offer, which described the surveyed lands sought, in accordance with 43 CFR 3111.2-2(a) (1987), by legal subdivision, section, township, range, and meridian, because the offeror failed to file three copies of a map required by 43 CFR 3111.2-2(d) (1987), is improper. The map requirement is limited to acquired lands oil and gas

REGULATIONS--Continued

INTERPRETATION--Continued

lease offers for lands which cannot be conformed to the rectangular system of public land surveys.

Thomas Connell, 116 IBLA 113 (Sept. 20, 1990)

After the effective date of the Federal Onshore Oil and Gas Leasing Reform Act of 1987, the Department lacks authority to reject lease stipulations recommended by the Secretary of Agriculture. For actions taken to require lease stipulations before the effective date of the Act, however, prior regulations require review of such stipulations by the Department.

Liberty Petroleum Corp., 118 IBLA 214 (Mar. 7, 1991)

BLM properly refused to accept an assignment of record title to an oil and gas lease filed on a form previously declared obsolete by the Director, BLM, by notice published in the Federal Register pursuant to Departmental regulation 43 CFR 3106.4-1.

E. Barger Miller, III, 120 IBLA 177 (July 26, 1991)

Where subsequent legislation renders questionable the continued validity of a BIA regulation, the Board of Indian Appeals will not apply the regulation to the detriment of a party dealing with the Bureau.

The Guardian Life Insurance Co. of America & Public Leasing Corp. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 22 IBIA 104 (June 11, 1992)

Regulations are interpreted in accordance with traditional principles of statutory construction. Words used in regulations are given their plain and ordinary meaning unless they are technical terms or terms of art, in which case they are given their technical meaning.

Okie Crude Co., et al. v. Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 174 (Feb. 5, 1993)

REGULATIONS--Continued

INTERPRETATION--Continued

Regulations are interpreted in accordance with traditional principles of statutory construction. Where a BIA regulation contains parallel sections applicable to different classes of persons, and one section is lacking a provision which is included in the other section, the omission is significant to show that a different intent existed.

ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 228 (Mar. 8, 1993)

BIA regulations and guidelines concerning grant programs for Indian tribes are subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

In administering competitive grant programs for Indian tribes, BIA has a duty to provide fair and equitable treatment to all applicants. This duty includes an obligation to ensure that the Bureau's Area Offices interpret the basic eligibility criteria for the programs in a consistent matter. It also includes an obligation to provide clear notice of the eligibility criteria to potential grant applicants.

Reno-Sparks Indian Colony v. Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 199 (Sept. 21, 1993)

Where there are discrepancies between a BIA regulation and a later-enacted statute, the statute controls.

Prairie Island Indian Community v. Minneapolis Area Director, Bureau of Indian Affairs, 25 IBIA 187 (Feb. 25, 1994)

PUBLICATION

All persons dealing with the Federal Government

REGULATIONS--Continued

PUBLICATION--Continued

are presumed to have knowledge of duly promulgated regulations.

K. S. Hays v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 380 (July 20, 1990)

All persons dealing with the Federal Government are presumed to have knowledge of duly promulgated regulations.

All Materials of Montana, Inc. v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 202 (Feb. 27, 1992)

A lessee of Indian trust or restricted property has a duty and responsibility to familiarize itself with the regulations governing its lease.

Craig McGriff Exploration, Inc. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 22 IBIA 265 (Sept. 8, 1992)

A person doing business on trust lands has the responsibility to familiarize himself with duly promulgated regulations governing his activities, and is deemed to have knowledge of regulations published in the CFR.

Racquet Club Properties, Inc. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 25 IBIA 251 (Apr. 6, 1994)

A lessee of trust or restricted property has the responsibility to become familiar with duly promulgated regulations governing activities on the leased property, and is deemed to have knowledge of regulations published in the CFR.

Narconon Chilocco New Life Center v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 273 (Apr. 19, 1994)

REGULATIONS--Continued

VALIDITY

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

ANR Production Co., 118 IBLA 338 (Mar. 12, 1991)

A right-of-way rental rate schedule which employed county-wide values for calculating fair market value according to use was correctly used to calculate rental for an electric power transmission line right-of-way in conformity with provisions of 43 CFR Part 2800.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)

Challenges to the validity of a national rule promulgated by the Secretary under the Surface Mining Control and Reclamation Act of 1977 may only be brought to the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1982). The Board of Land Appeals does not have jurisdiction to rule on such a challenge. The Board is bound by a duly promulgated regulation of the Secretary and is not authorized to declare it invalid.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

The intent of the proviso in a modified Federal coal lease that it is issued pursuant and subject to the terms and provisions of the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), and to all regulations of the Secretary of the Interior then in force or subsequently promulgated and to make them "a part hereof," is to incorporate future regulations, even though inconsistent with those in effect at the time of a modification of the lease under the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 203 (1982),

REGULATIONS--Continued

VALIDITY--Continued

and even though to do so creates additional obligations or burdens for the lease.

AMCA Coal Leasing, Inc. (On Reconsideration), 114 IBLA 246 (May 8, 1990)

BLM properly refused to accept an assignment of record title to an oil and gas lease filed on a form previously declared obsolete by the Director, BLM, by notice published in the Federal Register pursuant to Departmental regulation 43 CFR 3106.4-1.

E. Barger Miller, III, 120 IBLA 177 (July 26, 1991)

WAIVER

DOI lacks authority under 25 CFR 1.2 to waive a statutory restriction in the guise of waiving regulations in 25 CFR Chapter I.

Clifton W. Skye v. Aberdeen Area Director, Bureau of Indian Affairs, 26 IBIA 169 (Aug. 9, 1994)

DOI lacks authority to waive the government-to-government relationship between the Federal Government and the Indian tribes, which was reaffirmed by Congress in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n (1988 and Supps.).

Mark H. Perrault v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 26 IBIA 214 (Sept. 9, 1994)

RENT

The Board will not overturn a BLM appraisal of a communication site right-of-way by the comparable lease method of appraisal where the appellant fails to establish by a preponderance of the evidence either that the appraisal method was erroneous or that the appraised value is excessive. Specifically, the appraisal will be affirmed where appellant does not establish that BLM improperly eliminated certain

RENT--Continued

private and Government leases from comparison with the right-of-way, or that BLM improperly failed to adjust for differences both in the cost of obtaining access to the communication sites and between BLM rights-of-way and private leases.

MCI Telecommunications Corp., 115 IBLA 117 (June 27, 1990)

A rental rate adjustment determination, modified below as a result of errors in the record necessitating such corrective action, will be affirmed on appeal in the absence of evidence by appellant which would warrant any further adjustment in the rental.

In the Matter of the Quarters Rental Rate Appeal of Mr. Cliff Walker, 8 OHA 232 (Oct. 24, 1990)

The Board will affirm a BLM decision issuing a communication site right-of-way where on appeal the grantee complains that the rental for the right-of-way is too high, but the record shows that the rental was based on an appraisal of the fair market rental value utilizing the comparable lease method of appraisal and the appellant fails to show either that the appraisal method was erroneous or that the appraised value is excessive.

Idaho Wireless Corp., 120 IBLA 172 (July 23, 1991)

If payment is required for use of the public lands, either with or without prior approval of the Department, a fair market rental value determination must be made pursuant to 43 CFR 2920.

Fair market rental value may be assessed from a flat rate fee schedule established by BLM appraisal staff.

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)

RENT--Continued

Where BLM has granted a power line right-of-way subject to future determination of rental, and BLM later determines a rental on the basis of an erroneous calculation of acreage within the grant, BLM is not precluded from revising the rental on the basis of the correct acreage, and requiring the holder of the right-of-way to pay the revised rental from the date that the right-of-way was first granted.

Salt River Project, 121 IBLA 185 (Nov. 5, 1991)

An appraisal of the fair market rental value of a reservoir right-of-way will be upheld on appeal where no error is shown in the appraisal method used by BLM and the appellant fails to show by convincing evidence that the annual rental charge is excessive.

A decision initially advising the holder of a right-of-way of the fair market rental value of the grant and billing that amount more than 6 years after issuance of the right-of-way may be set aside and remanded for consideration of whether in the public interest the rental charge should be reduced on the basis of undue hardship to the holder under the regulation at 43 CFR 2803.1-2(b)(2)(iv) where the reservoir authorized by the right-of-way was never constructed.

V. Irene Wallace, 122 IBLA 349 (Mar. 12, 1992)

Rental rate adjustment determinations, modified below to change the effective date for implementation of the adjustments, will be affirmed on appeal where appellants fail to submit evidence which would warrant any further adjustment in the rental rates concerned.

Quarters Rental Rate Appeals of Messrs. Frank S. Alby & Hamilton Greely, 9 OHA 155 (Apr. 29, 1992)

BLM properly increased the rental for an existing FLPMA linear right-of-way using the regulatory rental fee schedule for linear rights-of-way, when the regulation calling for rental adjustment at least once every 5 years was expressly incorporated into appellant's right-of-way grant, and the regulatory fee schedule was applicable during the course of a periodic adjustment

RENT--Continued

necessary to reflect the then current fair market rental value.

Jack C. Gutte, 123 IBLA 295 (June 23, 1992)

If the appraisal setting fair market rental value fails to consider the effect of restrictive clauses limiting the use and enjoyment of the leased land on the fair market rental value, the appraisal will be set aside and the case file will be remanded to consider rental reductions reflecting those restrictions.

Mathilda B. Williams, Jack F. Brown, 124 IBLA 7 (Aug. 13, 1992)

The fair market value rental for a linear right-of-way is based upon the amount of land required to construct and maintain the pipeline. The mere fact that the pipeline is longer than it might be if the sole basis for choosing the route had been the per-acre rental charge is not a proper basis for concluding that the rental is too high.

The regulation at 43 CFR 2803.1-2 provides authority for reduction or waiver of rental for a right-of-way if requiring payment of the full rental will cause undue hardship on the holder and it is in the public interest to reduce or waive the rental. BLM need not consider applying this regulation when assessing the rental amount if there is no evidence that charging the full rental amount would cause undue hardship.

Jacqueline Balander, 125 IBLA 262 (Feb. 17, 1993)

When the right-of-way grant specifically provided for periodic rental adjustments to bring the right-of-way rental in line with fair market rental values it is proper for BLM to increase the annual rental to conform the rental amount to the current fair market rental value of the right-of-way.

When the holder of a right-of-way is a nonprofit municipal utility or cooperative, BLM may consider

RENT--Continued

whether the holder is entitled to a reduction of rental pursuant to 43 CFR 2803.1-2(b)(2)(i) or (ii).

Valley Pioneers Water Co., Inc., 125 IBLA 326 (Mar. 25, 1993)

Where an existing FLPMA access road right-of-way grant provided that it was subject to the regulations in 43 CFR Part 2800, BLM properly established the rental for use thereof by utilizing the regulatory rental fee schedule for linear rights-of-way found at 43 CFR 2803.1-2(c) during the course of a periodic adjustment necessary to reflect the current fair market rental value. While the relevant statute and regulations provide for waiver or a reduction in the rental amount under certain circumstances, the right-of-way holder must prove eligibility for such consideration.

Ruth Tausta-White, 127 IBLA 101 (July 29, 1993)

Reduction or waiver of rental for a right-of-way is authorized by 43 CFR 2803.1-2 if payment of full rental would cause undue hardship. To qualify for reduction the holder of the right-of-way must formally request relief pursuant to that section and submit data and relevant information demonstrating the existence of a hardship.

Thousand Peaks Ranches, Inc., 129 IBLA 397 (June 30, 1994)

RES JUDICATA

The Board will affirm BLM's rejection of State selection applications filed for land which, at the time of selection, was withdrawn by a public land order from State selection pursuant to sec. 17(d)(1) of the Alaska Native Claims Settlement Act, where the question of the validity of the order was determined as a result of the dismissal with prejudice of a prior judicial proceeding in which the order was expressly challenged, and as a

RES JUDICATA--Continued

result of an agreement between the appellant and the United States not to challenge the order in the future.

State of Alaska, 113 IBLA 86 (Feb. 13, 1990)

Under the doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, when a party has had an opportunity to abtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice.

A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude further consideration of the character of the land based on subsequent exploration and development.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

A litigant's failure to timely seek review of a notice of violation does not bar it from challenging OSMRE's jurisdictional authority to issue the underlying notice of violation in an application for review of a cessation order subsequently issued for failure to abate the violations set out in the NOV.

Stipulations in a proceeding in which a second party did not appear should not serve as the basis for concluding there was privity between the second party and a party to the previous action (a prerequisite for applying collateral estoppel) because the second party was not a party to the proceeding in which the stipulations were entered.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

RES JUDICATA--Continued

The Government is not collaterally estopped to determine the validity of an unpatented mining claim even where the Government has previously unsuccessfully contested a neighboring mining claim encompassing an arguably similar mineral deposit.

United States v. Robert D. Fisher, 115 IBLA 277 (July 26, 1990)

Where a State of Alaska protest against a Native allotment under sec. 905 of the Alaska National Interest Lands Conservation Act was granted in 1982 and, as a result, the allotment was adjudicated pursuant to the Alaska Native Allotment Act of 1906, no further adjudication of the allotment was required. In the absence of a timely appeal of the decision approving the allotment, the doctrine of administrative finality precludes review of the allotment on appeal from a subsequent decision.

State of Alaska (Henry J. Ekada), 117 IBLA 373 (Feb. 7, 1991)

A re-offering of a timber sale is a discretionary action and is a decision subject to protest pursuant to 43 CFR 5003.3. However, the doctrine of administrative finality precludes review of issues which could have been reviewed at the time of the first offering but were not, and of issues on which a final decision was made at the time of the first offering.

Oregon Natural Resources Council, 120 IBLA 261 (Aug. 21, 1991)

When the Board affirms a BLM decision dismissing a protest challenging the validity of a Native allotment application because the protest was not filed within 180 days after the effective date of ANILCA, and the Native allotment is legislatively approved pursuant to sec. 905(a)(1) of ANILCA, the doctrine of administrative finality precludes a subsequent appeal challenging the validity of the Native allotment when the decision appealed from was issued to conform the Native allotment to BLM's survey of the allotment.

Thelma M. Eckert, 120 IBLA 367 (Sept. 18, 1991)

RES JUDICATA--Continued

Where a decision of the Acting Secretary of the Interior disclaiming any Federal interests in a parcel of land has stood unchallenged for over 80 years and subsequent development of those lands has occurred, at least arguably in reliance on this determination, the doctrine of administrative finality is properly invoked as a bar to readjudication of the conclusions reached by the Acting Secretary in his original decision.

State of California et al., 121 IBLA 73 (Oct. 28, 1991) 98 I.D. 321

The State of Alaska made no showing that it was adversely affected by a BLM decision clarifying an earlier decision rejecting a townsite petition to the extent that it conflicted with a Native allotment. The clarification of the earlier administratively final decision approving the Native allotment application on its merits does not afford the State an opportunity to reopen the earlier decision without a showing that the clarification affected the State's interests.

State of Alaska (Anna Nick), 121 IBLA 155 (Oct. 31, 1991)

Reinstatement is properly denied for an allotment application terminated by operation of law pursuant to 43 CFR 2212.9-3(f) (1968) for failure to file proof of use and occupancy within 6 years after filing the application when the decedent's use and occupancy had begun less than 1 year before the application was filed.

Heirs of Edward Peter, 122 IBLA 109 (Jan. 14, 1992)

Where, in an appeal of a decision to issue an outfitter and guide permit to a third party for the 1990 season, the appellant seeks to raise issues relating to the original issuance in 1987 of such a permit to the third party in 1987, such a challenge is barred by the doctrine of administrative finality.

Keith Rush dba Rush's Lakeview Ranch, Kevin Rush, 125 IBLA 346 (Mar. 29, 1993)

RES JUDICATA--Continued

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own CO in situations where the violation which is the basis of the CO was cited and litigated by a state regulatory authority because the statutory scheme of sec. 521(a)(2) of SMCRA mandates issuance of a CO in such a situation where the Federal oversight inspection discloses an unabated violation which is causing or can be expected to cause imminent environmental harm.

The doctrines of res judicata or collateral estoppel do not ordinarily preclude review of a CO issued by OSM for operations conducted without a valid permit where the state regulatory agency agreed to a settlement of the same violation which did not require performance of the reclamation mandated by law. OSM is neither a party to the case nor in privity with the state regulatory agency where the latter adopts a position inconsistent with that required by OSM.

Triple R Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 310 (June 16, 1993)

Regulations governing state land exchanges under sec. 8 of the Taylor Grazing Act required publication of notice in local newspapers providing an opportunity to protest the exchange application. Where the record discloses exchanges were not protested and were approved by a final decision, the doctrine of administrative finality precludes review of the propriety of the terms of the conveyances at the behest of a mining claimant who located claims on the lands more than 40 years later.

UOP, 127 IBLA 105 (Aug. 9, 1993)

As a general rule, the principle of administrative finality, the administrative counterpart of the doctrine of res judicata, precludes reconsideration in a later case of matters resolved finally for the Department in an earlier appeal.

Notwithstanding the principle of administrative finality, the Secretary or those exercising his delegated authority may reconsider a matter previously decided and correct or reverse an erroneous decision to the extent the Department has retained jurisdiction over the subject of the adjudication. With respect to administration of an escrow fund under P.L. 94-204 for

RES JUDICATA--Continued

revenue arising from use of lands withdrawn for Native selection, the jurisdiction of the Department ends with the disbursement of the funds subsequent to conveyance and a decision reconsidering the allocation of the disbursed funds and requiring repayment of those funds will be vacated for lack of jurisdiction.

Mary Sanford, 129 IBLA 293 (May 24, 1994)

Where a decision by BIA declaring that an Indian oil and gas lease held in its extended term by production terminated for lack of production is not appealed, review of that termination is barred by the doctrine of administrative finality. Further, neither BLM nor the Board of Land Appeals has jurisdiction to review BIA's decision, which is committed entirely to its authority.

Cross Creek Corp., 131 IBLA 32 (Sept. 29, 1994)

Where, in a previous appeal, this Board found that rental charges for a right-of-way were proper, and where that decision was not appealed, the grantee's challenge to the rental in a subsequent appeal is barred by the doctrine of administrative finality.

Laguna Gatuna, Inc., 131 IBLA 169 (Nov. 2, 1994)

Under the doctrine of administrative finality, when a party has had an opportunity to obtain administrative review of a timber sale and the EA on which it is based and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in a later case except upon a showing of compelling legal reasons such as a violation of basic rights of the parties or the need to prevent an injustice. In the case of a modification or addition to a timber sale, reconsideration of the sale is ordinarily barred except to the extent of environmentally significant modifications or changed circumstances occurring between the time of the two sales.

Oregon Natural Resources Council, 131 IBLA 180 (Nov. 3, 1994)

RES JUDICATA--Continued

The doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, dictates that once a party has availed himself of the opportunity to obtain administrative review of a decision within the Department, that party is precluded from litigating the matter in subsequent proceedings except upon a showing of compelling legal or equitable reasons.

Gifford H. Allen et al., 131 IBLA 195 (Nov. 9, 1994)

RIGHTS-OF-WAY
(See also Indians, Reclamation Lands)

GENERALLY

Provision of 43 CFR 2803.1-2 allows a rental increase to be paid in graduated increments with the full amount of the increase being deferred until the third year after the increase is effective. This provision only applies, however, where there was payment at a lower rate. It does not apply where there was never a lower rental rate, nor can a rental deposit be considered to have been a rental rate for purposes of obtaining the delayed increase allowed by the regulation.

Keith P. Carpenter (On Reconsideration), 113 IBLA 27 (Jan. 30, 1990)

When Congress has enacted legislation to provide for rights-of-way for particular purposes, authorization to use public land for such purposes must be consistent with that legislation. Under the right-of-way provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), and its implementing regulations, 43 CFR Part 2800, authorization to use public land for a permanent access road to a wind energy park can only be accomplished through the issuance of a right-of-way grant. Approval of a plan of operations for a wind energy facility right-of-way does not constitute the authorization for an access road, which is not located on the lands described in the wind energy facility right-of-way grant.

Mesa Wind Developers, 113 IBLA 61 (Feb. 7, 1990)

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

Pursuant to 43 CFR 2803.1-2(b)(2)(ii), a reduction or waiver of rental for a communication site right-of-way may be granted when the holder provides without charge, or at a reduced rate, a valuable public service.

BLM may reduce rental payments for communication site rights-of-way if it determines pursuant to 43 CFR 2803.1-2(b)(2)(iv) that the imposition of the fair market value rental would cause undue hardship on the right-of-way holder and it is in the public interest to do so.

Lone Pine Television, Inc., 113 IBLA 264 (Mar. 9, 1990)

A right-of-way rental rate schedule which employed county-wide values for calculating fair market value according to use was correctly used to calculate rental for an electric power transmission line right-of-way in conformity with provisions of 43 CFR Part 2800.

The amendment in 1982 of two electric power transmission rights-of-way granted pursuant to the Act of Mar. 4, 1911, to form a single right-of-way 330 feet wide and approximately 17 miles long pursuant to provision of the Federal Land Policy and Management Act of 1976 resulted in the creation of a third right-of-way under the 1976 Federal Land Policy and Management Act.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)

A Bureau of Land Management appraisal of fair market value will not be set aside for failure to include five comparable electronic communication sites alleged to afford similar coverage to the appraised site, where no alternative appraisal or evidence is submitted to demonstrate that the allegedly comparable sites afford similar coverage, access, power, and terms to the subject site, or that inclusion of the five allegedly comparable sites would support a different conclusion than that reached by the Bureau of Land Management.

Randy L. Power dba ProComm, 114 IBLA 205 (Apr. 24, 1990)

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

A request for extension of a right-of-way for a culinary water well and related facilities within a wilderness study area is properly denied where the holder does not overcome BLM's determination that the extension will violate BLM's mandatory nonimpairment criteria.

The City of St. George, 116 IBLA 230 (Oct. 16, 1990)

If the right-of-way grant document provides that failure to pay the annual rental in a timely manner results in summary termination without an administrative proceeding, the right-of-way authorization automatically terminates by operation of law upon failure to pay the rental on or before the anniversary date, as specified in the right-of-way document, and no rental accrues beyond that date.

Wagner Equipment Co., 116 IBLA 275 (Oct. 22, 1990)

Where subsequent to approval of a Native allotment but prior to issuance by BLM of the document conveying legal title to the allottee, the allottee, as grantor, grants to the State of Alaska a public highway easement across her allotment, a request by the State to have that easement excluded from or reserved in the document conveying legal title will be denied.

State of Alaska, Dept. of Transportation & Public Facilities, 116 IBLA 317 (Oct. 29, 1990)

A road right-of-way issued in 1960 pursuant to the Act of Jan. 21, 1895, is subject to administration and assessment of rental pursuant to current Departmental regulations published at 43 CFR Part 2800. Assessment of increased annual rental under Departmental regulations does not require a hearing.

Western Nuclear, Inc., 117 IBLA 281 (Jan. 16, 1991)

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

An appellant who does not show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. A party challenging a BLM determination that a right-of-way is subject to cost recovery, Category I, has the burden of establishing by a preponderance of the evidence that the BLM determination is incorrect.

Joe B. Kearl, 119 IBLA 122 (Apr. 22, 1991)

The Departmental regulation applicable to payment to the United States for logging road use, 43 CFR 2812.5-2(b), provides that where a right-of-way permittee receives a right to use a road constructed or acquired by the United States, which is under the administrative jurisdiction of BLM, the permittee will be required to pay a fee the amount of which is to be determined by the authorized officer. Where BLM denies a request that certain roads utilized for timber hauling be designated as tie roads and, thus, exempt from the payment of fees, that decision will be affirmed where the record shows that it was based on a reasoned analysis of the facts made with due regard for the public interest, and the permittee fails to show error in BLM's determination.

Northwest Timber Affiliates, Inc., 121 IBLA 42 (Oct. 22, 1991)

Absent a demonstration that BLM's method for appraising the value of the linear and site components of a right-of-way granted for a hydroelectric power facility is erroneous or the rental is clearly excessive, a BLM decision adjusting the rental is properly affirmed.

Bear Creek Hydro, 122 IBLA 200 (Feb. 10, 1992)

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

An appraisal of a right-of-way will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market rental value or the appellant shows that the resulting charges are excessive. Absent error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

KPVI Channel 6, 122 IBLA 263 (Mar. 3, 1992)

The question whether a public highway was established pursuant to R.S. 2477 is to be determined by reference to state law. BLM may decide whether an R.S. 2477 road exists if the efficient administration of the public lands requires such a decision to be made.

Construction of 1,000 feet of road across public land in Oct. 1990 was done in trespass because no prior application for a right-of-way at the construction site was made and the road builder failed to show that the 1,000-foot road was a public highway recognized pursuant to Montana law prior to the repeal of R.S. 2477 by FLPMA.

Courtney Ayers, 122 IBLA 275 (Mar. 5, 1992)

Any use or occupancy of the public lands such as for radio broadcasting which requires a right-of-way or temporary use permit, which use has not been authorized, is prohibited and shall constitute a trespass for which the trespasser is liable for administrative costs, damages, and penalties under the regulations at 43 CFR 2801.3.

An assessment of damages for a willful trespass is properly affirmed where appellant's conduct constituted a voluntary or conscious trespass in that the evidence shows appellant knew of the lack of authority to use the public lands for communication site purposes.

High Desert Communications, Inc., 123 IBLA 20 (Apr. 24, 1992)

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

A rental rate adjustment for a right-of-way for a hydroelectric power plant under 43 CFR 2803.1-2 will be set aside and remanded so that the BLM Manual may apply policies and procedures that are being developed for determining rentals for such rights-of-way.

Bear Creek Hydro (On Reconsideration), 124 IBLA 225 (Oct. 27, 1992)

Use of a road on Oregon and California lands for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

Larry D. Olson, 126 IBLA 229 (May 24, 1993)

A BLM decision finding a right-of-way for an electric distribution line null and void to the extent it conflicts with a Native allotment application is reversed and remanded to permit issuance of the Native allotment subject to the right-of-way where the record shows occupancy of the land by the power line was approved, and it was constructed and operated for 4 years before the Native allotment applicant began use and occupancy of his allotment.

Naknek Electric Ass'n, Inc., 126 IBLA 256 (June 2, 1993)

Under 43 CFR 2802.4(a), a right-of-way application to use public lands may be denied if BLM determines, among other things, that (1) the proposed right-of-way would be inconsistent with the purposes for which the public lands are managed, or (2) the proposed right-of-way would not be in the public interest. An application for an amendment of an existing right-of-way that seeks authorization for use of a substantial new parcel of public lands is properly reviewed in light of that regulation. BLM's decision rejecting the right-of-way application is properly affirmed where the case record amply supports its conclusion that the amendment would be inconsistent with BLM's management plan for the area and would not be in the public interest, as it would

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

permanently destroy riparian lands and decrease habitat for the bald eagle, and would likely increase erosion.

The burden is on appellant, as the party challenging BLM's decision denying an application for amendment of a right-of-way, both to show adequate reason for appeal and, as appropriate, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively researched the question of potential damage to riparian lands and concluded that they would be permanently harmed by proposed action, it is not enough that appellant offers a contrary opinion, but it must demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusion. BLM's decision is properly affirmed where appellant fails to do so.

King's Meadow Ranches, 126 IBLA 339 (June 17, 1993)

A BLM increase in the annual rental charge for a communications site right-of-way will be vacated where the record fails to demonstrate any relationship between the right-of-way subject to appraisal and a BLM master appraisal determining the market value of a "typical" BLM right-of-way, and where there is no indication that the communications site at issue matched the comparable factors in BLM's appraisal for a "typical" right-of-way.

Confidential Communications Co., 126 IBLA 349 (June 25, 1993)

In approving a Native allotment application, BLM properly reserved a 100-foot-wide easement across the allotment for an existing public road constructed along the route of a relinquished railroad right-of-way where the land had, prior to the Native's use and occupancy, been established by the Secretary of the Interior as part of a 100-foot-wide public highway pursuant to the Act of June 30, 1932, ch. 320, 47 Stat. 446, and then been quitclaimed to the State of Alaska. Reservation of an easement conforming to the width of the relinquished

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

right-of-way was not required because that right-of-way ceased to exist when the relinquishment was accepted.

State of Alaska, Dept. of Transportation & Public Facilities, 127 IBLA 137 (Aug. 25, 1993)

An increase in the annual rental charge for a communications site right-of-way will be set aside if the record fails to demonstrate any relationship between the right-of-way subject to appraisal and a BLM master appraisal determining the market value of a "typical" BLM right-of-way, and there is no indication that the comparable factors at the communications site at issue matched the comparable factors considered in BLM's appraisal of a "typical" right-of-way.

Western Tele-Communications, Inc., 127 IBLA 313 (Oct. 12, 1993)

An application for a right-of-way for transportation of water across a WSA was properly rejected by BLM because it was inconsistent with purposes for which the land was managed. A right-of-way for water facilities was not shown to have existed prior to initiation of wilderness review by title documents that made no reference to facilities to transport water, nor did traces of an old pipeline at the proposed right-of-way location tend to show the existence of a continuing right-of-way for such facilities.

Roger G. Gervais, Patsy V. Gervais, 128 IBLA 43 (Dec. 1, 1993)

In accepting a right-of-way grant for salt water disposal, the grantee agrees to be bound by all applicable State and Federal laws, including those related to water quality. Where the U.S. EPA determines that the grantee is polluting waters of the United States in violation of Federal law and orders the grantee to cease and desist, this Board has no jurisdiction to review such an order.

Laguna Gatuna, Inc., 131 IBLA 169 (Nov. 2, 1994)

RIGHTS-OF-WAY--Continued

ACT OF MARCH 3, 1891

Where a right-of-way grant issued under the Act of Mar. 3, 1891, does not contain provisions expressly mandating the filing of proof of construction of required improvements, failure to file does not, by itself, justify cancellation of the right-of-way.

The holder of a right-of-way issued under the Act of Mar. 3, 1891, is entitled to a factfinding hearing prior to cancellation for failure to construct improvements within 5 years of issuance as required by sec. 20 of that Act, where the case record does not demonstrate that improvements were not timely constructed, and where the right-of-way holder has expressly asserted that construction has been completed. In such hearing, BLM, as the proponent of the invalidity of the right-of-way, has the burden of proving that authorized improvements were not timely constructed.

John C. Urquidi, 124 IBLA 353 (Dec. 4, 1992)

ACT OF JANUARY 21, 1895

A road right-of-way issued in 1960 pursuant to the Act of Jan. 21, 1895, is subject to administration and assessment of rental pursuant to current Departmental regulations published at 43 CFR Part 2800. Assessment of increased annual rental under Departmental regulations does not require a hearing.

Western Nuclear, Inc., 117 IBLA 281 (Jan. 16, 1991)

ACT OF MARCH 4, 1911

A BLM increase in the annual rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way by the comparable lease method of appraisal.

Union Pacific Railroad Co., 114 IBLA 399 (May 30, 1990)

RIGHTS-OF-WAY--Continued

ACT OF FEBRUARY 25, 1920

The National Environmental Policy Act of 1969 requires that every agency study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement applies to the preparation of environmental assessments which serve as a basis for a Finding of No Significant Impact. Under this requirement, all reasonable alternatives must be considered and obvious alternatives may not be ignored. A site which poses sufficiently higher risks to the reliable provision of an essential public service is not a reasonable alternative that must be studied in preparing an environmental assessment for an amendment of a right-of-way for a gas pipeline compressor station.

A Bureau of Land Management decision approving or rejecting an application for a right-of-way or amendment to a right-of-way under 30 U.S.C. § 185 (1982), is an exercise of discretion that will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason to disturb the decision is shown.

Robert M. Perry et al., 114 IBLA 252 (May 9, 1990)

The MLA, as implemented by Departmental regulations, does not require rights-of-way for construction and operation of "production facilities." In the case of gas, under 43 CFR 2880.5(k), production facilities include a lessee's or lease operator's gathering lines which are located on lease upstream from the point of delivery to a transportation pipeline.

Where pipelines on a Federal oil and gas lease (described by the lessee as "lateral lines") move lease production to a central accumulation point on each lease; where each such line connects directly to a gas well and brings gas by separate individual lines to a central point where the gas is delivered into a single line; and where the primary function of the lines is gathering, they are properly considered "gathering lines" under 43 CFR 2880.0-5(k).

It is incumbent upon BLM to examine the facts and circumstances of individual cases to determine where the point of delivery from production facilities to the transportation pipeline actually is. A decision by BLM

establishing the point of delivery as the "approved production accounting measurement point" at the wellhead will be set aside where the record does not establish that delivery took place at that point.

Enron Oil & Gas Co., 122 IBLA 224 (Feb. 26, 1992)
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ACT OF OCTOBER 21, 1976 (FLPMA)

Denial of an application for a right-of-way on the grounds that the right-of-way would destroy plants of a Category 1 candidate species under the Endangered Species Act and its habitat will be affirmed when the decision is based on a reasoned analysis of the factors involved, made in due regard for the public interest, and no significant reason is shown to disturb the decision. A showing that there is a possible difference of scientific opinion on the issue of whether the candidate species is properly regarded as a subspecies is not sufficient to disturb BLM's decision.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

Under 43 CFR 2802.4(a), a right-of-way application to use public lands may be denied if BLM determines, among other things, that (1) the proposed right-of-way would be inconsistent with the purposes for which the public lands are managed, or (2) the proposed right-of-way would not be in the public interest. An application for an amendment of an existing right-of-way that seeks authorization for use of a substantial new parcel of public lands is properly reviewed in light of that regulation. BLM's decision rejecting the right-of-way application is properly affirmed where the case record amply supports its conclusion that the amendment would be inconsistent with BLM's management plan for the area and would not be in the public interest, as it would permanently destroy riparian lands and decrease habitat for the bald eagle, and would likely increase erosion.

The burden is on appellant, as the party challenging BLM's decision denying an application for amendment of a right-of-way, both to show adequate reason for appeal and, as appropriate, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing

alone, do not suffice. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively researched the question of potential damage to riparian lands and concluded that they would be permanently harmed by proposed action, it is not enough that appellant offers a contrary opinion, but it must demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusion. BLM's decision is properly affirmed where appellant fails to do so.

King's Meadow Ranches, 126 IBLA 339 (June 17, 1993)

APPLICATIONS

A Bureau of Land Management decision rejecting a right-of-way application for sewage stabilization lagoons filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

Pete Zanetti, 113 IBLA 239 (Feb. 28, 1990)

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A Bureau of Land Management decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

Ben J. Trexel, 113 IBLA 250 (Mar. 8, 1990)

RIGHTS-OF-WAY--Continued

APPLICATIONS--Continued

The amendment in 1982 of two electric power transmission rights-of-way granted pursuant to the Act of Mar. 4, 1911, to form a single right-of-way 330 feet wide and approximately 17 miles long pursuant to provision of the Federal Land Policy and Management Act of 1976 resulted in the creation of a third right-of-way under the 1976 Federal Land Policy and Management Act.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)

An applicant for a right-of-way for the construction and operation of a water diversion and flume to serve a fish-propagation facility on adjoining land may be required to pay all reasonable administrative and other costs in processing the right-of-way application, pursuant to the provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982).

Earl M. Hardy, Box Canyon Trout Co., Inc., 113 IBLA 367 (Mar. 27, 1990)

A Bureau of Land Management decision approving or rejecting an application for a right-of-way or amendment to a right-of-way under 30 U.S.C. § 185 (1982), is an exercise of discretion that will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason to disturb the decision is shown.

Robert M. Perry et al., 114 IBLA 252 (May 9, 1990)

A Bureau of Land Management decision rejecting a right-of-way application for a water diversion and water pipeline in a wilderness study area, filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

C. B. Slabaugh, 116 IBLA 63 (Sept. 5, 1990)

RIGHTS-OF-WAY--Continued

APPLICATIONS--Continued

Under FLPMA, the Secretary of the Interior has discretionary authority to grant rights-of-way. A BLM decision approving a trail right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be based upon a reasoned analysis of the factors involved; made with due regard for the public interest; and no reason for disturbing the decision is shown.

Coy Brown, 115 IBLA 347 (Aug. 13, 1990)

A decision rejecting a right-of-way application for an access road will be affirmed where granting the right-of-way would be inconsistent with applicable law and not in the public interest. Application for an access road right-of-way was properly rejected where the water well to which access was sought was neither the subject of an approved mining plan of operations nor authorized through issuance of a right-of-way grant or temporary use permit.

George Bernadot, 121 IBLA 138 (Oct. 28, 1991)

A BLM decision to issue a right-of-way grant for an irrigation ditch and associated structures will be affirmed on appeal when based on a reasoned analysis of all relevant factors, including the threat to the human environment from potential breaches of the ditch and to the rights of downstream water users from the diversion of water, and provided the decision was made with due regard for the public interest and sufficient reasons for disturbing the decision have not been shown.

Daryl Richardson et al., 125 IBLA 132 (Jan. 15, 1993)

Denial of an application for a right-of-way on the grounds that the right-of-way would destroy plants of a Category 1 candidate species under the Endangered Species Act and its habitat will be affirmed when the decision is based on a reasoned analysis of the factors involved, made in due regard for the public interest, and no significant reason is shown to disturb the decision. A showing that there is a possible difference

RIGHTS-OF-WAY--Continued

APPLICATIONS--Continued

of scientific opinion on the issue of whether the candidate species is properly regarded as a subspecies is not sufficient to disturb BLM's decision.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

Use of public lands for the purpose of a National Guard Maneuver Area is not properly authorized pursuant to the grant of a right-of-way under sec. 501 of FLPMA, 43 U.S.C. § 1761 (1988).

State of Alaska, Division of State Lands, 127 IBLA 375 (Oct. 21, 1993)

An application for a right-of-way for transportation of water across a WSA was properly rejected by BLM because it was inconsistent with purposes for which the land was managed. A right-of-way for water facilities was not shown to have existed prior to initiation of wilderness review by title documents that made no reference to facilities to transport water, nor did traces of an old pipeline at the proposed right-of-way location tend to show the existence of a continuing right-of-way for such facilities.

Roger G. Gervais, Patsy V. Gervais, 128 IBLA 43 (Dec. 1, 1993)

The Board will not overturn a BLM determination of reimbursable costs expected to be incurred while administering a right-of-way application if the cost estimate is supported by the record and the applicant has failed to demonstrate otherwise.

Diablo Communications, Inc., 128 IBLA 377 (Mar. 11, 1994)

RIGHTS-OF-WAY--Continued

APPLICATIONS--Continued

A BLM decision to reject a right-of-way application calling for removal of vegetation and shaping the banks of a stream because the contemplated activity would conflict with BLM's riparian management policy will be affirmed when the record supports a finding that the decision was based upon a reasoned analysis of all relevant factors and made with due regard for the public interest.

Thomas L. Watson et al., 129 IBLA 18 (Mar. 15, 1994)

A BLM decision rejecting a right-of-way application for a water gathering and transportation system filed pursuant to sec. 501 of FLPMA will be affirmed where the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest. Where the record contains uncontroverted evidence, in the form of analysis by a BLM wildlife biologist and other environmental analysis, showing that granting the application would adversely affect public land values, including grazing activities, wildlife, and riparian vegetation and habitat, BLM's rejection of the application will be affirmed.

Kenneth Knight, 129 IBLA 182 (Apr. 28, 1994)

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A BLM decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1988), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

J. E. Lepetich et al., 129 IBLA 255 (May 5, 1994)

RIGHTS-OF-WAY--Continued

APPLICATIONS--Continued

In adjudicating a protest against an application for communications right-of-way, BLM is required by 43 CFR 4.450-2 only to consider and decide matters which are proposed to be done. Where an application for right-of-way has already matured into a functioning use, a protest against the proposal upon which the use was initiated must be dismissed.

Confidential Communications Co., 131 IBLA 188 (Nov. 7, 1994)

APPRAISALS

When BLM adjusts a linear right-of-way rental, in accordance with the rental fee schedule set forth at 43 CFR 2803.1-2(c)(1)(i), and the grantee files an appeal completely agreeing with that action, but complaining that BLM failed to adjust the rental for prior years, the grantee has failed to point out error in the action taken by BLM or to show how he has been adversely affected by the decision, and the appeal will be dismissed.

Jesse H. Johnson, 112 IBLA 369 (Jan. 19, 1990)

The appraised value of a communication site right-of-way pertains to each individual user and is not to be prorated among site users.

In establishing the fair market rental value for a communication site right-of-way, BLM shall not be limited by the estimated value at the time of issuance of the right-of-way.

An appraisal of fair market rental value for a communication site right-of-way may be set aside and the case remanded where the record on appeal shows insufficient analysis of the leases considered in the appraisal.

Lone Pine Television, Inc., 113 IBLA 264 (Mar. 9, 1990)

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

A right-of-way rental rate schedule which employed county-wide values for calculating fair market value according to use was correctly used to calculate rental for an electric power transmission line right-of-way in conformity with provisions of 43 CFR Part 2800.

That portions of a right-of-way duplicate another grant previously obtained for a similar purpose does not entitle the grantee to a reduction of rental by subtracting the duplicated acreage from the area of the second grant.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)

The Board of Land Appeals will uphold an appraisal of the fair market rental value of a right-of-way for the construction, operation, and maintenance of a water diversion, flume, and access road in conjunction with a fish-propagation facility on adjoining private land where the appraisal is based on a reasonable comparable sales analysis and the challenge to the appraisal does not establish error in the comparability evaluation.

Earl M. Hardy, Box Canyon Trout Co., Inc., 113 IBLA 367 (Mar. 27, 1990)

BLM properly cancels a communications site right-of-way where the holder fails to pay the annual rental charges for the first and second years of the grant following several 30-day notifications by BLM of the fair market rental amount due for those years, as determined by appraisal.

Roy L. Parrish, 114 IBLA 336 (May 22, 1990)

A BLM increase in the annual rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

the fair market rental value of the right-of-way by the comparable lease method of appraisal.

Union Pacific Railroad Co., 114 IBLA 399 (May 30, 1990)

The Board will not overturn a BLM appraisal of a communication site right-of-way by the comparable lease method of appraisal where the appellant fails to establish by a preponderance of the evidence either that the appraisal method was erroneous or that the appraised value is excessive. Specifically, the appraisal will be affirmed where appellant does not establish that BLM improperly eliminated certain private and Government leases from comparison with the right-of-way, or that BLM improperly failed to adjust for differences both in the cost of obtaining access to the communication sites and between BLM rights-of-way and private leases.

MCI Telecommunications Corp., 115 IBLA 117 (June 27, 1990)

Generally, the proper appraisal method for determining the fair market value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Southern Pacific Transportation Co., 116 IBLA 164 (Sept. 26, 1990)

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

An appraisal of fair market value for a natural gas compressor site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Where BLM has conducted an appraisal of fair market value of a natural gas compressor site right-of-way by utilizing comparable sales data for other compressor sites, its rental determination based thereon will not be overturned based on allegations that such sales are outdated, where the appraisal made negative adjustments for time and the sales presented by the right-of-way holder as comparable were not sales for compressor sites.

Western Field Production, Inc., 116 IBLA 225 (Oct. 12, 1990)

A BLM appraisal of fair market rental value of a communication site lease will be upheld unless an appellant can show error in the appraisal methods used and demonstrate by convincing evidence that the rental charge is excessive. In the absence of a preponderance of evidence that the appraisal is erroneous, an appraisal generally may be rebutted only by another appraisal.

Gila Electronics, 117 IBLA 51 (Nov. 27, 1990)

Where BLM establishes the rental for an access road right-of-way granted under sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1988), in accordance with the schedule adopted pursuant to 43 CFR 2803.1-2(c)(1), and appellant fails to demonstrate error, BLM's rental determination will be affirmed.

Mr. & Mrs. Gerald H. Murray, 117 IBLA 138 (Dec. 6, 1990)

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

A road right-of-way issued in 1960 pursuant to the Act of Jan. 21, 1895, is subject to administration and assessment of rental pursuant to current Departmental regulations published at 43 CFR Part 2800. Assessment of increased annual rental under Departmental regulations does not require a hearing.

Western Nuclear, Inc., 117 IBLA 281 (Jan. 16, 1991)

A BLM increase in the annual rental charge for a communications site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market value of the right-of-way by the comparable lease method of appraisal.

Questar Service Corp., 119 IBLA 65 (Mar. 29, 1991)

Where BLM granted appellant a communication site right-of-way under Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1988), subject to a future appraisal, application of 43 CFR 2803.1-2(c)(3)(ii), providing that BLM may establish an estimated rental fee, collect a deposit in advance, and adjust the advance deposit upon receipt of an approved fair market appraisal, was not a prohibited imposition of a retroactive rental.

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Oregon Broadcasting Co., 119 IBLA 241 (May 15, 1991)

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

A right-of-way grant for a water pipeline issued in 1990 pursuant to regulations published at 43 CFR Part 2800, implementing the Federal Land Policy and Management Act of 1976, was made subject to payment of rental under 43 CFR 2803.1-2(a).

Kevin C. Kehoe, 119 IBLA 257 (May 16, 1991)

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including rights-of-way for solar evaporation ponds and related facilities, is the comparable lease method of appraisal. An appraisal may be set aside and the case remanded where the record on appeal shows insufficient analysis of other leases considered in the appraisal to verify their comparability with the right-of-way appraised.

AMAX Magnesium, 119 IBLA 281 (June 6, 1991)

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

Where BLM is precluded by statutory proviso from expending funds in fiscal year 1991 to increase the fees charged for communication site rights-of-way, a decision reappraising the fair market rental value of the right-of-way may be vacated in part to reflect the lack of authority to collect the reappraised rental prior to Oct. 1, 1991.

Communications Enterprises, Inc., 120 IBLA 146 (July 16, 1991)

Uno Broadcasting Corp., 120 IBLA 380 (Sept. 23, 1991)

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

The Board will affirm a BLM decision issuing a communication site right-of-way where on appeal the grantee complains that the rental for the right-of-way is too high, but the record shows that the rental was based on an appraisal of the fair market rental value utilizing the comparable lease method of appraisal and the appellant fails to show either that the appraisal method was erroneous or that the appraised value is excessive.

Idaho Wireless Corp., 120 IBLA 172 (July 23, 1991)

Where BLM has set the annual rental charge for a communication site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charge and remand for a reappraisal and any necessary recalculation of such charges.

First Broadcasting of Nevada, Inc., 120 IBLA 240 (Aug. 9, 1991)

Under the relevant regulation, the comparable lease method of appraisal is the preferred method for determining the fair market value of a nonlinear right-of-way such as a communication site. Under this method, the rentals charged for similar sites in the area are reviewed and adjustments are made for variations in the features of the sites and the rights obtained under the leases. An appraisal based simply on application of the consumer price index to a prior appraisal without any analysis of comparable leases is properly remanded as inconsistent with the regulatory standard.

KSEI, Inc., 120 IBLA 266 (Aug. 21, 1991)

Where BLM has granted a power line right-of-way subject to future determination of rental, and BLM later determines a rental on the basis of an erroneous calculation of acreage within the grant, BLM is not precluded from revising the rental on the basis of the correct acreage, and requiring the holder of the right-of-way

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

to pay the revised rental from the date that the right-of-way was first granted.

Salt River Project, 121 IBLA 185 (Nov. 5, 1991)

The holder of a right-of-way grant for a salt water disposal site is required to pay annually, in advance, the fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices. In accordance with 43 CFR 2803.1-2(c)(3)(i), rental for non-linear right-of-way grants must be based on a market survey of comparable rentals or on a value determination for specific parcels.

A BLM decision adjusting the rental for a salt water disposal site right-of-way from a per acre fee to a fee per barrel of disposed water will be affirmed where the adjusted rental is based on a market survey of comparable salt water disposal leases which indicates that a per barrel fee is utilized in the market place to determine rentals, and the appellant has neither demonstrated error in that methodology nor shown that the rental charges are excessive.

Laguna Gatuna, Inc., 121 IBLA 302 (Dec. 3, 1991)

Absent a demonstration that BLM's method for appraising the value of the linear and site components of a right-of-way granted for a hydroelectric power facility is erroneous or the rental is clearly excessive, a BLM decision adjusting the rental is properly affirmed.

Bear Creek Hydro, 122 IBLA 200 (Feb. 10, 1992)

An appraisal of the fair market rental value of a reservoir right-of-way will be upheld on appeal where no error is shown in the appraisal method used by BLM and the appellant fails to show by convincing evidence that the annual rental charge is excessive.

A decision initially advising the holder of a right-of-way of the fair market rental value of the

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

grant and billing that amount more than 6 years after issuance of the right-of-way may be set aside and remanded for consideration of whether in the public interest the rental charge should be reduced on the basis of undue hardship to the holder under the regulation at 43 CFR 2803.1-2(b)(2)(iv) where the reservoir authorized by the right-of-way was never constructed.

V. Irene Wallace, 122 IBLA 349 (Mar. 12, 1992)

BLM properly increased the rental for an existing FLPMA linear right-of-way using the regulatory rental fee schedule for linear rights-of-way, when the regulation calling for rental adjustment at least once every 5 years was expressly incorporated into appellant's right-of-way grant, and the regulatory fee schedule was applicable during the course of a periodic adjustment necessary to reflect the then current fair market rental value.

Jack C. Gutte, 123 IBLA 295 (June 23, 1992)

A rental rate adjustment for a right-of-way for a hydroelectric power plant under 43 CFR 2803.1-2 will be set aside and remanded so that the BLM Manual may apply policies and procedures that are being developed for determining rentals for such rights-of-way.

Bear Creek Hydro (On Reconsideration), 124 IBLA 225 (Oct. 27, 1992)

BLM properly requires the holder of a communications site right-of-way to pay rental charges, in addition to those originally estimated at the time of issuance of the right-of-way grant, based upon an appraisal of the fair market rental value of the right-of-way.

Voice Ministries of Farmington, Inc., 124 IBLA 358 (Dec. 4, 1992)

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

The fair market value rental for a linear right-of-way is based upon the amount of land required to construct and maintain the pipeline. The mere fact that the pipeline is longer than it might be if the sole basis for choosing the route had been the per-acre rental charge is not a proper basis for concluding that the rental is too high.

The regulation at 43 CFR 2803.1-2 provides authority for reduction or waiver of rental for a right-of-way if requiring payment of the full rental will cause undue hardship on the holder and it is in the public interest to reduce or waive the rental. BLM need not consider applying this regulation when assessing the rental amount if there is no evidence that charging the full rental amount would cause undue hardship.

Jacqueline Balander, 125 IBLA 262 (Feb. 17, 1993)

When the right-of-way grant specifically provided for periodic rental adjustments to bring the right-of-way rental in line with fair market rental values it is proper for BLM to increase the annual rental to conform the rental amount to the current fair market rental value of the right-of-way.

When the holder of a right-of-way is a nonprofit municipal utility or cooperative, BLM may consider whether the holder is entitled to a reduction of rental pursuant to 43 CFR 2803.1-2(b)(2)(i) or (ii).

Valley Pioneers Water Co., Inc., 125 IBLA 326 (Mar. 25, 1993)

A BLM increase in the rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

to present sufficiently convincing evidence that the rental charges are excessive.

Quality Broadcasting Corp., Unicom Broadcasting, Inc., 126 IBLA 174 (May 11, 1993)

Where an existing FLPMA access road right-of-way grant provided that it was subject to the regulations in 43 CFR Part 2800, BLM properly established the rental for use thereof by utilizing the regulatory rental fee schedule for linear rights-of-way found at 43 CFR 2803.1-2(c) during the course of a periodic adjustment necessary to reflect the current fair market rental value. While the relevant statute and regulations provide for waiver or a reduction in the rental amount under certain circumstances, the right-of-way holder must prove eligibility for such consideration.

Ruth Tausta-White, 127 IBLA 101 (July 29, 1993)

An increase in the annual rental charge for a communications site right-of-way will be set aside if the record fails to demonstrate any relationship between the right-of-way subject to appraisal and a BLM master appraisal determining the market value of a "typical" BLM right-of-way, and there is no indication that the comparable factors at the communications site at issue matched the comparable factors considered in BLM's appraisal of a "typical" right-of-way.

Western Tele-Communications, Inc., 127 IBLA 313 (Oct. 12, 1993)

Because rights-of-way appeals regulation 43 CFR 2884.1 provides that decisions involving mineral leasing rights-of-way will be given immediate effect and will not be stayed pending appeal unless otherwise ordered, the general stay regulation provided at 43 CFR 4.21(a) does not apply to such rights-of-way appeals.

Texaco Trading & Transportation Inc., 128 IBLA 239 (Mar. 2, 1994)

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

BLM's fair market value determination will be affirmed if the appellant does not demonstrate error in the appraisal method or present convincing evidence that the fair market value determination is erroneous and the case file contains the facts or an analysis sufficiently complete to allow the Board to conclude that the fair market value determination is supported by the record.

Reduction or waiver of rental for a right-of-way is authorized by 43 CFR 2803.1-2 if payment of full rental would cause undue hardship. To qualify for reduction the holder of the right-of-way must formally request relief pursuant to that section and submit data and relevant information demonstrating the existence of a hardship.

Thousand Peaks Ranches, Inc., 129 IBLA 397 (June 30, 1994)

Where BLM granted a communication site right-of-way, subject to a future fair market value appraisal, application of 43 CFR 2803.1-2(c)(3)(ii), providing that BLM may establish an estimated rental fee, collect a deposit in advance, and adjust the advance deposit upon receipt of an approved fair market appraisal, was not a prohibited imposition of a retroactive rental.

Where a right-of-way holder charges that the fair market rental value determined by BLM is in error, but shows no error in BLM's appraisal method and provides no evidence to establish that BLM's appraisal is excessive, the Board will affirm BLM's determination.

Alaskan M.D.S., Inc., 130 IBLA 13 (July 6, 1994)

Where a right-of-way holder charges that the fair market value determined by BLM is in error, but shows no error in BLM's appraisal method and provides no evidence to establish that BLM's appraisal is excessive, the Board will affirm BLM's determination.

London Bridge Broadcasting, Inc., 130 IBLA 73 (July 26, 1994)

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

Where, in a previous appeal, this Board found that rental charges for a right-of-way were proper, and where that decision was not appealed, the grantee's challenge to the rental in a subsequent appeal is barred by the doctrine of administrative finality.

Laguna Gatuna, Inc., 131 IBLA 169 (Nov. 2, 1994)

CANCELLATION

BLM properly cancels a communications site right-of-way where the holder fails to pay the annual rental charges for the first and second years of the grant following several 30-day notifications by BLM of the fair market rental amount due for those years, as determined by appraisal.

Roy L. Parrish, 114 IBLA 336 (May 22, 1990)

If the right-of-way grant document provides that failure to pay the annual rental in a timely manner results in summary termination without an administrative proceeding, the right-of-way authorization automatically terminates by operation of law upon failure to pay the rental on or before the anniversary date, as specified in the right-of-way document, and no rental accrues beyond that date.

Wagner Equipment Co., 116 IBLA 275 (Oct. 22, 1990)

It is proper for BLM to cancel a reservoir right-of-way grant pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1766 (1988), when the grantee fails to obtain a performance bond required by the grant, after having been given notice and a reasonable time to comply.

Robert A. Erkins, 121 IBLA 61 (Oct. 25, 1991)

RIGHTS-OF-WAY--Continued

CANCELLATION--Continued

Where a right-of-way grant issued under the Act of Mar. 3, 1891, does not contain provisions expressly mandating the filing of proof of construction of required improvements, failure to file does not, by itself, justify cancellation of the right-of-way.

The holder of a right-of-way issued under the Act of Mar. 3, 1891, is entitled to a factfinding hearing prior to cancellation for failure to construct improvements within 5 years of issuance as required by sec. 20 of that Act, where the case record does not demonstrate that improvements were not timely constructed, and where the right-of-way holder has expressly asserted that construction has been completed. In such hearing, BLM, as the proponent of the invalidity of the right-of-way, has the burden of proving that authorized improvements were not timely constructed.

John C. Urquidi, 124 IBLA 353 (Dec. 4, 1992)

43 U.S.C. § 1766 (1988), and 43 CFR 2803.4(d) require written notice that cancellation of a right-of-way is contemplated for failure to comply with a condition of its granting and a reasonable opportunity to cure the noncompliance. A BLM decision cancelling a right-of-way without providing notice and a reasonable time to comply will be vacated.

John & Katherine Caton, 126 IBLA 335 (June 17, 1993)

In approving a Native allotment application, BLM properly reserved a 100-foot-wide easement across the allotment for an existing public road constructed along the route of a relinquished railroad right-of-way where the land had, prior to the Native's use and occupancy, been established by the Secretary of the Interior as part of a 100-foot-wide public highway pursuant to the Act of June 30, 1932, ch. 320, 47 Stat. 446, and then been quitclaimed to the State of Alaska. Reservation of an easement conforming to the width of the relinquished right-of-way was not required because that right-of-way ceased to exist when the relinquishment was accepted.

State of Alaska, Dept. of Transportation & Public Facilities, 127 IBLA 137 (Aug. 25, 1993)

RIGHTS-OF-WAY--Continued

CANCELLATION--Continued

A right-of-way issued under FLPMA, 43 U.S.C. § 1761 (1988), for the development of a spring and pipeline is properly cancelled when the holder of the right-of-way abandons the project within the meaning of 43 U.S.C. § 1766 (1988), and 43 CFR 2803.4(c) by failing to use the right-of-way for a continuous 5-year period and submits nothing that demonstrates that the failure to use the right-of-way was due to circumstances not within the holder's control.

Theron E. Coon, 129 IBLA 30 (Mar. 21, 1994)

Under 43 CFR 2803.4(d), before suspending or terminating a right-of-way grant for failure to comply with applicable law or regulations, BLM must give the holder written notice that such action is contemplated and the grounds therefor and must allow the holder a reasonable opportunity to cure such noncompliance. When, by decision, BLM terminates a right-of-way grant without providing the required notice, that decision will be set aside and the case remanded to BLM.

Laguna Gatuna, Inc., 131 IBLA 169 (Nov. 2, 1994)

CONDITIONS AND LIMITATIONS

When Congress has enacted legislation to provide for rights-of-way for particular purposes, authorization to use public land for such purposes must be consistent with that legislation. Under the right-of-way provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), and its implementing regulations, 43 CFR Part 2800, authorization to use public land for a permanent access road to a wind energy park can only be accomplished through the issuance of a right-of-way grant. Approval of a plan of operations for a wind energy facility right-of-way does not constitute the authorization for an access road, which is not located on the lands described in the wind energy facility right-of-way grant.

Mesa Wind Developers, 113 IBLA 61 (Feb. 7, 1990)

RIGHTS-OF-WAY--Continued

CONDITIONS AND LIMITATIONS--Continued

In denying a right-of-way authorizing motorized access to private property across lands included in a wild and scenic river area, BLM acted contrary to sec. 12(b) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1283(b) (1982), and the implementing regulations at 43 CFR 8351.2-1, since the record established that appellants and their predecessors have historically used motorized vehicles in reaching their property.

Alvin R. Platz et al., 114 IBLA 8 (Mar. 30, 1990)
97 I.D. 125

If the right-of-way grant document provides that failure to pay the annual rental in a timely manner results in summary termination without an administrative proceeding, the right-of-way authorization automatically terminates by operation of law upon failure to pay the rental on or before the anniversary date, as specified in the right-of-way document, and no rental accrues beyond that date.

Wagner Equipment Co., 116 IBLA 275 (Oct. 22, 1990)

Under 25 CFR 169.19, the renewal of a right-of-way across individually owned Indian land requires the consent of the owners of a majority of the interests in the land.

The owner of an interest in individually owned Indian land may withdraw his/her consent to a right-of-way at any time prior to the granting of the right-of-way easement by the Bureau of Indian Affairs.

Nellie Moccasin v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 184 (Feb. 5, 1991)

BLM properly declines to condition a grant of a slurry pipeline right-of-way on a requirement that the pipeline be operated as a common carrier for the benefit of other producers of phosphate ore where no statute requires such operation and there is no demonstration

RIGHTS-OF-WAY--Continued

CONDITIONS AND LIMITATIONS--Continued

that such a condition is necessary to protect competition, future development of phosphate reserves, or the environment.

John D. Archer, 120 IBLA 290 (Sept. 6, 1991)

Absent a demonstration that BLM's method for appraising the value of the linear and site components of a right-of-way granted for a hydroelectric power facility is erroneous or the rental is clearly excessive, a BLM decision adjusting the rental is properly affirmed.

Bear Creek Hydro, 122 IBLA 200 (Feb. 10, 1992)

A rental rate adjustment for a right-of-way for a hydroelectric power plant under 43 CFR 2803.1-2 will be set aside and remanded so that the BLM Manual may apply policies and procedures that are being developed for determining rentals for such rights-of-way.

Bear Creek Hydro (On Reconsideration), 124 IBLA 225 (Oct. 27, 1992)

The Federal grant for a pipeline right-of-way requires BLM to comply with sec. 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (1988), on both Federal and non-Federal lands involved in the project.

Central Valley Electric Cooperative, Inc., 128 IBLA 126 (Dec. 22, 1993)

FEDERAL HIGHWAY ACT

Those portions of mining claims located on land subject to a valid, ongoing, and pre-existing highway right-of-way granted to the State of California pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982), are null and void ab initio.

William Peterson et al., 113 IBLA 19 (Jan. 26, 1990)

RIGHTS-OF-WAY--Continued

FEDERAL HIGHWAY ACT--Continued

A Native allotment was not subject to an amended right-of-way grant for a Federal-Aid Highway because the amendment was subject to valid existing rights and was made after initiation of the Native claim.

State of Alaska Dept. of Transportation & Public Facilities, 125 IBLA 291 (Mar. 9, 1993)

That portion of a mining claim located on land subject to a pre-existing highway right-of-way granted to the State of California pursuant to the Federal Highway Act of Nov. 9, 1921, 42 Stat. 212, now the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), is null and void ab initio.

Jesse R. Collins et al., 127 IBLA 122 (Aug. 23, 1993)

If, after a Native initiates use and occupancy of certain lands, an amended right-of-way grant for a Federal-Aid Highway is sought and granted by BLM across such lands subject to valid existing rights, completion of 5 years of use and occupancy coupled with timely filing of a Native allotment application vests an inchoate preference right arising from use and occupancy. That right relates back to the time when use and occupancy began, and takes precedence over the intervening amended right-of-way grant, which is properly declared null and void.

State of Alaska v. William T. Bryant, 129 IBLA 35 (Mar. 21, 1994)

Those portions of placer mining claims located on lands subject to a right-of-way grant issued pursuant to sec. 317 of the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), are properly declared null and void ab initio.

Robert J. Collins et al., 129 IBLA 341 (May 31, 1994)

RIGHTS-OF-WAY--Continued

FEDERAL HIGHWAY ACT--Continued

BLM properly declared an association placer mining claim null and void ab initio in part to the extent the claim was located on lands subject to a highway right-of-way granted pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1988).

James Aubert et al., 130 IBLA 50 (July 13, 1994)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

When Congress has enacted legislation to provide for rights-of-way for particular purposes, authorization to use public land for such purposes must be consistent with that legislation. Under the right-of-way provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), and its implementing regulations, 43 CFR Part 2800, authorization to use public land for a permanent access road to a wind energy park can only be accomplished through the issuance of a right-of-way grant. Approval of a plan of operations for a wind energy facility right-of-way does not constitute the authorization for an access road, which is not located on the lands described in the wind energy facility right-of-way grant.

Mesa Wind Developers, 113 IBLA 61 (Feb. 7, 1990)

A Bureau of Land Management decision rejecting a right-of-way application for sewage stabilization lagoons filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

Pete Zanetti, 113 IBLA 239 (Feb. 28, 1990)

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A Bureau of Land Management decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

Ben J. Trexel, 113 IBLA 250 (Mar. 8, 1990)

The amendment in 1982 of two electric power transmission rights-of-way granted pursuant to the Act of Mar. 4, 1911, to form a single right-of-way 330 feet wide and approximately 17 miles long pursuant to provision of the Federal Land Policy and Management Act of 1976 resulted in the creation of a third right-of-way under the 1976 Federal Land Policy and Management Act.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)

The Board of Land Appeals will uphold an appraisal of the fair market rental value of a right-of-way for the construction, operation, and maintenance of a water diversion, flume, and access road in conjunction with a fish-propagation facility on adjoining private land where the appraisal is based on a reasonable comparable sales analysis and the challenge to the appraisal does not establish error in the comparability evaluation.

Earl M. Hardy, Box Canyon Trout Co., Inc., 113 IBLA 367 (Mar. 27, 1990)

In denying a right-of-way authorizing motorized access to private property across lands included in a wild and scenic river area, BLM acted contrary to sec. 12(b) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1283(b) (1982), and the implementing regulations at 43 CFR 8351.2-1, since the record established that

appellants and their predecessors have historically used motorized vehicles in reaching their property.

Alvin R. Platz et al., 114 IBLA 8 (Mar. 30, 1990)
97 I.D. 125

A Bureau of Land Management decision rejecting a right-of-way application for a water diversion and water pipeline in a wilderness study area, filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

C. B. Slabaugh, 116 IBLA 63 (Sept. 5, 1990)

Under FLPMA, the Secretary of the Interior has discretionary authority to grant rights-of-way. A BLM decision approving a trail right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be based upon a reasoned analysis of the factors involved; made with due regard for the public interest; and no reason for disturbing the decision is shown.

A FONSI will be affirmed if the record supports a conclusion that all relevent areas of environmental concern were identified and carefully reviewed, and that the final determination of no significant impact is reasonable in light of the environmental analysis. A party challenging a FONSI determination must show that it was premised on a clear error of law or demonstrable error of fact, or that analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be established by objective proof. Mere expressions of a difference of opinion provide no basis for reversal.

Coy Brown, 115 IBLA 347 (Aug. 13, 1990)

Where BLM establishes the rental for an access road right-of-way granted under sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1988), in accordance with the schedule adopted pursuant to 43 CFR 2803.1-2(c)(1), and appellant fails to demonstrate error, BLM's rental determination will be affirmed.

Mr. & Mrs. Gerald H. Murray, 117 IBLA 138 (Dec. 6, 1990)

Although 43 CFR 2801.1-2 authorizes BLM to require that a road right-of-way applicant grant a reciprocal right-of-way to the United States as a condition to receiving a right-of-way pursuant to sec. 501(a) of FLPMA, 43 U.S.C. 1761(a) (1988), the reciprocal grants must be equivalent, and a BLM decision denying an application for the assignment of a road right-of-way, based on the purported refusal of the assignee to grant public access across his private land, will be vacated because a FLPMA right-of-way does not grant public access.

Charles Ryden, 119 IBLA 277 (June 6, 1991)

It is proper for BLM to cancel a reservoir right-of-way grant pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1766 (1988), when the grantee fails to obtain a performance bond required by the grant, after having been given notice and a reasonable time to comply.

Robert A. Erkins, 121 IBLA 61 (Oct. 25, 1991)

Where BLM has granted a power line right-of-way subject to future determination of rental, and BLM later determines a rental on the basis of an erroneous calculation of acreage within the grant, BLM is not precluded from revising the rental on the basis of the correct acreage, and requiring the holder of the right-of-way to pay the revised rental from the date that the right-of-way was first granted.

Salt River Project, 121 IBLA 185 (Nov. 5, 1991)

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)
98 I.D. 398

Absent a demonstration that BLM's method for appraising the value of the linear and site components of a right-of-way granted for a hydroelectric power facility is erroneous or the rental is clearly excessive, a BLM decision adjusting the rental is properly affirmed.

Bear Creek Hydro, 122 IBLA 200 (Feb. 10, 1992)

The question whether a public highway was established pursuant to R.S. 2477 is to be determined by reference to state law. BLM may decide whether an R.S. 2477 road exists if the efficient administration of the public lands requires such a decision to be made.

Construction of 1,000 feet of road across public land in Oct. 1990 was done in trespass because no prior application for a right-of-way at the construction site was made and the road builder failed to show that the 1,000-foot road was a public highway recognized pursuant to Montana law prior to the repeal of R.S. 2477 by FLPMA.

Courtney Ayers, 122 IBLA 275 (Mar. 5, 1992)

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

Where BLM issues a decision denying the assignment of a salt water disposal right-of-way and such decision is merely conclusory in nature, the record is barren of any supporting rationale, and other unaddressed issues are presented, the decision will be set aside and the case remanded for BLM to reassess assignment of the right-of-way and determine what steps are necessary for the protection of the Federal mineral interest in the land in question.

Burnett Oil Co., Inc., 122 IBLA 330 (Mar. 11, 1992)

BLM properly increased the rental for an existing FLPMA linear right-of-way using the regulatory rental fee schedule for linear rights-of-way, when the regulation calling for rental adjustment at least once every 5 years was expressly incorporated into appellant's right-of-way grant, and the regulatory fee schedule was applicable during the course of a periodic adjustment necessary to reflect the then current fair market rental value.

Jack C. Gutte, 123 IBLA 295 (June 23, 1992)

A rental rate adjustment for a right-of-way for a hydroelectric power plant under 43 CFR 2803.1-2 will be set aside and remanded so that the BLM Manual may apply policies and procedures that are being developed for determining rentals for such rights-of-way.

Bear Creek Hydro (On Reconsideration), 124 IBLA 225 (Oct. 27, 1992)

A BLM decision to issue a right-of-way grant for an irrigation ditch and associated structures will be affirmed on appeal when based on a reasoned analysis of all relevant factors, including the threat to the human environment from potential breaches of the ditch and to the rights of downstream water users from the diversion of water, and provided the decision was made with due regard for the public interest and sufficient reasons for disturbing the decision have not been shown.

Daryl Richardson et al., 125 IBLA 132 (Jan. 15, 1993)

BLM is entitled (and required) to charge fair market rental for an existing water pipeline right-of-way issued pursuant to Title V of FLPMA, as amended, 43 U.S.C. §§ 1761-1771 (1988), even though no rental had been charged for a right-of-way or use authorization for the pipeline for a number of years prior to right-of-way issuance.

It does not matter that no surface uses of the land subject to an existing water pipeline right-of-way are or may be disrupted by the pipeline. The rental is charged for the right to use the land, and would accrue even if the right-of-way holder did not use the land.

The fair market value rental for a linear right-of-way is based upon the amount of land required to construct and maintain the pipeline. The mere fact that the pipeline is longer than it might be if the sole basis for choosing the route had been the per-acre rental charge is not a proper basis for concluding that the rental is too high.

The regulation at 43 CFR 2803.1-2 provides authority for reduction or waiver of rental for a right-of-way if requiring payment of the full rental will cause undue hardship on the holder and it is in the public interest to reduce or waive the rental. BLM need not consider applying this regulation when assessing the rental amount if there is no evidence that charging the full rental amount would cause undue hardship.

Jacqueline Balander, 125 IBLA 262 (Feb. 17, 1993)

Denial of an application for a right-of-way on the grounds that the right-of-way would destroy plants of a Category 1 candidate species under the Endangered Species Act and its habitat will be affirmed when the decision is based on a reasoned analysis of the factors involved, made in due regard for the public interest, and no significant reason is shown to disturb the decision. A showing that there is a possible difference of scientific opinion on the issue of whether the candidate species is properly regarded as a subspecies is not sufficient to disturb BLM's decision.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

When the right-of-way grant specifically provided for periodic rental adjustments to bring the right-of-way rental in line with fair market rental values it is proper for BLM to increase the annual rental to conform the rental amount to the current fair market rental value of the right-of-way.

When the holder of a right-of-way is a nonprofit municipal utility or cooperative, BLM may consider whether the holder is entitled to a reduction of rental pursuant to 43 CFR 2803.1-2(b)(2)(i) or (ii).

Valley Pioneers Water Co., Inc., 125 IBLA 326 (Mar. 25, 1993)

43 U.S.C. § 1766 (1988), and 43 CFR 2803.4(d) require written notice that cancellation of a right-of-way is contemplated for failure to comply with a condition of its granting and a reasonable opportunity to cure the noncompliance. A BLM decision cancelling a right-of-way without providing notice and a reasonable time to comply will be vacated.

John & Katherine Caton, 126 IBLA 335 (June 17, 1993)

Under 43 CFR 2802.4(a), a right-of-way application to use public lands may be denied if BLM determines, among other things, that (1) the proposed right-of-way would be inconsistent with the purposes for which the public lands are managed, or (2) the proposed right-of-way would not be in the public interest. An application for an amendment of an existing right-of-way that seeks authorization for use of a substantial new parcel of public lands is properly reviewed in light of that regulation. BLM's decision rejecting the right-of-way application is properly affirmed where the case record amply supports its conclusion that the amendment would be inconsistent with BLM's management plan for the area and would not be in the public interest, as it would permanently destroy riparian lands and decrease habitat for the bald eagle, and would likely increase erosion.

The burden is on appellant, as the party challenging BLM's decision denying an application for amendment of a right-of-way, both to show adequate reason for appeal and, as appropriate, to support its allegations with evidence showing error. Conclusory

allegations of error or differences of opinion, standing alone, do not suffice. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively researched the question of potential damage to riparian lands and concluded that they would be permanently harmed by proposed action, it is not enough that appellant offers a contrary opinion, but it must demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusion. BLM's decision is properly affirmed where appellant fails to do so.

King's Meadow Ranches, 126 IBLA 339 (June 17, 1993)

Where an existing FLPMA access road right-of-way grant provided that it was subject to the regulations in 43 CFR Part 2800, BLM properly established the rental for use thereof by utilizing the regulatory rental fee schedule for linear rights-of-way found at 43 CFR 2803.1-2(c) during the course of a periodic adjustment necessary to reflect the current fair market rental value. While the relevant statute and regulations provide for waiver or a reduction in the rental amount under certain circumstances, the right-of-way holder must prove eligibility for such consideration.

Ruth Tausta-White, 127 IBLA 101 (July 29, 1993)

An application for a right-of-way for transportation of water across a WSA was properly rejected by BLM because it was inconsistent with purposes for which the land was managed. A right-of-way for water facilities was not shown to have existed prior to initiation of wilderness review by title documents that made no reference to facilities to transport water, nor did traces of an old pipeline at the proposed right-of-way location tend to show the existence of a continuing right-of-way for such facilities.

Roger G. Gervais, Patsy V. Gervais, 128 IBLA 43 (Dec. 1, 1993)

The Federal grant for a pipeline right-of-way requires BLM to comply with sec. 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (1988), on both Federal and non-Federal lands involved in the project.

Central Valley Electric Cooperative, Inc., 128 IBLA 126 (Dec. 22, 1993)

The Board will not overturn a BLM determination of reimbursable costs expected to be incurred while administering a right-of-way application if the cost estimate is supported by the record and the applicant has failed to demonstrate otherwise.

Diablo Communications, Inc., 128 IBLA 377 (Mar. 11, 1994)

A right-of-way issued under FLPMA, 43 U.S.C. § 1761 (1988), for the development of a spring and pipeline is properly cancelled when the holder of the right-of-way abandons the project within the meaning of 43 U.S.C. § 1766 (1988), and 43 CFR 2803.4(c) by failing to use the right-of-way for a continuous 5-year period and submits nothing that demonstrates that the failure to use the right-of-way was due to circumstances not within the holder's control.

Theron E. Coon, 129 IBLA 30 (Mar. 21, 1994)

A BLM decision rejecting a right-of-way application for a water gathering and transportation system filed pursuant to sec. 501 of FLPMA will be affirmed where the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest. Where the record contains uncontroverted evidence, in the form of analysis by a BLM wildlife biologist and other environmental analysis, showing that granting the application would adversely affect public land values, including grazing activities, wildlife, and riparian vegetation and habitat, BLM's rejection of the application will be affirmed.

Kenneth Knight, 129 IBLA 182 (Apr. 28, 1994)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A BLM decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1988), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

J. E. Lepetich et al., 129 IBLA 255 (May 5, 1994)

BLM must charge fair market rental value for a right-of-way issued pursuant to Title V of FLPMA, as amended, 43 U.S.C. §§ 1761-1771 (1988).

Reduction or waiver of rental for a right-of-way is authorized by 43 CFR 2803.1-2 if payment of full rental would cause undue hardship. To qualify for reduction the holder of the right-of-way must formally request relief pursuant to that section and submit data and relevant information demonstrating the existence of a hardship.

Thousand Peaks Ranches, Inc., 129 IBLA 397 (June 30, 1994)

In deciding whether to issue an EIS, BLM must consider indirect environmental effects of development of private lands if caused by its action. Where the record shows that such development (construction of housing in a subdivision) will likely occur even if BLM does not take the action in question (granting a right-of-way for an access road across Federal land to the subdivision), it cannot be said that the effects of development were "caused by" the BLM action, and BLM need not consider those effects in an EA or EIS.

A BLM decision granting a right-of-way for an access across public land to a subdivision on private land will be affirmed where the record shows the decision to be based on a reasoned analysis of the facts involved, made with due regard for the public interest, and where appellants fail to show error in the decision. Where BLM identifies adverse environmental effects, but reasonably judges them to be similar to effects resulting from the no-action alternative, and where the action

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

presents other benefits not provided by the no-action alternative, its decision will be affirmed.

James Shaw, S. Eric Krasa, 130 IBLA 105 (Aug. 2, 1994)

A BLM decision approving a reservation for a communication site right-of-way under FLPMA, 43 U.S.C. § 1767(a) (1988), is an exercise of discretion that will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason to disturb the decision is shown.

Confidential Communications Co., 131 IBLA 188 (Nov. 7, 1994)

NATURE OF DECISION

The amendment in 1982 of two electric power transmission rights-of-way granted pursuant to the Act of Mar. 4, 1911, to form a single right-of-way 330 feet wide and approximately 17 miles long pursuant to provision of the Federal Land Policy and Management Act of 1976 resulted in the creation of a third right-of-way under the 1976 Federal Land Policy and Management Act.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)

NATURE OF INTEREST GRANTED

When Congress has enacted legislation to provide for rights-of-way for particular purposes, authorization to use public land for such purposes must be consistent with that legislation. Under the right-of-way provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), and its implementing regulations, 43 CFR Part 2800, authorization to use public land for a permanent access road to a wind energy park can only be accomplished through the issuance of a right-of-way grant. Approval of a plan of operations for a wind energy facility right-of-way does not constitute the authorization for an access

RIGHTS-OF-WAY--Continued

NATURE OF INTEREST GRANTED--Continued

road, which is not located on the lands described in the wind energy facility right-of-way grant.

Mesa Wind Developers, 113 IBLA 61 (Feb. 7, 1990)

The amendment in 1982 of two electric power transmission rights-of-way granted pursuant to the Act of Mar. 4, 1911, to form a single right-of-way 330 feet wide and approximately 17 miles long pursuant to provision of the Federal Land Policy and Management Act of 1976 resulted in the creation of a third right-of-way under the 1976 Federal Land Policy and Management Act.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)

In denying a right-of-way authorizing motorized access to private property across lands included in a wild and scenic river area, BLM acted contrary to sec. 12(b) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1283(b) (1982), and the implementing regulations at 43 CFR 8351.2-1, since the record established that appellants and their predecessors have historically used motorized vehicles in reaching their property.

Alvin R. Platz et al., 114 IBLA 8 (Mar. 30, 1990)
97 I.D. 125

Where, after a Native initiates use and occupancy of certain lands and files an allotment application but prior to the completion of 5 years' use and occupancy, rights-of-way are sought and granted by BLM across such lands, subject to valid existing rights, the completion of the requisite 5 years vests the inchoate preference right arising from use and occupancy. That right relates back to the initiation of use and occupancy, thereby taking precedence over the intervening rights-of-way, which are properly declared null and void.

State of Alaska, Dept. of Transportation & Public Facilities, 124 IBLA 386 (Dec. 10, 1992)

RIGHTS-OF-WAY--Continued

NATURE OF INTEREST GRANTED--Continued

Where, after a Native initiates use and occupancy of certain lands, a right-of-way is sought and granted by BLM across such lands, subject to valid existing rights, the later filing of the allotment application vests the inchoate preference right arising from use and occupancy, and that right relates back to the initiation of use and occupancy, thereby taking precedence over the intervening right-of-way, which is properly declared null and void.

State of Alaska, 125 IBLA 21 (Dec. 21, 1992)

A Native allotment was not subject to an amended right-of-way grant for a Federal-Aid Highway because the amendment was subject to valid existing rights and was made after initiation of the Native claim.

State of Alaska Dept. of Transportation & Public Facilities, 125 IBLA 291 (Mar. 9, 1993)

If, after a Native initiates use and occupancy of certain lands, an amended right-of-way grant for a Federal-Aid Highway is sought and granted by BLM across such lands subject to valid existing rights, completion of 5 years of use and occupancy coupled with timely filing of a Native allotment application vests an inchoate preference right arising from use and occupancy. That right relates back to the time when use and occupancy began, and takes precedence over the intervening amended right-of-way grant, which is properly declared null and void.

State of Alaska v. William T. Bryant, 129 IBLA 35 (Mar. 21, 1994)

OIL AND GAS PIPELINES

The National Environmental Policy Act of 1969 requires that every agency study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement applies to the preparation of environmental assessments which serve as a basis for a Finding of No Significant Impact. Under

this requirement, all reasonable alternatives must be considered and obvious alternatives may not be ignored. A site which poses sufficiently higher risks to the reliable provision of an essential public service is not a reasonable alternative that must be studied in preparing an environmental assessment for an amendment of a right-of-way for a gas pipeline compressor station.

A Bureau of Land Management decision approving or rejecting an application for a right-of-way or amendment to a right-of-way under 30 U.S.C. § 185 (1982), is an exercise of discretion that will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason to disturb the decision is shown.

Robert M. Perry et al., 114 IBLA 252 (May 9, 1990)

Under 25 CFR 169.19, the renewal of a right-of-way across individually owned Indian land requires the consent of the owners of a majority of the interests in the land.

The owner of an interest in individually owned Indian land may withdraw his/her consent to a right-of-way at any time prior to the granting of the right-of-way easement by the Bureau of Indian Affairs.

Nellie Moccasin v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 184 (Feb. 5, 1991)

The MLA, as implemented by Departmental regulations, does not require rights-of-way for construction and operation of "production facilities." In the case of gas, under 43 CFR 2880.5(k), production facilities include a lessee's or lease operator's gathering lines which are located on lease upstream from the point of delivery to a transportation pipeline.

Where pipelines on a Federal oil and gas lease (described by the lessee as "lateral lines") move lease production to a central accumulation point on each lease; where each such line connects directly to a gas well and brings gas by separate individual lines to a central point where the gas is delivered into a single line; and where the primary function of the lines is

gathering, they are properly considered "gathering lines" under 43 CFR 2880.0-5(k).

It is incumbent upon BLM to examine the facts and circumstances of individual cases to determine where the point of delivery from production facilities to the transportation pipeline actually is. A decision by BLM establishing the point of delivery as the "approved production accounting measurement point" at the wellhead will be set aside where the record does not establish that delivery took place at that point.

Enron Oil & Gas Co., 122 IBLA 224 (Feb. 26, 1992)
99 I.D. 20

Analysis under NEPA of the impacts to the human environment of an oil and gas pipeline designed to serve certain existing and proposed oil and gas wells properly considers the foreseeable cumulative impacts of the pipeline and the wells it is designed to serve.

Southern Utah Wilderness Alliance et al., 124 IBLA 162 (Oct. 1, 1992)

A decision approving a right-of-way for an oil and gas pipeline on public lands on the basis of an EA finding no significant impact which is tiered to a programmatic EIS for oil and gas leasing in the area will be affirmed where BLM has considered the cumulative impact of the right-of-way and the foreseeable oil and gas development to be served thereby and the record provides a reasonable basis for the conclusion that there will be no significant impacts other than those addressed in the EIS.

Southern Utah Wilderness Alliance, 127 IBLA 282 (Oct. 7, 1993)

RIGHTS-OF-WAY--Continued

REVISED STATUTES SEC. 2477

The question whether a public highway was established pursuant to R.S. 2477 is to be determined by reference to state law. BLM may decide whether an R.S. 2477 road exists if the efficient administration of the public lands requires such a decision to be made.

Construction of 1,000 feet of road across public land in Oct. 1990 was done in trespass because no prior application for a right-of-way at the construction site was made and the road builder failed to show that the 1,000-foot road was a public highway recognized pursuant to Montana law prior to the repeal of R.S. 2477 by FLPMA.

Courtney Ayers, 122 IBLA 275 (Mar. 5, 1992)

RULES OF PRACTICE
(See also Administrative Procedure, Appeals, Contests & Protests, Contracts, Hearings, Indian Probate, Practice Before the Department)

GENERALLY

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract for one of the Five Civilized Tribes is final for the Department and is not subject to appeal within the Department.

Principal Chief, Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 105 (Jan. 17, 1990)

The Board adheres to its determination that the 2-year period afforded by 43 U.S.C. § 1339(a) (1982), in which an oil and gas lessee may seek a refund of a royalty overpayment commences to run upon the making of the payment for which a refund is requested.

Conoco Inc., 114 IBLA 28 (Apr. 3, 1990)

RULES OF PRACTICE--Continued

GENERALLY--Continued

The Department's regulations implementing the EAJA provide a two-tier adjudicatory procedure in which an application for an award of fees and expenses is filed with the adjudicative officer who presided at the adversary adjudication, and the decision of that officer on the application is then appealable to the appropriate appeals board. When an application is filed in the first instance with the Board of Land Appeals, it will ordinarily be transferred to the appropriate adjudicative officer; however, where, as a matter of law, the application must be denied, the Board may adjudicate the application, since transfer of the application would serve no useful purpose.

Herbert J. Hansen, 119 IBLA 29 (Mar. 21, 1991)

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

A re-offering of a timber sale is a discretionary action and is a decision subject to protest pursuant to 43 CFR 5003.3. However, the doctrine of administrative finality precludes review of issues which could have been reviewed at the time of the first offering but were not, and of issues on which a final decision was made at the time of the first offering.

Oregon Natural Resources Council, 120 IBLA 261 (Aug. 21, 1991)

Where a decision of the Acting Secretary of the Interior disclaiming any Federal interests in a parcel of land has stood unchallenged for over 80 years and subsequent development of those lands has occurred, at least arguably in reliance on this determination, the doctrine of administrative finality is properly invoked

RULES OF PRACTICE--Continued

GENERALLY--Continued

as a bar to readjudication of the conclusions reached by the Acting Secretary in his original decision.

State of California et al., 121 IBLA 73 (Oct. 28, 1991)
98 I.D. 321

To the extent that a unit operator is delegated with all rights of the working interest owners with respect to allocation of production, receipt by the unit operator of a notice by BLM accepting the unit operator's determination that a well completion is noncommercial constitutes constructive service of that notice on the working interest owners.

Where, under a joint Federal/State unit agreement, authority for the approval of a noncommerciality determination is vested in the authorized officer, the New Mexico Land Commissioner, or the New Mexico Conservation Commission, depending upon whether the well in question is completed on Federal, State, or private land, respectively, a notice that BLM is filing a noncommerciality determination for a well not located on Federal land "for the record" does not constitute an appealable decision under 43 CFR 4.410.

Global Natural Resources Corp., 121 IBLA 286 (Nov. 22, 1991)

When presenting evidence to overcome a Government's prima facie case that the claim is not supported by a discovery the claimants are not limited to rebutting the evidence submitted by the mineral examiners, and may present evidence of the location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners.

United States v. Estate of Melvin E. Viles, Mary S. Viles, 126 IBLA 162 (May 10, 1993)

RULES OF PRACTICE--Continued

GENERALLY--Continued

When the boundary of a WSA excluding mining operations conducted before Oct. 21, 1976, is uncertain, it is appropriate to set aside the portion of a BLM decision requiring reclamation of slopes in the mined area and remand the matter for a delineation of the boundary.

Ceminex, Ltd., 129 IBLA 64 (Mar. 25, 1994)

For summary judgment there must be no true issue of fact when all factual inferences are drawn in the light most favorable to the opposing party. Therefore, the party seeking permission to file an interlocutory appeal from the denial of a motion for summary dismissal, pursuant to 43 CFR 4.28, must show that there is no true issue of fact and that an immediate appeal from the denial order will materially advance the final decision. The degree to which a FWS Biological Opinion may or may not have foreclosed BLM's obligation and discretionary authority to act in accordance with the Taylor Grazing Act and other applicable laws is an unresolved issue of sufficient magnitude and import to justify denying a motion for summary dismissal.

Edwin O. Larson v. Bureau of Land Management (On Reconsideration), 129 IBLA 250 (May 2, 1994)

A decision declaring a mining claim abandoned and void must be mailed to each claim owner at his last address of record. Where BLM fails to serve each claim owner with a copy of a decision, the decision is not effective to adjudicate the rights and interests in the claims of those owners who were not served. A copy of the decision must be mailed even though previous correspondence has been returned to BLM. Without attempted delivery of a decision and its return to BLM, there cannot be constructive service under 43 CFR 1810.2(b).

Lanny Perry, 131 IBLA 1 (Sept. 16, 1994)

RULES OF PRACTICE--Continued

GENERALLY--Continued

Under 43 CFR 4.31, if a person submitting a document in a proceeding before the Department claims that some or all of the information contained in the document is confidential information the disclosure of which to another party in the proceeding is prohibited by law, notwithstanding that party's agreement to keep the information confidential, the submitter of the document has the burden of demonstrating why disclosure of the information is prohibited by law. That the information falls within an exemption from disclosure under FOIA, 5 U.S.C. § 552(b) (1988), does not suffice to establish that disclosure of the information is prohibited by law.

Yates Petroleum Corp., et al., 131 IBLA 230 (Nov. 18, 1994)

A BLM decision notifying a claimant that continued occupancy of mining claims is unauthorized, requiring reclamation of the site, and demanding the removal of a mobile home, generators, and other personal property from mining claims because the property is located within a WSA is properly affirmed where the IMP provides that any temporary impacts must be removed and reclaimed by June 30, 1989, the date the Secretary was scheduled to send his recommendation on that WSA to the President.

Virgil Schuette, 131 IBLA 332 (Dec. 22, 1994)

APPEALS

Generally

As a general rule, an administrative decision is properly set aside and remanded where it is not supported by a case record providing the Board with the evidence necessary for an objective, independent review of the basis for the decision.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)
97 I.D. 74

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

When an appellant attempts to remedy the defects which led to a BLM decision rejecting a nationwide oil and gas geophysical exploration bond rider by providing additional information on appeal, the Board may affirm the rejection decision but remand the matter to BLM for adjudication of the acceptability of the rider in light of the additional information.

Frontier Exploration, Inc., Frontier Geophysical Co., 114 IBLA 280 (May 9, 1990)

A decision by a BLM officer which does not fall within any of the exceptions enumerated in 43 CFR 4.410 or provided by other duly promulgated regulation is subject to appeal to the Board of Land Appeals and a BLM official is without authority to state otherwise.

BLM is required to transmit the relevant case file within no more than 10 business days after receipt of a notice of appeal.

When a protest against a notice of intent to conduct geophysical operations has been filed or an appeal has been filed from a decision to allow such operations, BLM is obliged to inform the party filing the notice of intent that the notice cannot be processed until the protest and any appeal therefrom has been resolved.

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), provides that all Native allotment applications which were pending before the Department on or before Dec. 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section. Pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), if BLM rejected a Native allotment application without first affording the applicant an opportunity for a hearing before a trier of fact, the decision to reject is not final, and the application was pending before the Department on Dec. 18, 1971. BLM erred in rejecting a request by the heirs of the applicant that the Native allotment application be reinstated and

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

either approved or adjudicated pursuant to sec. 905(a) of ANILCA.

Heirs of Saul Sockpealuk, Heirs of Carl Takak, Heirs of Silas Sockpealuk, 115 IBLA 317 (Aug. 7, 1990)

Associations of users of the California Desert Conservation Area who have participated in decisionmaking have standing to appeal a decision establishing motor vehicle travel routes in and around the Afton Canyon area of critical environmental concern.

High Desert Multiple-Use Coalition, Inc., California Assn of 4WD Clubs, Inc., California Off-Road Vehicle Assn, Inc., 116 IBLA 47 (Sept. 5, 1990)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), provides that all Native allotment applications which were pending before the Department on or before Dec. 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section. An application is pending on or before Dec. 18, 1971, where the application is filed in 1961 and closed in 1967 for failure to provide any proof of use and occupancy, but the applicant is not notified by decision of the closure. Under such circumstances, BLM erred in rejecting an applicant's request that his Native allotment application be reinstated and either approved or adjudicated pursuant to sec. 905(a) of ANILCA.

Michael Gloko, 116 IBLA 145 (Sept. 24, 1990)

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not described in the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a factfinding hearing in

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

which he may attempt to show that he did, in fact, make timely application for the parcel in question.

Mitchell Allen, 117 IBLA 330 (Jan. 24, 1991)

Where an oil and gas lessee fails to show error in decisions imposing stipulations to oil and gas leases, the decisions are affirmed.

Liberty Petroleum Corp., 118 IBLA 214 (Mar. 7, 1991)

Any party appealing from a decision of an officer of the Bureau of Land Management has the burden of establishing error in the decision under appeal, by a preponderance of the evidence. Conclusory allegations of error, standing alone, do not discharge this burden.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

Reed B. Robison, RO Livestock v. Bureau of Land Management, 120 IBLA 181 (July 26, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

Once jurisdiction over an appeal has been lodged in the Board of Land Appeals by the timely filing of a notice of appeal, the supervisory authority provided by 43 CFR 4.5 may be exercised only by the Secretary, Deputy Secretary, or Director, Office of Hearings and Appeals.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

The regulations governing special recreation permits do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. A decision by a BLM Area Office adversely affecting a party to a case is subject to immediate appeal to the Board of Land Appeals under 43 CFR 4.410(a).

Patrick G. Blumm, dba Rio Grande Rapid Transit, 121 IBLA 169 (Oct. 31, 1991)

When the record does not confirm that a lessee has been assigned or assumed legal responsibility for making royalty payments on behalf of co-lessees, an MMS decision directing the lessee to recalculate the royalties for all co-lessees will be set aside and the case remanded for recalculation by the appropriate party or parties.

Phillips Petroleum Co., Phillips 66 Natural Gas Co., 121 IBLA 278 (Nov. 19, 1991)

Departmental regulation 43 CFR 3120.1-3 provides that no action taken pursuant to regulations governing competitive oil and gas leasing in Subpart 3120 shall be suspended under 43 CFR 4.21(a), which would otherwise suspend the effect of decisions after appeal or while an appeal could be filed. Although BLM's authorized officer may suspend offering a particular lease parcel while a protest or appeal is considered, BLM properly refused to suspend sale of 37 lease parcels where objection was

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

made on the day of sale but no reason was stated for the protest.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 17 (Jan. 2, 1992)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1988), provides that all Native allotment applications which were pending before the Department on or before Dec. 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section. An application is pending on or before Dec. 18, 1971, where the application is filed in 1960 and closed in 1966 for failure to provide any proof of use and occupancy, but the applicant is not notified by decision of the closure and the BLM field report discloses an issue of fact as to applicant's exclusive use or occupancy. Under such circumstances, BLM erred in rejecting an applicant's request that his Native allotment application be reinstated and either approved or adjudicated pursuant to sec. 905(a) of ANILCA.

Andrew Balluta, 122 IBLA 30 (Jan. 3, 1992)

Where, in the course of analysis and adjudication, a proposal is changed so much that those potentially adversely affected do not have fair notice of its contents, the decision of the ALJ on the proposal will be set aside and the matter remanded so that BLM may issue a new proposed decision based on analysis of the redefined proposal.

Glenn Grenke v. Bureau of Land Management, 122 IBLA 123 (Jan. 24, 1992)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

Where the Colorado State Director, BLM, issued a decision approving a record of decision for an EIS regarding a vegetative treatment program for 13 western states, insofar as it related to public lands administered by BLM in Colorado, and the Ass't Secretary, Land and Minerals Management, subsequently concurred in selection of the vegetative treatment program, that concurrence amounted to Secretarial approval of the vegetative treatment program for BLM lands in 13 western states, including Colorado. Accordingly, the Board of Land Appeals lacks jurisdiction to consider an appeal of the Colorado State Director's decision file subsequent to the Ass't Secretary's action.

The Wilderness Society, 122 IBLA 162 (Feb. 6, 1992)

The Board does not make initial adjudication of the existence of valid existing rights to mine that has not first been submitted to and decided by OSM, the agency with jurisdiction of the subject matter involved, nor does the Board render advisory opinions.

Gabriel Energy Corp. v. Office of Surface Mining Reclamation & Enforcement, 122 IBLA 316 (Mar. 11, 1992)

Review of the merits of a trespass case may be expedited by the Board where the decision is made effective by regulation pending appeal and review of a motion for stay discloses a conflict between the threat of injury to the appellant and the threat of adverse effect to the public interest.

High Desert Communications, Inc., 123 IBLA 20 (Apr. 24, 1992)

Under the Board's Rule 4.114(a), it may call upon the parties for evidence deemed by it to be relevant and material. When the contractor, pursuant to the Board's remand decision, offered quantum evidence from the Government's files obtained during discovery; the Government apparently conceded the document at issue was prepared by BOR and, at a minimum, offered no specific challenge to its authenticity, although it had ample

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

time to do so; and the document was consistent with evidence already in the record, relevant, and material, the Board admitted it in supplementation of the record.

Appeal of White & McNeil Excavating, Inc., IBCA-2448 (July 24, 1992) 99 I.D. 121

Facsimile transmission of a document does not comply with the service requirements of 43 CFR 4.401(c).

Animal Protection Institute of America, 124 IBLA 231 (Oct. 28, 1992)

A person who has participated in the decisionmaking process in the capacity of president of a corporation is party to a case in his personal capacity.

An adverse effect on a competitor's economic interests is a legally cognizable interest sufficient to grant the competitor a right of appeal.

Allen E. Miller, 125 IBLA 139 (Jan. 15, 1993)

Under the provisions of 43 CFR 3101.7-3. a third-party objecting to issuance of an oil and gas lease on land within the National Forest System, pursuant to the consent of the FS, has standing to appeal to the Interior Board of Land Appeals. However, to the extent that the third-party raises objections to the conformity of actions undertaken by the FS with respect to its own internal operating procedures or with laws solely applicable to the FS, the Board will not review such contentions where the FS has provided its own appeal system for the resolution of such issues.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

Where, in an appeal of a decision to issue an outfitter and guide permit to a third party for the 1990 season, the appellant seeks to raise issues relating to the original issuance in 1987 of such a permit to the third party in 1987, such a challenge is barred by the doctrine of administrative finality.

Keith Rush dba Rush's Lakeview Ranch, Kevin Rush, 125 IBLA 346 (Mar. 29, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

The doctrines of res judicata or collateral estoppel do not ordinarily preclude review of a CO issued by OSM for operations conducted without a valid permit where the state regulatory agency agreed to a settlement of the same violation which did not require performance of the reclamation mandated by law. OSM is neither a party to the case nor in privity with the state regulatory agency where the latter adopts a position inconsistent with that required by OSM.

Triple R Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 310 (June 16, 1993)

An administrative decision is properly set aside and remanded if it is not supported by a case record providing this Board the information necessary for an objective, independent review of the basis for decision.

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

Under 43 CFR 4.410(a), the first prerequisite for an appeal to the Board of Land Appeals is that there be a written "decision" by BLM. However, the written form used by BLM in announcing its actions is not controlling on whether or not the Board will consider it to be a "decision" for purposes of entertaining an appeal.

A conclusive presumption is one in which proof of basic fact renders the existence of the presumed fact conclusive and irrebuttable. Thus, the conclusive presumption of abandonment which attends the failure to pay timely the rental fees required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), and 43 CFR 3833.1-5 (58 FR 38199 (July 15, 1993)), does not arise until BLM has concluded by adjudication that proof of the basic fact exists, i.e., that the claimant has failed to qualify for the exemption or failed to pay the rental fee timely in accordance with the Act and regulations, and the claimant has exhausted its administrative appeal rights.

Mesa Sand & Rock, Inc., 128 IBLA 243 (Mar. 2, 1994)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

While the Board of Land Appeals generally accords substantial deference to the findings of an ALJ with respect to conflicting evidence, such deference is not absolute, since the Board, in the exercise of its delegated plenary authority, may undertake a de novo review of the entire record and make findings of fact thereon as fully and finally as might the Secretary of the Interior.

United States v. J. Gary Feezor et al., 130 IBLA 146 (Aug. 4, 1994)

The regulations governing special land-use permits, 43 CFR Part 2920, do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. A decision by a BLM Area Manager refusing to renew a land-use permit is subject to immediate appeal by the permittee to the Board of Land Appeals under 43 CFR 4.410(a).

Carl S. Hansen, 130 IBLA 369 (Sept. 15, 1994)

Where, in a previous appeal, this Board found that rental charges for a right-of-way were proper, and where that decision was not appealed, the grantee's challenge to the rental in a subsequent appeal is barred by the doctrine of administrative finality.

Laguna Gatuna, Inc., 131 IBLA 169 (Nov. 2, 1994)

Under the doctrine of administrative finality, when a party has had an opportunity to obtain administrative review of a timber sale and the EA on which it is based and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in a later case except upon a showing of compelling legal reasons such as a violation of basic rights of the parties or the need to prevent an injustice. In the case of a modification or addition to a timber sale, reconsideration of the sale is ordinarily

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

barred except to the extent of environmentally significant modifications or changed circumstances occurring between the time of the two sales.

Oregon Natural Resources Council, 131 IBLA 180 (Nov. 3, 1994)

An administrative decision is properly set aside and remanded where it is not supported by a case record providing the Board with the evidence necessary for an objective, independent review of the basis for the decision.

Confidential Communications Co., 131 IBLA 188 (Nov. 7, 1994)

Board of Land Appeals

Where an oil and gas lessee fails to show error in decisions imposing stipulations to oil and gas leases, the decisions are affirmed.

Liberty Petroleum Corp., 118 IBLA 214 (Mar. 7, 1991)

An appeal from a BLM decision to issue a land-use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the U.S., but is instead owned by the applicant. The application for a land-use permit was an admission by the applicant that the land sought was public land.

Lawrence Smart Trust, 127 IBLA 55 (July 20, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Board of Land Appeals--Continued

A decision by an authorized officer of BLM, an ALJ, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. For purposes of making that determination, the word "resource" is considered to include all rangeland values that might be subject to degradation.

Nat'l Wildlife Federation, Southern Utah Wilderness Alliance, & Joseph M. Feller (Appellants/Appellees) v. Bureau of Land Management (Respondent/Appellant), American Farm Bureau Federation, Utah Farm Bureau Federation, & Ute Mtn. Ute Indian Tribe (Intervenors/Appellants), 128 IBLA 231 (Mar. 1, 1994)

Under 43 CFR 4.410(a), the first prerequisite for an appeal to the Board of Land Appeals is that there be a written "decision" by BLM. However, the written form used by BLM in announcing its actions is not controlling on whether or not the Board will consider it to be a "decision" for purposes of entertaining an appeal.

Mesa Sand & Rock, Inc., 128 IBLA 243 (Mar. 2, 1994)

Burden of Proof

Where the Government has presented evidence that various dependent millsites are not being used or occupied for mining or milling purposes, the Government has established a prima facie case of invalidity because such use or occupancy is a prerequisite to the validity of a millsite claim under 30 U.S.C. § 42 (1982). Upon presentation of such evidence, the burden shifts to the millsite claimant to affirmatively establish that the claim is used or occupied for mining and milling purposes.

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

When a hearing is held pursuant to 43 CFR 3563.4(c), affording a sodium preference right lease applicant an opportunity to demonstrate entitlement, the applicant has both the burden of going forward and the ultimate burden of proof of showing that a valuable sodium deposit has been discovered. If there is an appeal from the Administrative Law Judge decision following the hearing, the appealing party has the burden of showing error in the Administrative Law Judge's decision.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

In an appeal from a decision by an Administrative Law Judge on motion for summary judgment after argument by the parties, the appellant has the burden of showing the existence of an issue of material fact which might alter the outcome of the proceedings or an error of law in the decision.

Pete Stamatakis v. Bureau of Land Management, 115 IBLA 69 (June 15, 1990)

A Government motion for summary judgment filed in connection with a contractor's unilateral mistake in bid claim is denied where the Government fails to show that the release language included in a modification to the contract (relied upon by the Government for its affirmative defenses of abandonment, novation, release and accord, and satisfaction) either expressly or by implication refers to any mistake in bid claim where the Board finds that an affidavit filed by appellant raises a genuine issue of material fact as to the intention of the parties at the time the modification containing the release in question was negotiated and executed. The Government's motion for summary judgment is also denied on the alternative ground that subsequent to the execution of the release the parties showed by their conduct that they never considered the release as constituting an abandonment or the mistake in bid claim.

The Board denies a Government motion for summary judgment for the failure of the appellant to state a

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

claim for relief with respect to its unilateral mistake in bid claim, where the Board finds (i) that the Government has failed to furnish any information as to what actions the contracting officer took with respect to his bid verification duties upon the opening of bids; (ii) that in the absence of such information it is not possible to determine the reasonableness of the contracting officer's actions; and (iii) that in ruling upon a motion for summary judgment all inferences are to be drawn in favor of the party against whom the motion for summary judgment is advanced.

An appellant's cross-motion for summary judgment is denied where the Board finds (i) that the motion is predicated upon a particular application of the law of warranties; (ii) that the principal grounds for the motion appears to be based upon the provisions of the Uniform Commercial Code; (iii) that all of the cases cited which apparently involve the Uniform Commercial Code are state cases; (iv) that in regard to such cases the appellant has failed to show that the principles apparently enunciated therein have been endorsed by the Federal courts so as to become a part of what has been described as the general Federal common law; (v) that the state cases so relied upon have not been shown to be dispositive of the question presented; and (vi) that appellant has failed to show that it is entitled to summary judgment as a matter of law.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990)
97 I.D. 193

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of clear reasons for modification or reversal. When an appellant has challenged a timber sale located in an area of critical environmental concern on the basis that the sale is allegedly inconsistent with the applicable management plan, but such inconsistency has not been established, the timber sale shall be allowed to occur.

In re Grassy Overlook Timber Sale, 115 IBLA 359
(Aug. 14, 1990)

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan first approved in writing or prescribed by the authorized officer, as required by regulation 43 CFR 3152.3-4(a). Where the record establishes that the Secretary's technical experts have evaluated unapproved plugging and abandonment work performed by an operator and have found such work deficient, the Secretary is entitled to rely on their professional opinion, absent a showing of error by a preponderance of the evidence.

Daniel C. Wychgram, 116 IBLA 89 (Sept. 17, 1990)

One challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

James O. Steambarge, 116 IBLA 185 (Oct. 4, 1990)

Where BLM attempts to establish that lands were omitted from an officially filed original survey as a result of gross error or fraud, it may prove by clear and convincing evidence that the original survey was grossly in error. However, it need only demonstrate by a preponderance of the evidence that the omitted land was land in place at the time of the original survey and was similar to the surveyed land at that time.

Lawyers Title Insurance Corp. v. Bureau of Land Management, 117 IBLA 63 (Dec. 3, 1990)

Although the Board has jurisdiction over the contractor's appeals, the Government carried the burden of proof necessary to sustain its motion to suspend Board proceedings pending the resolution of a civil fraud action against appellant. The alleged fraud is intertwined with the contractor's submission of its claims,

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

their nature, amount, and the facts it asserts in support. The Board is unable to segregate portions of the claims potentially involving a determination of liability for fraud, in which the Board will not engage, 41 U.S.C. § 605(a), from other portions of the claims. Also, it would be contrary to the efficient and economic resolution of the related controversies between the parties to proceed in two fora simultaneously.

Appeals of Hardrives, Inc., IBCA-2319 et al. (Feb. 6, 1991) 98 I.D. 23

When an appellant merely urges some other course of action which may be theoretically as correct as that chosen by BLM, this Board will not overturn a BLM decision to gather excess wild horses. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. In cases involving an expert's interpretation of data, it is not enough that the party objecting to the determination demonstrates that another course of action or interpretation is available or that the proposed course of action is also supported by the evidence. The appellant must demonstrate by the preponderance of the evidence that the BLM expert erred when collecting the underlying data, when interpreting that data, or in reaching the conclusion.

Animal Protection Institute of America et al., 118 IBLA 63 (Feb. 22, 1991)

An appellant who does not show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. A party challenging a BLM determination that a right-of-way is subject to cost recovery, Category I, has the burden of establishing by a preponderance of the evidence that the BLM determination is incorrect.

Joe B. Kearl, 119 IBLA 122 (Apr. 22, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

When the Government has presented evidence that a quartz mill or reduction works is not present on a millsite, and the claimant fails to refute that evidence, the millsite does not qualify as an independent millsite pursuant to 30 U.S.C. § 42 (1988).

When the Government has presented evidence that a millsite is not being used or occupied for mining and milling purposes, and the claimant fails to refute that evidence, the millsite does not qualify as a dependent millsite pursuant to 30 U.S.C. § 42 (1988).

United States v. Loyall Fraker, 122 IBLA 24 (Jan. 3, 1992)

An appellant who does not with some particularity show adequate reason for appeal, and, as appropriate, support the allegation with argument or evidence showing error, cannot be afforded favorable consideration. Conclusory allegations of error, standing alone, do not suffice.

Glanville Farms, Inc. v. Bureau of Land Management, 122 IBLA 77 (Jan. 14, 1992)

The burden is on appellant, as the party challenging BLM's decision denying an application for amendment of a right-of-way, both to show adequate reason for appeal and, as appropriate, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively researched the question of potential damage to riparian lands and concluded that they would be permanently harmed by proposed action, it is not enough that appellant offers a contrary opinion, but it must demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusion. BLM's decision is properly affirmed where appellant fails to do so.

King's Meadow Ranches, 126 IBLA 339 (June 17, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

When the parties sought summary judgment on the same issue; stated in a report to the Board that no significant facts were disputed; had an opportunity for discovery and to submit affidavits and documentary evidence; available BIA records had been produced; and the issue involved an unambiguous integrated written agreement, such that credibility assessments would be immaterial; the Board concluded that little would be gained by a hearing. Because the material facts upon which it relied were uncontroverted, summary judgment was appropriate.

To prove an express contract with BIA, appellant had to establish mutual intent to be bound; the authority of BIA's representative; and consideration. Because compromise of a disputed claim was involved, accord and satisfaction principles were relevant: proper subject matter, competent parties, meeting of the minds, and consideration reflected by a bona fide dispute.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

In cases where the amount of land originally applied for in a Native allotment application is at issue, the proper standard of proof to be applied is the preponderance of the evidence.

United States v. Heirs of Ambrose Kozevnikoff, 128 IBLA 130 (Dec. 30, 1993)

The burden of proof to show that a stay should issue rests with the one who seeks it. An offer of evidence of purchase valued for agricultural acreage did not tend to refute a BLM rental-rate determination for a small-acreage right-of-way that was based on a survey of rental values of similar small sites in Wyoming, and a stay pending appeal was denied because of the consequent failure to carry the burden of proof that a stay should issue.

Texaco Trading & Transportation Inc., 128 IBLA 239 (Mar. 2, 1994)

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

An official dependent resurvey by BLM of an 1891 survey that found one of the original quarter corners was not shown to be in error by reference to a conflicting quarter corner monument erected in the course of an unofficial survey run by surveyors for the FS.

Dan Ogle et al., 131 IBLA 129 (Oct. 25, 1994)

By regulation, 43 CFR 4.478(b), the Department has provided that an adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 CFR Part 4100. 43 CFR 4.478(b). In this manner, the Department has considerably narrowed the scope of review of BLM grazing decision by an ALJ and by this Board.

The standard of proof to be applied in weighing the evidence presented at a hearing held pursuant to an appeal of a grazing decision issued by BLM is the preponderance of evidence test. Where a decision determining grazing privileges has been reached in the exercise of administrative discretion, the appellant seeking relief therefrom bears the burden of showing by a preponderance of the evidence that the decision is unreasonable or improper.

Jerry Kelly (Appellee) v. Bureau of Land Management (Appellant), Sheldon W. Lamb (Intervenor/Appellant), 131 IBLA 146 (Oct. 31, 1994)

Discovery

A request for the issuance of subpoenas is denied where the Board finds (i) that instead of proceeding with voluntary discovery in an orderly and timely manner, appellant precipitately filed an application for the issuance of subpoenas to three Government employees calling for them to appear as appellant's witnesses at a requested oral hearing and to bring with them to the hearing voluminous Government records; (ii) that in the absence of appellant's counsel having had an opportunity to review the documents requested prior to the hearing and to winnow therefrom material irrelevant to the issues involved in the appeal, the

RULES OF PRACTICE--Continued

APPEALS--Continued

Discovery--Continued

granting of the subpoenas requested would confront the Board at the hearing with the choice of either delaying the commencement of the hearing while the winnowing process took place or encumbering the record with a great deal of extraneous material by accepting into evidence all of the documents covered by the subpoenas; and (iii) that resort to either of these alternatives would not be compatible with the requirement that the Board's rules be interpreted so as to secure a just and inexpensive result without unnecessary delay.

Appeal of Noslot Cleaning Services, Inc., IBCA-2554 (Aug. 14, 1990) 97 I.D. 231

In applying its discovery rules, the Interior Board has adopted a flexible application of the term "good cause" and strongly encourages parties to engage in informal, cooperative, relevant, discovery to the extent practicable, without abusing the process.

The Board held that, consistent with the amended Federal Rules of Civil Procedure, no later than 30 days before hearing, both parties were to identify their proposed lay hearing witnesses and exhibits, and to exchange those exhibits not already in the other's possession.

Each party was to notify the other of any experts to be called at hearing as soon as those experts were identified and was to supply the other with a copy of any expert report or exhibit as soon as prepared. Without the need to request subpoenas from the Board, each party could depose the other's expert report or exhibit. In any case, expert identification and production of any expert report or exhibit was to occur no later than 60 days before hearing.

Without the need to request subpoenas from the Board, each party could notice and take the depositions of the other's knowledgeable personnel, based upon its own analysis, and/or upon the other's response to a Fed. R. Civ. P. 30(b)(6) notice. If a party deemed the number of depositions or particular individuals to be

RULES OF PRACTICE--Continued

APPEALS--Continued

Discovery--Continued

deposed to be unreasonable, it could seek a protective order.

The Board issued rulings on interrogatories and requests for production of documents to which the Government had objected on the grounds that the requested information had been supplied through document production, or that the requests were overly broad or irrelevant. The Board agreed that some of appellant's interrogatories and document production requests were overly broad, but found others to be relevant, and directed various responses by the Government.

The Board found that disputed requests for admission were relevant and clear and directed responses.

Appeals of Federal Insurance Co., IBCA-3236 (Dec. 22, 1993) 100 I.D. 448

Dismissal

When BLM adjusts a linear right-of-way rental, in accordance with the rental fee schedule set forth at 43 CFR 2803.1-2(c)(1)(i), and the grantee files an appeal completely agreeing with that action, but complaining that BLM failed to adjust the rental for prior years, the grantee has failed to point out error in the action taken by BLM or to show how he has been adversely affected by the decision, and the appeal will be dismissed.

Jesse H. Johnson, 112 IBLA 369 (Jan. 19, 1990)

A request for review by a State Director of the Bureau of Land Management under 43 CFR 3165.3(b) is properly dismissed as untimely when it is filed more than 20 business days after the date a notice of violation or assessment or instruction, order, or decision issued under 43 CFR 3165.3(a) is received.

Han-San, Inc., 113 IBLA 361 (Mar. 22, 1990)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. However, the Board does not automatically dismiss every case where the action sought to be prevented by the filing of an appeal has taken place; we have recognized that dismissal of a particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal of the appeal would tend to preclude the issue from ever being reviewed. Even assuming an issue involving a timber sale could be recurring, where it is not evasive of review, a motion to dismiss for mootness may be granted.

In re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51 (Apr. 6, 1990)

A Minerals Management Service decision dismissing an appeal of a royalty payment order as untimely will be reversed where it appears that the order was merely implementing a prior royalty valuation decision issued to the same lessee, covering the same production from the same leases, which was at the time the subject of a timely filed appeal.

Walter Van Norman, Jr., 114 IBLA 56 (Apr. 6, 1990)

In the absence of an appeal directly presenting the propriety of BLM's demands for additional information in the context of a pending mineral patent application (such as an appeal from a decison rejecting a mineral patent application as containing information sufficient to confirm compliance with governing law), the Board of Land Appeals lacks authority to consider them.

G. Donald Massey, 114 IBLA 209 (Apr. 25, 1990)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

An appeal brought by a person who does not qualify to practice under 43 CFR 1.3 is subject to dismissal. A person filing an appeal has the responsibility of showing that he is qualified under the regulation to represent the appellant.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)

Unlike the failure to timely file a notice of appeal, failure to timely file a statement of reasons does not deprive the Board of jurisdiction. Under 43 CFR 4.402, failure to file a statement of reasons within the required time makes the appeal subject to summary dismissal. The Board avoids procedural dismissals when there has been no showing that the delay in filing the statement of reasons prejudiced the adverse party.

James C. Mackey, 114 IBLA 308 (May 14, 1990)

An appeal from a decision approving geophysical exploration on land within and adjacent to a wilderness study area will not be dismissed as moot even though the challenged action had occurred, where issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. However, the Board does not automatically dismiss every case where the action sought to be prevented by the filing of an appeal has taken place; we have recognized that dismissal of a

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal of the appeal would tend to preclude the issue from ever being reviewed.

Where, on appeal, the principal objection to issuance of an application for permit to drill a coal-bed methane well is the failure to consider the cumulative impacts of drilling the well in question in conjunction with other proposed coal-bed methane drilling in the same area, the appeal may be dismissed as moot, where the record shows that the well has been drilled and the surface managing agency and BLM have undertaken an environmental analysis designed to assess the cumulative impacts of such proposed drilling.

San Juan Citizens Alliance, Western Colorado Congress, 114 IBLA 366 (May 24, 1990)

An assignee of an oil and gas lease agrees to be bound by the terms and conditions of the lease as issued, including any stipulations consented to by the lessee as a condition of leasing. Accordingly, an appeal by an assignee of stipulations consented to by the lessee, his predecessor-in-interest, is properly denied.

Texaco Inc., 115 IBLA 369 (Aug. 15, 1990)

An appeal from a decision denying an application for a grazing permit will not be dismissed as moot even though the relevant grazing season has passed, where issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

Pursuant to 43 CFR 1610.5-2(b) approval or amendment of resource management plans are not appealable to

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

the Board of Land Appeals and an appeal is properly dismissed to the extent that it seeks review of such a plan.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

An appeal from a decision denying a protest against a timber sale will not be dismissed as moot even though the protested action has occurred, where issues raised by the appeal are capable of repetition and where failure to decide the appeal would cause substantial issues to evade review.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

Shell Offshore Inc., 116 IBLA 246 (Oct. 17, 1990)

Summary dismissal of an appeal for failure to timely serve a copy of the notice of appeal on the Solicitor is discretionary and a motion to dismiss is properly denied in the absence of any showing of prejudice.

George Gilchrist et al., 117 IBLA 142 (Dec. 11, 1990)

The Board has discretion not to dismiss an appeal for failure to serve copies of appeal documents on an adverse party, as the regulations state merely that such failure will "subject the appeal to dismissal."

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

In the absence of a showing of prejudice on the adverse party, a motion to dismiss for failure to serve is properly denied.

Even though an appellant corporation is not incorporated until after the date of issuance by BLM of the decision it seeks to appeal, its appeal is not properly dismissed for lack of standing if it appears (1) that the appellant corporation succeeded to the interests of an entity that participated in the decisionmaking process and, thus, became a party to the case, and (2) that both the appellant corporation and the earlier entity are adversely affected by BLM's decision.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)
97 I.D. 263

An appeal may properly be dismissed as moot where the Board can grant no further relief because of events occurring subsequent to the appeal.

Animal Protection Institute of America, 118 IBLA 20 (Feb. 15, 1991)

An appeal is properly dismissed as moot if, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant and no reasonable expectation or demonstrated probability that the same controversy will again occur involving the same complaining party. Where an appeal was taken in reliance on a provision of law appearing in an annual appropriations act prohibiting export of unprocessed timber from Federal lands, but the provision appearing in the appropriations act was later replaced by a more detailed statute, the probability the same controversy will be repeated is slight.

Oregon Cedar Products Co., 119 IBLA 89 (Apr. 9, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

Pursuant to the applicable Departmental regulations, an appeal is subject to summary dismissal where a SOR in support of the appeal is not included in the notice of appeal and is not filed within 30 days after the filing of the notice of appeal. Similarly, a SOR filed in support of an appeal which does not affirmatively point out in what respect the decision appealed from is in error does not meet the requirements of the Department's rules of practice and the appeal is also subject to dismissal.

Where an individual or organization fails to protest action proposed to be taken by BLM, such an entity has no standing to appeal from the denial of a protest filed by some other individual or organization.

Burton A. & Mary H. McGregor et al., 119 IBLA 95 (Apr. 15, 1991)

Refusal to accept personal delivery of a BLM decision does not vitiate service of the decision. A notice of appeal transmitted more than 30 days after personal service of the decision being appealed is untimely and the appeal must be dismissed.

Humane Society of Southern Nevada, 119 IBLA 216 (May 13, 1991)

The Government's motion to dismiss appellant's appeals for lack of jurisdiction, because they were filed more than 3 years after appellant's original appeal, based upon the same allegations, was dismissed without prejudice, is denied. The Board's Rule 4.127(a), requiring reinstatement within 3 years of an appeal dismissed without prejudice because it was in a suspense status, is procedural, and not part of the jurisdictional constraints of the Contract Disputes Act of 1978. Moreover, the Rule is inapplicable. Appellant's former appeal was not dismissed because it was in a suspense status. It was dismissed for failure to certify the underlying claim, rendering that claim a

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

legal nullity. Thus, the present appeals are not "reinstated." They are new appeals based upon legally new claims.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (May 31, 1991) 98 I.D. 210

The Government's motion to dismiss appellant's claims that the Government failed to protect appellant's rights under its lease from Hopi Indians of a construction yard and sand pit site is sustained. The Government was not a party to the lease. Thus, the lease claims are not based upon a contract with the Government, a prerequisite to a cause of action, and to the Board's jurisdiction, under the Contract Disputes Act of 1978.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

An appeal brought by a person who has not shown that he is qualified under 43 CFR 1.3 to represent the party issued and adversely affected by a trespass notice is properly dismissed.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

The existence of a BLM decision, adverse to a party to a case, is necessary to provide standing to appeal to the Board of Land Appeals under 43 CFR 4.410(a). An appealable decision takes or prohibits some action. A letter restating and summarizing Departmental policy that was put into effect by prior planning documents is not an appealable decision. An appeal from such a letter will be dismissed.

Joe Trow, 119 IBLA 388 (July 3, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

The 90-day appeal period established by the Contract Disputes Act of 1978 is a statutory limitation upon jurisdiction and cannot be waived by the Board. In the area of timeliness of a contractor's appeal, that is the only jurisdictional limitation upon the Board's ability to accept appeals.

Unlike the 90-day filing limitation, the portion of the Board's rule 4.102(a) seeking an original and two copies of an appeal is not jurisdictional. It is procedural. It is always within the Board's discretion to relax or modify that part of the rule in the interests of justice.

The Government's motion to dismiss the contractor's appeals as untimely is denied when the appeals were telefaxed to the Board, received in full, and filed by the Recorder of the Board, within the statutory time period prescribed by the Contract Disputes Act of 1978. Although the Board does not encourage appeals by telefax, and a contractor telefaxes at its own risk, the Board will accept a telefaxed appeal if it is received in full, by an individual authorized to receive it on behalf of the Board, before the filing period expires, provided the Board receives the identical original hard copy within a reasonable time thereafter.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (Aug. 19, 1991) 98 I.D. 253

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board of Land Appeals). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with the Board, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Thelma M. Eckert, 120 IBLA 367 (Sept. 18, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

Certification of multiple claims by a division manager under a contract for the construction, inter alia, of a pumping plant is found to be inadequate for the purpose of vesting jurisdiction in the Board over the claims in issue where appellants assert that the division manager qualifies as a senior company official in charge at the contractor's plant or location involved but the evidence offered fails to establish that the division manager had primary responsibility for the execution of the contract and that he had a physical presence at the location of the primary contract activity.

Certification of multiple claims by an assistant vice president of a surety company that completed the contract work is found to be inadequate for the purpose of vesting the Board with jurisdiction over the claims in issue where appellants assert that the assistant vice president had authority to bind the surety company and to certify the claims but make no attempt to show that the assistant vice president who certified the claimson behalf of the surety had overall responsibility for the conduct of the contractor's affairs in general.

Besides moving to dismiss the instant appeals for lack of proper certification, the Government has also moved to dismiss two of the claims involved (captioned "Maladministration" and "Incidental Impact Expenses") on the ground that such claims were never presented to the contracting officer for decision. The Board finds, however, that the two claims in question were presented to and decided by the contracting officer and that subject to proper certification at the time of resubmission they may again be presented to the contracting officer in their present form for his consideration and decision.

Appeals of Rodgers Construction, Inc., Federal Insurance Co., IBCA-2777 et al. (Oct. 15, 1991) 98 I.D. 281

When, in submitting a claim to the contracting officer in excess of $50,000, the contractor failed to certify that "the supporting data are accurate and complete to the best of his knowledge and belief," the certification did not meet the requirements of the Contract Disputes Act of 1978. The facts that the Board suspected the omission was due to typographical error, and that the contractor otherwise certified to more than

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

was necessary, were irrelevant. The Board could not supply the missing certification requirement by inference. Due to the defective certification, the Board did not possess jurisdiction to entertain the contractor's appeal from the contracting officer's failure to render a decision on the claim.

Appeal of Rock Point Community School Board, IBCA-2953 (Oct. 29, 1991) 98 I.D. 355

The State of Alaska made no showing that it was adversely affected by a BLM decision clarifying an earlier decision rejecting a townsite petition to the extent that it conflicted with a Native allotment. The clarification of the earlier administratively final decision approving the Native allotment application on its merits does not afford the State an opportunity to reopen the earlier decision without a showing that the clarification affected the State's interests.

State of Alaska (Anna Nick), 121 IBLA 155 (Oct. 31, 1991)

Pursuant to 43 CFR 3185.1 and 43 CFR 3165.3, where a party to a unit agreement files a request for technical and procedural review by a State Director of BLM, the request is properly dismissed as untimely pursuant to 43 CFR 3165.3(b) when it is filed more than 20 business days after the date the decision of the authorized officer was received or deemed to be received by the aggrieved party.

Global Natural Resources Corp., 121 IBLA 286 (Nov. 22, 1991)

In deciding a motion to dismiss, the Board will consider the uncontroverted facts alleged by the appellant to be correct and will construe its allegations favorably to it, but the appellant is required to establish jurisdiction. If the appellant has made a prima facie showing that jurisdiction exists, however, the Government must present some evidence to refute that

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

showing. An unsubstantiated allegation will not suffice.

When the certification requirements of the Contract Disputes Act are met, the Board has jurisdiction to entertain an appeal from a contracting officer's decision denying a claim brought and certified on behalf of a dissolved joint venture, and the appeal may be pursued in the name of the joint venture.

The Board found that a corporation properly could be substituted as the appellant because it was the real party in interest in the appeal. The substitution did not violate the anti-assignment statutes, because they did not apply. The Board based its conclusion upon the facts that the appeal originally was filed correctly on behalf of the joint venture contracting entity; 3 months before the completion of the 2-1/2-year contract term the venture dissolved, but the corporate member of the venture, which was a contract signatory and the venture's managing party for the contract, remained intact, continued to perform, and attended to the completion of the contract work; before the appeal was filed, all of the venture's interests and obligations were merged into the corporation; and there was no prejudice to the Government.

The Board found that the corporate member of a joint venture contracting entity had the authority to certify a claim on behalf of the joint venture and, in any event, was the equivalent of the "general partner" of the venture with overall responsibility for the conduct of its affairs. The latter factor alone qualified the corporation under the contract's Disputes clause to certify the claim. The corporate president, in turn, clearly was authorized to sign for the corporation. Accordingly, his signature bound the joint venture. He also had implied authority to bind the joint venture because he signed the contract on behalf of both of its members. The certification otherwise met all of the requirements of the Disputes clause and the Board had jurisdiction to entertain the appeal.

Appeal of Ball, Ball, & Brosamer, Inc., IBCA-2103-N (Feb. 5, 1992) 99 I.D. 1

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

A statement of reasons filed in support of an appeal that does not affirmatively point out how the decision appealed from is in error does not meet the requirements of the Department's rules of practice and the appeal is subject to dismissal.

W. J. & Betty Lo Wells, 122 IBLA 250 (Feb. 28, 1992)

An appeal from an order establishing a reclamation bond for a mining operation becomes moot if, during appeal, the plan expires or is modified.

Jim D. Wills, Reggie N. Wills, 123 IBLA 74 (May 11, 1992)

To constitute an adequate SOR, an appellant's document must affirmatively point out error in the appealed decision. If the SOR is deemed inadequate, the appeal will be subject to summary dismissal.

J. W. Weaver, 124 IBLA 29 (Aug. 21, 1992)

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal or that appellant had actual notice of the decision for more than 30 days before notice of appeal was filed.

Animal Protection Institute of America, 124 IBLA 231 (Oct. 28, 1992)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

As used in 43 CFR 4.401(a), which provides a grace period for documents untimely filed, a document is "transmitted or probably transmitted" when custody and control of the document is surrendered to an agency charged with delivering the document to the proper office.

United States Forest Service, Alaska Region, 124 IBLA 336 (Nov. 18, 1992)

An appeal filed by means of a FAX machine is properly considered to have been transmitted on the day of filing in the absence of any evidence the notice of appeal was transmitted earlier. Hence, a notice of appeal received by FAX machine 1 day beyond the appeal period set forth in 43 CFR 4.411 will be dismissed as untimely where there is no indication that the notice of appeal was transmitted or probably transmitted before the end of the period in which it was required to be filed.

Ron Williams Construction Co., 124 IBLA 340 (Nov. 25, 1992)

Practice before the Interior Board of Land Appeals is controlled by 43 CFR 1.3. To the extent it is brought by a person who does not fall within any of the categories of persons authorized to practice by 43 CFR 1.3, an appeal is subject to dismissal.

High Plains Petroleum Corp., 125 IBLA 24 (Dec. 29, 1992)

In deciding motions to dismiss for lack of jurisdiction, in connection with appellant's claims under its contract with the BOR for canal construction, the Board construed the complaint's allegations favorably to appellant; accepted unchallenged allegations as true; and considered relevant evidence of record.

The Board found that a subcontractor had not withdrawn its claims against appellant arising out of the BOR contract, and the fact that appellant was required

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

to pay the subcontractor in accordance with the subcontract, if the Bureau paid appellant was sufficient to bar the application of the "Severin doctrine," which provides that a prime contractor cannot recover sums from the Government if they pertain only to a subcontractor's claim which the prime is not liable to pay. The Board also found that appellant properly was pursuing claims in its own right, as the entity in privity of contract with the Government.

In finding that appellant's administrative delay claim in connection with the resolution of a design defect involving five concrete structures was based upon the same operative facts included in its original certified claim to the contracting officer under the CDA, and did not constitute a new claim, the Board considered the totality of the relevant correspondence and communications. It also found that the claim satisfied the dispute and "sum certain" requirements of FAR 33.201.

The Board concluded that appellant's increase in its amended complaint of the number of delay days sought, its presentation of its quantum proof on a modified total cost basis, and its inclusion of costs associated with the effect of erroneous contract earthwork elevations upon pipe trenching, previously presented as a separate claim, then withdrawn, did not constitute new claims that had not been submitted to the contracting officer.

While finding that the Government had ample opportunity to audit and review appellant's claims, the Board stressed that an audit was not a jurisdictional prerequisite under the CDA to the Board's consideration of a properly submitted claim.

Appeals of Hardrives, Inc., IBCA-2319 et al. (Dec. 30, 1992) 99 I.D. 249

A corporate vice president and member of the contractor's Board of Directors, who was demonstrated to have responsibility for corporate activities substantially equivalent to that of the contractor's president, qualified under FAR 33.207(c)(2)(ii) to certify the contractor's Contract Disputes Act claims as "(a)n officer

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

* * * of the contractor having overall responsibility for the conduct of the contractor's affairs."

Appeals of Tecom, IBCA-2970 (Jan. 15, 1993)
100 I.D. 1

An appeal from a BLM decision to issue a land-use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the U.S., but is instead owned by the applicant. The application for a land-use permit was an admission by the applicant that the land sought was public land.

Lawrence Smart Trust, 127 IBLA 55 (July 20, 1993)

When an oil and gas lease operator challenges incidents of noncompliance that have been removed from the record by the decision under appeal and the operator does not contest the fact of violation, the appeal will be dismissed because there is no effective relief that can be afforded to the operator by the Board.

Petro-X Corp., 127 IBLA 111 (Aug. 12, 1993)

When the contractor had timely completed the contract; had described as moot its appeal from the contracting officer's decision denying it a 7-day extension due to a partial suspend work order; and had subsumed the acceleration and impact aspects of its appeal into its other, unsuccessful, acceleration and impact appeals, the Board dismissed the earlier appeal with prejudice.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993)
100 I.D. 329

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

In denying the Government's motion to dismiss, the Board held that, when the Government disputed any liability for wage increases during a contract's base year, appellant's quantified claims for such increases satisfied Contract Disputes Act requirements.

The Board found that appellant's claim for increased wages paid after the contract's base year properly was subsumed into appellant's certified, quantified, disputed claim that the Government's option exercise was defective and that, therefore, appellant was entitled to all of its costs on a "cost-plus" basis.

Appeals of Tecom, IBCA-2970 a-1 (Mar. 11. 1994)
101 I.D. 22

For summary judgment there must be no true issue of fact when all factual inferences are drawn in the light most favorable to the opposing party. Therefore, the party seeking permission to file an interlocutory appeal from the denial of a motion for summary dismissal, pursuant to 43 CFR 4.28, must show that there is no true issue of fact and that an immediate appeal from the denial order will materially advance the final decision. The degree to which a FWS Biological Opinion may or may not have foreclosed BLM's obligation and discretionary authority to act in accordance with the Taylor Grazing Act and other applicable laws is an unresolved issue of sufficient magnitude and import to justify denying a motion for summary dismissal.

Edwin O. Larson v. Bureau of Land Management (On Reconsideration), 129 IBLA 250 (May 2, 1994)

The Board held that it possessed jurisdiction under the CDA, 41 U.S.C. § 601, to entertain appellant concessionaire's claim for costs incurred due to allegedly defective specifications provided by the NPS pursuant to an agreement which had settled appellant's prior claims against NPS under its 1961 concession contract. Noting that the Interior Board has held previously that concession contracts are procurement contracts subject to the CDA, the Board found that the settlement agreement modified appellant's successor 1982 concession contract

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

to make NPS responsible for providing the specifications.

Although it did not dispute the amount of appellant's alleged damages, NPS contended that they were consequential and, therefore, the Board lacks jurisdiction over the appeal. The Board noted that whether damages were consequential did not affect jurisdiction and, due to its determination denying liability, it did not address the question.

Appeal of Nat'l Park Concessions, Inc., IBCA-2995 (Aug. 18, 1994) 101 I.D. 92

The doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, dictates that once a party has availed himself of the opportunity to obtain administrative review of a decision within the Department, that party is precluded from litigating the matter in subsequent proceedings except upon a showing of compelling legal or equitable reasons.

The Departmental appeal regulation at 43 CFR 4.411 requires that an appeal of a decision be filed within 30 days of receipt of the decision. This requirement is jurisdictional and, hence, an untimely appeal is properly dismissed.

Gifford H. Allen et al., 131 IBLA 195 (Nov. 9, 1994)

A party seeking review by the State Director of a NOV pursuant to 43 CFR 3165.3(b) must file a request for such review within 20 business days of the date such NOV was received. Where, in connection with an appeal involving State Director review of other NOVs, a party seeks to challenge issuance of a NOV for which State Director review was not timely sought, such a challenge must be rejected as not within the Board's jurisdiction.

Conley P. Smith Oil Producers, 131 IBLA 313 (Dec. 13, 1994)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

Where an appeal to the Board constitutes, in essence, a request for an advisory opinion, the appeal will be dismissed.

AMAX Coal Co., 131 IBLA 324 (Dec. 14, 1994)

The Board will dismiss an appeal from a BLM decision dismissing a protest of the section line adopted in dependent resurveys where the appellant fails to demonstrate that he has been adversely affected by such dismissal since he has no legally cognizable interest which will be affected by BLM's placement of the line.

Robert M. Sayre, 131 IBLA 337 (Dec. 27, 1994)

An appeal will normally be dismissed as moot where, prior to the filing of a notice of appeal, the action being challenged has already occurred and there is no effective relief which can be afforded the appellant. While the Board will decline to dismiss an appeal for mootness where it involves issues which are "capable of repetition but evading review," this exception is not applicable where such recurrence would not be evasive of review.

Wildlife Damage Review, 131 IBLA 353 (Dec. 29, 1994)

Effect of

Under the doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, when a party has had an opportunity to abtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

RULES OF PRACTICE--Continued

APPEALS--Continued

Effect of--Continued

In keeping with the principle that the filing of a notice of appeal vests exclusive authority over the matter under appeal with the Board of Land Appeals, BLM must forward the case (as represented by BLM's case file) to the Board within no more than 10 working days so that it may exercise its authority to resolve the dispute.

Thana Conk, 114 IBLA 263 (May 9, 1990)

While the filing of an appeal suspends the authority of a deciding official to act in the instant matter, it does not affect his authority to act on matters that relate to management or preservation of public lands. Whether to permit road construction in a wilderness study area is an issue independent of the rejection of a plan of operations proposing such activity.

Murray Perkins, Internat'l Silica Corp., 116 IBLA 288 (Oct. 23, 1990)

A re-offering of a timber sale is a discretionary action and is a decision subject to protest pursuant to 43 CFR 5003.3. However, the doctrine of administrative finality precludes review of issues which could have been reviewed at the time of the first offering but were not, and of issues on which a final decision was made at the time of the first offering.

Oregon Natural Resources Council, 120 IBLA 261 (Aug. 21, 1991)

As a general rule, the effect of a decision is stayed pending an opportunity for administrative review of the decision pursuant to the appeal regulation at 43 CFR 4.21(a). An exception is recognized with respect to decisions regarding the readjusted terms (including royalty rate) of coal leases where the relevant regulation provides that the decision shall be effective as of

RULES OF PRACTICE--Continued

APPEALS--Continued

Effect of--Continued

the lease anniversary date regardless of whether an appeal is filed.

Atlantic Richfield Co., et al., 121 IBLA 373 (Dec. 19, 1991) 98 I.D. 429

Departmental regulation 43 CFR 3120.1-3 provides that no action taken pursuant to regulations governing competitive oil and gas leasing in Subpart 3120 shall be suspended under 43 CFR 4.21(a), which would otherwise suspend the effect of decisions after appeal or while an appeal could be filed. Although BLM's authorized officer may suspend offering a particular lease parcel while a protest or appeal is considered, BLM properly refused to suspend sale of 37 lease parcels where objection was made on the day of sale but no reason was stated for the protest.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 17 (Jan. 2, 1992)

The general regulations governing proceedings before OHA contain a rule, 43 CFR 4.21(a), providing that a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and that the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. The rule specifically provides, however, that it is effective "[e]xcept as otherwise provided by law or other pertinent regulation." An interim final rule, published in the Federal Register on Mar. 13, 1992 (57 FR 9010), 43 CFR 3150.2, provides otherwise by making decisions approving notices of intent to conduct geophysical exploration effective pending appeal.

The interim final rule amending 43 CFR Subpart 3150 to make decisions and approvals of the authorized officer in onshore oil and gas geophysical exploration matters effective pending appeal has the effect of making such BLM determinations final agency action immediately subject to judicial review under the provisions of 5 U.S.C. § 704 (1988). While the interim final rule provides that a petition for stay may be filed with the Board of Land Appeals, a person would

RULES OF PRACTICE--Continued

APPEALS--Continued

Effect of--Continued

not be required to exhaust that procedure before proceeding to District Court.

Southern Utah Wilderness Alliance, 123 IBLA 13 (Apr. 22, 1992)

Except as otherwise provided by law or other pertinent regulation, a decision issued before Feb. 18, 1993, will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. It is not necessary to seek a stay of a decision issued prior to Feb. 18, 1993, which is not automatically effective by law or pertinent regulation, and a request for an extension of time in which to file a stay request will be denied.

Committee for Idaho's High Desert, 123 IBLA 301 (Mar. 16, 1993)

The effectiveness of a BLM decision to round up and remove wild horses during the pendency of an appeal to the Board of Land Appeals is controlled by 43 CFR 4770.3(c), not by 43 CFR 4.21(a) (58 FR 4942-43 (Jan. 19, 1993)). Where BLM fails to place its roundup decision into full force and effect on a specified date, pursuant to 43 CFR 4770.3(c), and a notice of appeal of that decision is timely filed, it is error for BLM to proceed with the roundup, as the effect of BLM's decision is stayed during the appeal period and pending the Board's ruling on the appeal.

Animal Protection Institute of America, 128 IBLA 90 (Dec. 10, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Effect of--Continued

In promulgating a revision to 43 CFR 4.21 in 1993, the Department intended that the revised procedure involving the petitioning for a stay of a decision would apply to appeals filed on or after the effective date of that revision, i.e., Feb. 18, 1993.

A decision by an authorized officer of BLM, an ALJ, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. For purposes of making that determination, the word "resource" is considered to include all rangeland values that might be subject to degradation.

Nat'l Wildlife Federation, Southern Utah Wilderness Alliance, & Joseph M. Feller (Appellants/Appellees) v. Bureau of Land Management (Respondent/Appellant), American Farm Bureau Federation, Utah Farm Bureau Federation, & Ute Mtn. Ute Indian Tribe (Intervenors/Appellants), 128 IBLA 231 (Mar. 1, 1994)

The doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, dictates that once a party has availed himself of the opportunity to obtain administrative review of a decision within the Department, that party is precluded from litigating the matter in subsequent proceedings except upon a showing of compelling legal or equitable reasons.

Gifford H. Allen et al., 131 IBLA 195 (Nov. 9, 1994)

Extensions of Time

Except as otherwise provided by law or other pertinent regulation, a decision issued before Feb. 18, 1993, will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. It is not necessary to seek a stay of a decision issued prior to Feb. 18, 1993, which is

RULES OF PRACTICE--Continued

APPEALS--Continued

Extensions of Time--Continued

not automatically effective by law or pertinent regulation, and a request for an extension of time in which to file a stay request will be denied.

Committee for Idaho's High Desert, 123 IBLA 301 (Mar. 16, 1993)

An extension of time for filing a petition for reconsideration may be granted in accordance with 43 CFR 4.22(f).

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

Failure to Appeal

Where a decision by BLM cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest is delivered to the last address of record of the holder of the interest, and where no appeal is filed by him, BLM's decision cancelling his interest becomes final for him.

Where the record fails to establish that a copy of a BLM decision cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest was received by the interest holder, by a qualified representative of her estate, or by her heirs, a failure to appeal does not render BLM's decision final.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990) 97 I.D. 137

When BLM determines in its land-use planning process to remove wild horses from a grazing allotment and, following notice to interested parties, implements that plan, a challenge to a subsequent BLM decision allocating grazing use in the allotment, by a party who received notice of the removal, on the basis that wild

RULES OF PRACTICE--Continued

APPEALS--Continued

Failure to Appeal--Continued

horses were improperly removed and should be relocated into the allotment, is untimely.

Animal Protection Institute of America, 120 IBLA 342 (Sept. 12, 1991)

Failure to appeal a decision designating an area as a WSA renders it final and precludes a party from later challenging it on appeal of a subsequent BLM decision approving a road restoration project within the WSA.

San Juan County Commission, 123 IBLA 68 (May 11, 1992)

Upon the failure of a mining claimant to appeal from a decision cancelling recordation of a mining claim under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988), all rights under the location are conclusively deemed to be abandoned and void.

Robert L. Mendenhall et al., 127 IBLA 73 (July 20, 1993)

Failure of the operator to appeal assessment decisions for incidents of noncompliance issued for violations of the oil and gas operations regulations renders those decisions and the findings contained therein final for the Department and precludes the operator from challenging the merits of the violations or the amounts assessed in a subsequent appeal of a decision demanding payment.

CCCo., 127 IBLA 291 (Oct. 7, 1993)

The Board of Land Appeals is without jurisdiction to review the merits of a decision that is not timely appealed. A decision to designate appellant as a principal user of a communication site right-of-way and to fix rent for this right-of-way is not reviewable absent a timely appeal.

King Broadcasting Co., 129 IBLA 265 (May 16, 1994)

RULES OF PRACTICE--Continued

APPEALS--Continued

Hearings

A request for the issuance of subpoenas is denied where the Board finds (i) that instead of proceeding with voluntary discovery in an orderly and timely manner, appellant precipitately filed an application for the issuance of subpoenas to three Government employees calling for them to appear as appellant's witnesses at a requested oral hearing and to bring with them to the hearing voluminous Government records; (ii) that in the absence of appellant's counsel having had an opportunity to review the documents requested prior to the hearing and to winnow therefrom material irrelevant to the issues involved in the appeal, the granting of the subpoenas requested would confront the Board at the hearing with the choice of either delaying the commencement of the hearing while the winnowing process took place or encumbering the record with a great deal of extraneous material by accepting into evidence all of the documents covered by the subpoenas; and (iii) that resort to either of these alternatives would not be compatible with the requirement that the Board's rules be interpreted so as to secure a just and inexpensive result without unnecessary delay.

Appeal of Noslot Cleaning Services, Inc., IBCA-2554 (Aug. 14, 1990) 97 I.D. 231

Where the record on appeal presents unresolved questions of fact or undecided, significant legal issues, under 43 CFR 4.415 the Board of Land Appeals has discretionary authority to refer the matter for a hearing.

Jerome P. McHugh & Associates (On Reconsideration), 117 IBLA 303 (Jan. 17, 1991)

A second hearing will not be afforded if an appellant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result.

Roy E. Mehaffey v. Office of Surface Mining Reclamation & Enforcement, 117 IBLA 350 (Jan. 31, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Hearings--Continued

Where BLM issues a single multiple-use decision regarding both adjustment of livestock grazing privileges, which has been appealed to an ALJ pursuant to 43 CFR 4.470, and wild horse removal, which has been appealed to the Board under 43 CFR 4770.3, the wild horse appeal may properly be referred to the ALJ to the extent it involves factual issues for hearing and consideration together with the grazing appeal.

Animal Protection Institute of America, Roy Shurtz, 118 IBLA 345 (Mar. 13, 1991)

A decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. When the record is not adequate for the Board to determine whether such a situation exists, it may refer the question for hearing, findings of fact, and conclusions of law.

William J. Thoman v. Bureau of Land Management, Roberts Ranch et al. (Intervenors), 120 IBLA 302 (Sept. 9, 1991)

The relinquishment of a Native allotment application must be made voluntarily and with knowledge of the applicant's allotment rights and the consequences of the relinquishment. In determining whether there is a factual issue whether the relinquishment of a Native allotment application was knowing and voluntary so as to require a hearing, the Board will regard as true the factual allegations made in affidavits filed in support of a request for reinstatement.

Heir of Frank Hobson (On Reconsideration), 120 IBLA 66 (Oct. 25, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Hearings--Continued

The holder of a right-of-way issued under the Act of Mar. 3, 1891, is entitled to a factfinding hearing prior to cancellation for failure to construct improvements within 5 years of issuance as required by sec. 20 of that Act, where the case record does not demonstrate that improvements were not timely constructed, and where the right-of-way holder has expressly asserted that construction has been completed. In such hearing, BLM, as the proponent of the invalidity of the right-of-way, has the burden of proving that authorized improvements were not timely constructed.

John C. Urquidi, 124 IBLA 353 (Dec. 4, 1992)

Where the record raises a question of fact regarding whether an individual, charged by BLM under 43 CFR 2920.1-2(a) with the costs of removing structures allegedly placed in trespass on public lands, was responsible for their construction or use, the case will be referred for a hearing on that question.

John H. Peterson, 125 IBLA 267 (Feb. 17, 1993)

An appraisal will not be set aside unless an appellant shows error in the method of appraisal or shows by convincing evidence that the charges are excessive. When the decision of an ALJ does not clearly apply to this standard, the Board will review the evidence and the arguments of the parties to determine whether the result reached should be considered erroneous.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

Although the Board has discretionary authority to order a hearing before an ALJ pursuant to 43 CFR 4.415, a hearing is necessary only when there is a material issue of fact requiring resolution through the introduction of testimony and other evidence.

Vanderbilt Gold Corp., 126 IBLA 72 (Apr. 19, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Hearings--Continued

Although authorized under 43 CFR 4.415, a factfinding hearing will be ordered only when the record before the Board presents conflicting issues of fact that cannot be resolved on the basis of that record. Where appellant fails to submit all available evidence to the Board, it is not possible to conclude that the evidence is irreconcilable, and the request for hearing is properly denied.

Pine Grove Farms, 126 IBLA 269 (June 3, 1993)

Although the Board has discretionary authority to order a hearing before an ALJ pursuant to 43 CFR 4.415, it normally orders a hearing only when an appellant presents a material issue of fact requiring resolution through the introduction of testimony and other evidence not readily obtainable through the ordinary appeal procedure. If no oral testimony is required and an appeal can be resolved relying on documentary submissions, a request for a hearing is properly denied.

Felix F. Vigil, 129 IBLA 345 (June 2, 1994)

BLM decisions denying applications for permits to drill oil and gas wells within the Potash Area established by the Secretary of the Interior will be set aside and the matters referred for a hearing where the record contains significant, unresolved factual issues concerning BLM's designation of the areas sought to be drilled as potash enclaves and BLM's determination that drilling the wells would make potash mining unsafe and ultimately uneconomic, thereby constituting an undue waste of the potash resource.

Yates Petroleum Corp., et al., 131 IBLA 230 (Nov. 18, 1994)

RULES OF PRACTICE--Continued

APPEALS--Continued

Jurisdiction

Provision of the Department of the Interior and Related Agencies Appropriations Act, 1989, 102 Stat. 1774 (Sept. 27, 1988), restricting "judicial review" to "particular activities" does not affect the authority of the Board of Land Appeals to consider timber sale appeals.

An appeal from a decision denying a protest against a timber sale will not be dismissed as moot even though the protested action has occurred, where issues raised by the appeal are capable of repetition and where failure to decide the appeal would cause substantial issues to evade review.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)

The Government's motion to dismiss appellant's appeals for lack of jurisdiction, because they were filed more than 3 years after appellant's original appeal, based upon the same allegations, was dismissed without prejudice, is denied. The Board's Rule 4.127(a), requiring reinstatement within 3 years of an appeal dismissed without prejudice because it was in a suspense status, is procedural, and not part of the jurisdictional constraints of the Contract Disputes Act of 1978. Moreover, the Rule is inapplicable. Appellant's former appeal was not dismissed because it was in a suspense status. It was dismissed for failure to certify the underlying claim, rendering that claim a legal nullity. Thus, the present appeals are not "reinstated." They are new appeals based upon legally new claims.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (May 31, 1991) 98 I.D. 210

The Government's motion to dismiss appellant's claims that the Government failed to protect appellant's rights under its lease from Hopi Indians of a construction yard and sand pit site is sustained. The Government was not a party to the lease. Thus, the lease

RULES OF PRACTICE--Continued

APPEALS--Continued

Jurisdiction--Continued

claims are not based upon a contract with the Government, a prerequisite to a cause of action, and to the Board's jurisdiction, under the Contract Disputes Act of 1978.

Appellant's allegations that the Government breached an implied duty to cooperate under its road contract with appellant, of differing site conditions, and of entitlement to equitable contract reformation, arise from the same set of operative facts presented to the contracting officer in appellant's claim and the Board has jurisdiction to consider them.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

The 90-day appeal period established by the Contract Disputes Act of 1978 is a statutory limitation upon jurisdiction and cannot be waived by the Board. In the area of timeliness of a contractor's appeal, that is the only jurisdictional limitation upon the Board's ability to accept appeals.

Unlike the 90-day filing limitation, the portion of the Board's rule 4.102(a) seeking an original and two copies of an appeal is not jurisdictional. It is procedural. It is always within the Board's discretion to relax or modify that part of the rule in the interests of justice.

The Government's motion to dismiss the contractor's appeals as untimely is denied when the appeals were telefaxed to the Board, received in full, and filed by the Recorder of the Board, within the statutory time period prescribed by the Contract Disputes Act of 1978. Although the Board does not encourage appeals by telefax, and a contractor telefaxes at its own risk, the Board will accept a telefaxed appeal if it is received in full, by an individual authorized to receive it on behalf of the Board, before the filing period expires, provided the Board receives the identical original hard copy within a reasonable time thereafter.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (Aug. 19, 1991) 98 I.D. 253

RULES OF PRACTICE--Continued

APPEALS--Continued

Jurisdiction--Continued

When, in submitting a claim to the contracting officer in excess of $50,000, the contractor failed to certify that "the supporting data are accurate and complete to the best of his knowledge and belief," the certification did not meet the requirements of the Contract Disputes Act of 1978. The facts that the Board suspected the omission was due to typographical error, and that the contractor otherwise certified to more than was necessary, were irrelevant. The Board could not supply the missing certification requirement by inference. Due to the defective certification, the Board did not possess jurisdiction to entertain the contractor's appeal from the contracting officer's failure to render a decision on the claim.

Appeal of Rock Point Community School Board, IBCA-2953 (Oct. 29, 1991) 98 I.D. 355

Standing to appeal a decision of BLM requires that an appellant establish that it is a party to the case adversely affected by the decision.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 17 (Jan. 2, 1992)

In deciding a motion to dismiss, the Board will consider the uncontroverted facts alleged by the appellant to be correct and will construe its allegations favorably to it, but the appellant is required to establish jurisdiction. If the appellant has made a prima facie showing that jurisdiction exists, however, the Government must present some evidence to refute that showing. An unsubstantiated allegation will not suffice.

When the certification requirements of the Contract Disputes Act are met, the Board has jurisdiction to entertain an appeal from a contracting officer's decision denying a claim brought and certified on behalf of a dissolved joint venture, and the appeal may be pursued in the name of the joint venture.

The Board found that a corporation properly could be substituted as the appellant because it was the real party in interest in the appeal. The substitution did

RULES OF PRACTICE--Continued

APPEALS--Continued

Jurisdiction--Continued

not violate the anti-assignment statutes, because they did not apply. The Board based its conclusion upon the facts that the appeal originally was filed correctly on behalf of the joint venture contracting entity; 3 months before the completion of the 2-1/2-year contract term the venture dissolved, but the corporate member of the venture, which was a contract signatory and the venture's managing party for the contract, remained intact, continued to perform, and attended to the completion of the contract work; before the appeal was filed, all of the venture's interests and obligations were merged into the corporation; and there was no prejudice to the Government.

The Board found that the corporate member of a joint venture contracting entity had the authority to certify a claim on behalf of the joint venture and, in any event, was the equivalent of the "general partner" of the venture with overall responsibility for the conduct of its affairs. The latter factor alone qualified the corporation under the contract's Disputes clause to certify the claim. The corporate president, in turn, clearly was authorized to sign for the corporation. Accordingly, his signature bound the joint venture. He also had implied authority to bind the joint venture because he signed the contract on behalf of both of its members. The certification otherwise met all of the requirements of the Disputes clause and the Board had jurisdiction to entertain the appeal.

Appeal of Ball, Ball, & Brosamer, Inc., IBCA-2103-N (Feb. 5, 1992) 99 I.D. 1

A decision that is approved by the Secretary of the Interior is not subject to review by the Board of Land Appeals.

Power River Basin Resource Council, Wyoming Chapter of the Sierra Club, Wyoming Outdoor Council, 124 IBLA 83 (Sept. 15, 1992)

RULES OF PRACTICE--Continued

APPEALS--Continued

Jurisdiction--Continued

An appeal filed by means of a FAX machine is properly considered to have been transmitted on the day of filing in the absence of any evidence the notice of appeal was transmitted earlier. Hence, a notice of appeal received by FAX machine 1 day beyond the appeal period set forth in 43 CFR 4.411 will be dismissed as untimely where there is no indication that the notice of appeal was transmitted or probably transmitted before the end of the period in which it was required to be filed.

Ron Williams Construction Co., 124 IBLA 340 (Nov. 25, 1992)

In deciding motions to dismiss for lack of jurisdiction, in connection with appellant's claims under its contract with the BOR for canal construction, the Board construed the complaint's allegations favorably to appellant; accepted unchallenged allegations as true; and considered relevant evidence of record.

The Board found that a subcontractor had not withdrawn its claims against appellant arising out of the BOR contract, and the fact that appellant was required to pay the subcontractor in accordance with the subcontract, if the Bureau paid appellant was sufficient to bar the application of the "Severin doctrine," which provides that a prime contractor cannot recover sums from the Government if they pertain only to a subcontractor's claim which the prime is not liable to pay. The Board also found that appellant properly was pursuing claims in its own right, as the entity in privity of contract with the Government.

In finding that appellant's administrative delay claim in connection with the resolution of a design defect involving five concrete structures was based upon the same operative facts included in its original certified claim to the contracting officer under the CDA, and did not constitute a new claim, the Board considered the totality of the relevant correspondence and communications. It also found that the claim satisfied the dispute and "sum certain" requirements of FAR 33.201.

The Board concluded that appellant's increase in its amended complaint of the number of delay days sought, its presentation of its quantum proof on a

RULES OF PRACTICE--Continued

APPEALS--Continued

Jurisdiction--Continued

modified total cost basis, and its inclusion of costs associated with the effect of erroneous contract earthwork elevations upon pipe trenching, previously presented as a separate claim, then withdrawn, did not constitute new claims that had not been submitted to the contracting officer.

While finding that the Government had ample opportunity to audit and review appellant's claims, the Board stressed that an audit was not a jurisdictional prerequisite under the CDA to the Board's consideration of a properly submitted claim.

Appeals of Hardrives, Inc., IBCA-2319 et al. (Dec. 30, 1992) 99 I.D. 249

A corporate vice president and member of the contractor's Board of Directors, who was demonstrated to have responsibility for corporate activities substantially equivalent to that of the contractor's president, qualified under FAR 33.207(c)(2)(ii) to certify the contractor's Contract Disputes Act claims as "(a)n officer * * * of the contractor having overall responsibility for the conduct of the contractor's affairs."

Appeals of Tecom, IBCA-2970 (Jan. 15, 1993) 100 I.D. 1

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Jurisdiction--Continued

An appeal from a BLM decision to issue a land-use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the U.S., but is instead owned by the applicant. The application for a land-use permit was an admission by the applicant that the land sought was public land.

Lawrence Smart Trust, 127 IBLA 55 (July 20, 1993)

In an appeal alleging an agreement with the contracting officer settling a dispute under contracts issued pursuant to the Indian Self-Determination and Education Assistance Act, which provides that the CDA shall apply, the contracting officer's proclaimed final decision denying Busby's properly certified claim imbued the Board with jurisdiction under the CDA to determine whether the claim had been settled.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

In denying the Government's motion to dismiss, the Board held that, when the Government disputed any liability for wage increases during a contract's base year, appellant's quantified claims for such increases satisfied Contract Disputes Act requirements.

The Board found that appellant's claim for increased wages paid after the contract's base year properly was subsumed into appellant's certified, quantified, disputed claim that the Government's option

RULES OF PRACTICE--Continued

APPEALS--Continued

Jurisdiction--Continued

exercise was defective and that, therefore, appellant was entitled to all of its costs on a "cost-plus" basis.

Appeals of Tecom, IBCA-2970 a-l (Mar. 11. 1994) 101 I.D. 22

An appeal taken pursuant to 43 CFR 4.1280 from a decision requiring payment of additional reclamation fees will be dismissed where the decision did not specifically grant a right of appeal to the Board.

Terry Eagle Coal Co., 129 IBLA 367 (June 7, 1994)

The Board held that it possessed jurisdiction under the CDA, 41 U.S.C. § 601, to entertain appellant concessionaire's claim for costs incurred due to allegedly defective specifications provided by the NPS pursuant to an agreement which had settled appellant's prior claims against NPS under its 1961 concession contract. Noting that the Interior Board has held previously that concession contracts are procurement contracts subject to the CDA, the Board found that the settlement agreement modified appellant's successor 1982 concession contract to make NPS responsible for providing the specifications.

Although it did not dispute the amount of appellant's alleged damages, NPS contended that they were consequential and, therefore, the Board lacks jurisdiction over the appeal. The Board noted that whether damages were consequential did not affect jurisdiction and, due to its determination denying liability, it did not address the question.

Appeal of Nat'l Park Concessions, Inc., IBCA-2995 (Aug. 18, 1994) 101 I.D. 92

RULES OF PRACTICE--Continued

APPEALS--Continued

Jurisdiction--Continued

Where a decision by BIA declaring that an Indian oil and gas lease held in its extended term by production terminated for lack of production is not appealed, review of that termination is barred by the doctrine of administrative finality. Further, neither BLM nor the Board of Land Appeals has jurisdiction to review BIA's decision, which is committed entirely to its authority.

Cross Creek Corp., 131 IBLA 32 (Sept. 29, 1994)

BLM properly refuses to allow a DLE and returns the DLE application where the land sought to be entered, located within the California Desert Conservation Area, has been classified as unavailable for agricultural use in the land-use plan promulgated for the area in accordance with 43 U.S.C. §§ 1712 and 1781 (1988). The Board has no authority to review such a land-use plan or the classifications contained therein.

Max Wilson, 131 IBLA 306 (Dec. 5, 1994)

Mootness

An appeal from a BLM decision to round up horses is not moot, even though the horses have been removed, as remedies are available (even apart from returning the same horses to the range) if BLM's decision is found to be in error. BLM may be directed to allow the population of wild horses to return to its former numbers or to repopulate the range with other animals taken from its holding areas. Further, the appeal is not moot, as it is capable of repetition, in that the population of wild horses may return in time to former numbers through propagation of the remaining horses.

Animal Protection Institute of America, 128 IBLA 90 (Dec. 10, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Motions

A Government motion for summary judgment filed in connection with a contractor's unilateral mistake in bid claim is denied where the Government fails to show that the release language included in a modification to the contract (relied upon by the Government for its affirmative defenses of abandonment, novation, release and accord, and satisfaction) either expressly or by implication refers to any mistake in bid claim where the Board finds that an affidavit filed by appellant raises a genuine issue of material fact as to the intention of the parties at the time the modification containing the release in question was negotiated and executed. The Government's motion for summary judgment is also denied on the alternative ground that subsequent to the execution of the release the parties showed by their conduct that they never considered the release as constituting an abandonment or the mistake in bid claim.

The Board denies a Government motion for summary judgment for the failure of the appellant to state a claim for relief with respect to its unilateral mistake in bid claim, where the Board finds (i) that the Government has failed to furnish any information as to what actions the contracting officer took with respect to his bid verification duties upon the opening of bids; (ii) that in the absence of such information it is not possible to determine the reasonableness of the contracting officer's actions; and (iii) that in ruling upon a motion for summary judgment all inferences are to be drawn in favor of the party against whom the motion for summary judgment is advanced.

An appellant's cross-motion for summary judgment is denied where the Board finds (i) that the motion is predicated upon a particular application of the law of warranties; (ii) that the principal grounds for the motion appears to be based upon the provisions of the Uniform Commercial Code; (iii) that all of the cases cited which apparently involve the Uniform Commercial Code are state cases; (iv) that in regard to such cases the appellant has failed to show that the principles apparently enunciated therein have been endorsed by the Federal courts so as to become a part of what has been described as the general Federal common law; (v) that the state cases so relied upon have not been shown to be dispositive of the question presented; and (vi) that

RULES OF PRACTICE--Continued

APPEALS--Continued

Motions--Continued

appellant has failed to show that it is entitled to summary judgment as a matter of law.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990) 97 I.D. 193

A request for the issuance of subpoenas is denied where the Board finds (i) that instead of proceeding with voluntary discovery in an orderly and timely manner, appellant precipitately filed an application for the issuance of subpoenas to three Government employees calling for them to appear as appellant's witnesses at a requested oral hearing and to bring with them to the hearing voluminous Government records; (ii) that in the absence of appellant's counsel having had an opportunity to review the documents requested prior to the hearing and to winnow therefrom material irrelevant to the issues involved in the appeal, the granting of the subpoenas requested would confront the Board at the hearing with the choice of either delaying the commencement of the hearing while the winnowing process took place or encumbering the record with a great deal of extraneous material by accepting into evidence all of the documents covered by the subpoenas; and (iii) that resort to either of these alternatives would not be compatible with the requirement that the Board's rules be interpreted so as to secure a just and inexpensive result without unnecessary delay.

Appeal of Noslot Cleaning Services, Inc., IBCA-2554 (Aug. 14, 1990) 97 I.D. 231

Although the Board has jurisdiction over the contractor's appeals, the Government carried the burden of proof necessary to sustain its motion to suspend Board proceedings pending the resolution of a civil fraud action against appellant. The alleged fraud is intertwined with the contractor's submission of its claims, their nature, amount, and the facts it asserts in support. The Board is unable to segregate portions of the claims potentially involving a determination of liability for fraud, in which the Board will not engage, 41 U.S.C. § 605(a), from other portions of the claims. Also, it

RULES OF PRACTICE--Continued

APPEALS--Continued

Motions--Continued

would be contrary to the efficient and economic resolution of the related controversies between the parties to proceed in two fora simultaneously.

Appeals of Hardrives, Inc., IBCA-2319 et al. (Feb. 6, 1991) 98 I.D. 23

The Government's motion to dismiss appellant's appeals for lack of jurisdiction, because they were filed more than 3 years after appellant's original appeal, based upon the same allegations, was dismissed without prejudice, is denied. The Board's Rule 4.127(a), requiring reinstatement within 3 years of an appeal dismissed without prejudice because it was in a suspense status, is procedural, and not part of the jurisdictional constraints of the Contract Disputes Act of 1978. Moreover, the Rule is inapplicable. Appellant's former appeal was not dismissed because it was in a suspense status. It was dismissed for failure to certify the underlying claim, rendering that claim a legal nullity. Thus, the present appeals are not "reinstated." They are new appeals based upon legally new claims.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (May 31, 1991) 98 I.D. 210

The Government's motion to dismiss appellant's claims that the Government failed to protect appellant's rights under its lease from Hopi Indians of a construction yard and sand pit site is sustained. The Government was not a party to the lease. Thus, the lease claims are not based upon a contract with the Government, a prerequisite to a cause of action, and to the Board's jurisdiction, under the Contract Disputes Act of 1978.

Appellant's allegations that the Government breached an implied duty to cooperate under its road contract with appellant, of differing site conditions, and of entitlement to equitable contract reformation, arise from the same set of operative facts presented to

RULES OF PRACTICE--Continued

APPEALS--Continued

Motions--Continued

the contracting officer in appellant's claim and the Board has jurisdiction to consider them.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

Reed B. Robison, RO Livestock v. Bureau of Land Management, 120 IBLA 181 (July 26, 1991)

The 90-day appeal period established by the Contract Disputes Act of 1978 is a statutory limitation upon jurisdiction and cannot be waived by the Board. In the area of timeliness of a contractor's appeal, that is the only jurisdictional limitation upon the Board's ability to accept appeals.

Unlike the 90-day filing limitation, the portion of the Board's rule 4.102(a) seeking an original and two copies of an appeal is not jurisdictional. It is procedural. It is always within the Board's discretion to relax or modify that part of the rule in the interests of justice.

The Government's motion to dismiss the contractor's appeals as untimely is denied when the appeals were telefaxed to the Board, received in full, and filed by

RULES OF PRACTICE--Continued

APPEALS--Continued

Motions--Continued

the Recorder of the Board, within the statutory time period prescribed by the Contract Disputes Act of 1978. Although the Board does not encourage appeals by telefax, and a contractor telefaxes at its own risk, the Board will accept a telefaxed appeal if it is received in full, by an individual authorized to receive it on behalf of the Board, before the filing period expires, provided the Board receives the identical original hard copy within a reasonable time thereafter.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (Aug. 19, 1991) 98 I.D. 253

Review of the merits of a trespass case may be expedited by the Board where the decision is made effective by regulation pending appeal and review of a motion for stay discloses a conflict between the threat of injury to the appellant and the threat of adverse effect to the public interest.

High Desert Communications, Inc., 123 IBLA 20 (Apr. 24, 1992)

A motion by appellant to stay the effect of a decision pending review by the Board on appeal is generally decided on the basis of certain factors: the likelihood of success on the merits; the threat of irreparable injury to the moving party if the stay is denied; whether the threatened injury to the moving party outweighs the threatened injury to nonmoving parties; and whether the stay is contrary to the public interest. In order to support a preliminary stay the probability of success on the merits need not be free from doubt, but the motion must be supported by a showing of a reasonable basis for challenging the legal soundness of the decision below meriting careful review. In the absence of such a showing, the motion is properly denied.

Jan Wroncy, 124 IBLA 150 (Sept. 30, 1992)

RULES OF PRACTICE--Continued

APPEALS--Continued

Motions--Continued

In deciding motions to dismiss for lack of jurisdiction, in connection with appellant's claims under its contract with the BOR for canal construction, the Board construed the complaint's allegations favorably to appellant; accepted unchallenged allegations as true; and considered relevant evidence of record.

The Board found that a subcontractor had not withdrawn its claims against appellant arising out of the BOR contract, and the fact that appellant was required to pay the subcontractor in accordance with the subcontract, if the Bureau paid appellant was sufficient to bar the application of the "Severin doctrine," which provides that a prime contractor cannot recover sums from the Government if they pertain only to a subcontractor's claim which the prime is not liable to pay. The Board also found that appellant properly was pursuing claims in its own right, as the entity in privity of contract with the Government.

In finding that appellant's administrative delay claim in connection with the resolution of a design defect involving five concrete structures was based upon the same operative facts included in its original certified claim to the contracting officer under the CDA, and did not constitute a new claim, the Board considered the totality of the relevant correspondence and communications. It also found that the claim satisfied the dispute and "sum certain" requirements of FAR 33.201.

The Board concluded that appellant's increase in its amended complaint of the number of delay days sought, its presentation of its quantum proof on a modified total cost basis, and its inclusion of costs associated with the effect of erroneous contract earthwork elevations upon pipe trenching, previously presented as a separate claim, then withdrawn, did not constitute new claims that had not been submitted to the contracting officer.

While finding that the Government had ample opportunity to audit and review appellant's claims, the Board stressed that an audit was not a jurisdictional prerequisite under the CDA to the Board's consideration of a properly submitted claim.

Appeals of Hardrives, Inc., IBCA-2319 et al. (Dec. 30, 1992) 99 I.D. 249

RULES OF PRACTICE--Continued

APPEALS--Continued

Motions--Continued

A corporate vice president and member of the contractor's Board of Directors, who was demonstrated to have responsibility for corporate activities substantially equivalent to that of the contractor's president, qualified under FAR 33.207(c)(2)(ii) to certify the contractor's Contract Disputes Act claims as "(a)n officer * * * of the contractor having overall responsibility for the conduct of the contractor's affairs."

Appeals of Tecom, IBCA-2970 (Jan. 15, 1993) 100 I.D. 1

Except as otherwise provided by law or other pertinent regulation, a decision issued before Feb. 18, 1993, will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. It is not necessary to seek a stay of a decision issued prior to Feb. 18, 1993, which is not automatically effective by law or pertinent regulation, and a request for an extension of time in which to file a stay request will be denied.

Committee for Idaho's High Desert, 123 IBLA 301 (Mar. 16, 1993)

An appeal from a BLM decision to issue a land-use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the U.S., but is instead owned by the applicant. The application for a land-use permit was an admission by the applicant that the land sought was public land.

Lawrence Smart Trust, 127 IBLA 55 (July 20, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Motions--Continued

When the parties sought summary judgment on the same issue; stated in a report to the Board that no significant facts were disputed; had an opportunity for discovery and to submit affidavits and documentary evidence; available BIA records had been produced; and the issue involved an unambiguous integrated written agreement, such that credibility assessments would be immaterial; the Board concluded that little would be gained by a hearing. Because the material facts upon which it relied were uncontroverted, summary judgment was appropriate.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

In denying the Government's motion to dismiss, the Board held that, when the Government disputed any liability for wage increases during a contract's base year, appellant's quantified claims for such increases satisfied Contract Disputes Act requirements.

The Board found that appellant's claim for increased wages paid after the contract's base year properly was subsumed into appellant's certified, quantified, disputed claim that the Government's option exercise was defective and that, therefore, appellant was entitled to all of its costs on a "cost-plus" basis.

Appeals of Tecom, IBCA-2970 a-1 (Mar. 11. 1994) 101 I.D. 22

Notice of Appeal

A document that is styled as a "protest" is nevertheless a notice of appeal where the person filing it has been a party in a dispute and challenges BLM's decision to repossess a wild horse.

Thana Conk, 114 IBLA 263 (May 9, 1990)

RULES OF PRACTICE--Continued

APPEALS--Continued

Notice of Appeal--Continued

While during the pendency of an appeal from a decision of the Minerals Management Service dismissing an appeal as untimely, the regulations are amended to provide that a delay in filing a notice of appeal to the Director, Minerals Management Service, will be waived if the notice of appeal is filed not later than 10 days after it was required to be filed and it is determined that the notice of appeal was transmitted to the proper office before the end of the time required for filing by 30 CFR 290.3(a)(1), the Board may, in the absence of intervening rights of others or prejudice to the interests of the United States, apply the amendment to pending cases.

Conoco, Inc., 115 IBLA 105 (June 27, 1990)

If a mining claimant files an affidavit of assessment work or notice of intention to hold without sufficient service charges as required by 43 CFR 3833.1-3, regulation 43 CFR 3833.1-4 provides for a 30-day compliance period during which this deficiency may be corrected prior to rejection. Because rejection of annual filings does not occur, if at all, until expiration of the compliance period pursuant to 43 CFR 3833.1-4, a decision notifying the claimant of the deficiency is interlocutory, i.e., not final for purposes of appeal. A notice of appeal filed by the claimant during the compliance period may be dismissed as premature and, in such case, the substance of the "appeal" should be treated as a protest.

Bennie Sinerius, 115 IBLA 312 (Aug. 7, 1990)

Pursuant to 43 CFR Subpart 4160, a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

RULES OF PRACTICE--Continued

APPEALS--Continued

Notice of Appeal--Continued

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board of Land Appeals). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with the Board, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Thelma M. Eckert, 120 IBLA 367 (Sept. 18, 1991)

The general regulations governing proceedings before OHA contain a rule, 43 CFR 4.21(a), providing that a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and that the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. The rule specifically provides, however, that it is effective "[e]xcept as otherwise provided by law or other pertinent regulation." An interim final rule, published in the Federal Register on Mar. 13, 1992 (57 FR 9010), 43 CFR 3150.2, provides otherwise by making decisions approving notices of intent to conduct geophysical exploration effective pending appeal.

The interim final rule amending 43 CFR Subpart 3150 to make decisions and approvals of the authorized officer in onshore oil and gas geophysical exploration matters effective pending appeal has the effect of making such BLM determinations final agency action immediately subject to judicial review under the provisions of 5 U.S.C. § 704 (1988). While the interim final rule provides that a petition for stay may be filed with the Board of Land Appeals, a person would not be required to exhaust that procedure before proceeding to District Court.

Southern Utah Wilderness Alliance, 123 IBLA 13 (Apr. 22, 1992)

RULES OF PRACTICE--Continued

APPEALS--Continued

Notice of Appeal--Continued

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal or that appellant had actual notice of the decision for more than 30 days before notice of appeal was filed.

Animal Protection Institute of America, 124 IBLA 231 (Oct. 28, 1992)

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

A notice of appeal signed by an individual on behalf of other parties (two associations and two individuals) is not a valid notice of appeal as to those other parties unless the signer is authorized to represent them. Where the signer is neither an attorney, an officer in the associations, nor a family member of the individuals, the signer does not meet the criteria allowing her to practice before the Department on their behalf, and the notice of appeal is properly dismissed as to the parties that she is not authorized to represent.

Audubon Society of Portland et al., 128 IBLA 370 (Mar. 11, 1994)

RULES OF PRACTICE--Continued

APPEALS--Continued

Protests

Where a party executes stipulations to an oil and gas lease and yet challenges those stipulations stating that the lease will not be accepted if the stipulations are approved, such action is constructed as an execution under protest.

Where initial action has not been taken to deny or sustain protests against execution of stipulations to an oil and gas lease but the record establishes reasons for establishing stipulations as required and it is clear the protests would be denied if remanded for further review, the appeals may be adjudicated on their merits despite the absence of a formal rejection of the protests.

Liberty Petroleum Corp., 118 IBLA 214 (Mar. 7, 1991)

A re-offering of a timber sale is a discretionary action and is a decision subject to protest pursuant to 43 CFR 5003.3. However, the doctrine of administrative finality precludes review of issues which could have been reviewed at the time of the first offering but were not, and of issues on which a final decision was made at the time of the first offering.

Oregon Natural Resources Council, 120 IBLA 261 (Aug. 21, 1991)

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Protests--Continued

A decision denying a protest of a timber sale which is not timely filed is properly affirmed under the relevant regulations. When modification of a timber sale is announced after awarding the initial sale contract, a protest of the sale amendment may be timely filed.

Oregon Natural Resources Council, 131 IBLA 180 (Nov. 3, 1994)

Reconsideration

A motion for reconsideration is denied where appellant fails to apprise the Board of any significant newly discovered evidence, or evidence not duly considered in the course of rendering the principal decision.

Appeal of Lonnie Gene Partout (On Reconsideration), IBCA-2280 (Mar. 9, 1990)

Where an appellant seeks to rebut the presumption of regularity attending the official acts of public officers upon an offer of proof that her Native allotment application was filed, and that procedures operative in the Bureau of Indian Affairs during the mid-to-latter part of 1970 resulted in the absence of her Native allotment application from the file, a fact-finding hearing is warranted.

June I. Degnan (On Reconsideration), 114 IBLA 373 (May 24, 1990)

Except in the case where the petitioning party contends that it has discovered new evidence that could not have been discovered earlier, the Board will generally deny a petition for reconsideration if it is not based on an asserted error of law.

Appeals of Harvey C. Jones, Inc. (On Reconsideration), IBCA-2070 *et al*. (Sept. 10, 1990)

RULES OF PRACTICE--Continued

APPEALS--Continued

Reconsideration--Continued

An extension of time for filing a petition for reconsideration may be granted in accordance with 43 CFR 4.22(f).

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

The Board denied appellant's motion for reconsideration because it did not contain any arguments or facts not previously considered by the Board and did not persuade the Board that its decision was erroneous as a matter of law or unsupported by the evidence of record.

Appeal of Nat'l Park Concessions, Inc., IBCA-2995 (Nov. 29, 1994) 101 I.D. 359

Service on Adverse Party

The Board has discretion not to dismiss an appeal for failure to serve copies of appeal documents on an adverse party, as the regulations state merely that such failure will "subject the appeal to dismissal." In the absence of a showing of prejudice on the adverse party, a motion to dismiss for failure to serve is properly denied.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990) 97 I.D. 263

Facsimile transmission of a document does not comply with the service requirements of 43 CFR 4.401(c).

Animal Protection Institute of America, 124 IBLA 231 (Oct. 28, 1992)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal

Standing to appeal requires that an appellant be both a party to the decision appealed from and adversely affected by the decision. To be adversely affected, an appellant must have a legally cognizable interest in the land at issue.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

In the absence of an appeal directly presenting the propriety of BLM's demands for additional information in the context of a pending mineral patent application (such as an appeal from a decison rejecting a mineral patent application as containing information sufficient to confirm compliance with governing law), the Board of Land Appeals lacks authority to consider them.

G. Donald Massey, 114 IBLA 209 (Apr. 25, 1990)

Standing to appeal requires that an appellant not only have been a party to the decision appealed from but also be adversely affected by the decision. When the record before the Board does not show that the party filing an appeal has a legally cognizable interest in the matter at issue, the appeal is properly dismissed for lack of standing to appeal.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)

Standing to appeal requires that an appellant be a party to the case adversely affected by the decision appealed. A cultural resources permittee is not a party to a case with standing to appeal a decision adjudicating a right-of-way holder's compliance with a stipulation to the right-of-way requiring mitigation of impacts to cultural resources.

Specific procedures for review of adjudication of a cultural resource use permit are found in the regulations at 43 CFR Part 7, Subpart B. These provisions give the permittee a right to request a conference to

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

discuss a disputed decision relating to issuance, denial, modification, suspension, or revocation of a permit or the inclusion of specific terms and conditions in a permit. 43 CFR 7.36(a). Such decisions are properly distinguished from a decision adjudicating a right-of-way holder's compliance with a stipulation requiring mitigation of damage to cultural resources and denial of a conference in the latter context entails no reversible error.

The Board has no jurisdiction to review Bureau of Land Management procedures outlined in a manual in the absence of a decision applying such procedures to dispose of a case to which appellant is a party.

James C. Mackey, 114 IBLA 308 (May 14, 1990)

An appeal from a BLM decision approving the use of herbicides as a means to control undesirable vegetation on public lands (based on a programmatic environmental impact statement) is properly dismissed where BLM has reserved the decision of whether and where to authorize actual herbicide spraying until after preparation of site-specific environmental assessments or environmental impact statements.

Salmon River Concerned Citizens et al., Lois Hollingsworth, 114 IBLA 344 (May 22, 1990)

To establish standing to appeal under provision of 43 CFR 4.410 one must be a party to the case and must allege to have an adversely affected recognizable interest. Where one has shown that, prior to approval of an application to drill a geothermal well, objection was stated in writing to the drilling, and on appeal it is urged that such drilling will damage domestic water sources, one has standing to appeal.

Dorothy A. Towne et al., 115 IBLA 31 (June 8, 1990)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

When the Government issues a mining claim contest complaint to more than one contestee and subsequently issues a decision declaring the interests in the claim of those contestees null and void for failure to file a timely answer to the complaint, a contestee appealing that decision has no standing to challenge it on the basis of failure to properly serve another contestee, where the appealing contestee has affirmatively alleged that he does not represent the other contestee.

Robert D. McGoldrick et al., 115 IBLA 242 (July 18, 1990)

Because of the Department's obligation to lease to the first-qualified applicant, issuance of a lease pursuant to a noncompetitive future interest oil and gas lease offer for acquired lands does not preclude a junior offeror from challenging issuance of the lease on appeal from BLM's rejection of the junior offer for the reasons that the lands requested were leased to a senior offeror. The junior offeror has standing to appeal for, if the lease is cancelled, the junior offer must be processed. The right to challenge issuance of the lease and the Department's authority to cancel an improperly issued lease were not lost through estoppel or laches where the junior offeror was not notified of lease issuance nor allowed to be heard until the decision rejecting its offer.

Beard Oil Co., 117 IBLA 54 (Nov. 27, 1990)

Even though an appellant corporation is not incorporated until after the date of issuance by BLM of the decision it seeks to appeal, its appeal is not properly dismissed for lack of standing if it appears (1) that the appellant corporation succeeded to the interests of an entity that participated in the decisionmaking process and, thus, became a party to the case, and (2) that both the appellant corporation and the earlier entity are adversely affected by BLM's decision.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)
97 I.D. 263

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a), and the decisional law of the Department, and not by judicial standing determinations.

Animal Protection Institute of America, 117 IBLA 208 (Dec. 21, 1990)

Where a State of Alaska protest against a Native allotment under sec. 905 of the Alaska National Interest Lands Conservation Act was granted in 1982 and, as a result, the allotment was adjudicated pursuant to the Alaska Native Allotment Act of 1906, no further adjudication of the allotment was required. In the absence of a timely appeal of the decision approving the allotment, the doctrine of administrative finality precludes review of the allotment on appeal from a subsequent decision.

State of Alaska (Henry J. Ekada), 117 IBLA 373 (Feb. 7, 1991)

Determinations of judicial standing do not control adjudications of administrative standing. Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a).

Animal Protection Institute of America et al., 118 IBLA 63 (Feb. 22, 1991)

While the principal means by which a person becomes a "party to a case" within the meaning of 43 CFR 4.410(a) is to actively participate in the decision-making process which leads to the appeal, it is not the only means. Where BLM approves a Native allotment application on National Park System lands and the National Park Service files an appeal of that decision, the status of the National Park Service as the agency charged with administrative responsibilities for the management of such lands satisfies the "party to a case" requirement of 43 CFR 4.410(a).

National Park Service, 118 IBLA 204 (Mar. 6, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

Where an individual or organization fails to protest action proposed to be taken by BLM, such an entity has no standing to appeal from the denial of a protest filed by some other individual or organization.

Burton A. & Mary H. McGregor et al., 119 IBLA 95 (Apr. 15, 1991)

Standing to appeal a decision to the Board requires that an appellant be a party to the case adversely affected by the decision appealed. An assignee who has filed an application for approval of an assignment of a coal lease lacks standing to appeal a decision finding the assignment subject to approval on provision of a lease bond where the bond requirement is not contested.

G. H. Allen et al., 119 IBLA 272 (May 30, 1991)

A party filing a notice of appeal of a decision to convey land under the Alaska Native Claims Settlement Act is required to file a statement of standing within 30 days of filing a notice of appeal. If a statement of standing is not filed, the appeal is subject to summary dismissal. Discretion to dismiss an appeal for failure to timely file a statement of standing will not be exercised when the property interest on which a party claims standing is identified in the statement of reasons and there is no showing that the procedural deficiency has prejudiced an adverse party.

In relation to a decision to convey land under sec. 12 of ANCSA, 43 U.S.C. § 1611 (1988), the phrase "land affected by the decision" in 43 CFR 4.410(b) refers to the land to be conveyed. Land which is near or adjacent to the land to be conveyed is not "land affected by the decision." Because the reason for reserving a public easement under subsec. 17(b)(1) of ANCSA is to provide access to lands not conveyed, a different rule applies to decisions concerning easements.

Robert A. Perkins, 119 IBLA 375 (June 28, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

The existence of a BLM decision, adverse to a party to a case, is necessary to provide standing to appeal to the Board of Land Appeals under 43 CFR 4.410(a). An appealable decision takes or prohibits some action. A letter restating and summarizing Departmental policy that was put into effect by prior planning documents is not an appealable decision. An appeal from such a letter will be dismissed.

Joe Trow, 119 IBLA 388 (July 3, 1991)

When the Board affirms a BLM decision dismissing a protest challenging the validity of a Native allotment application because the protest was not filed within 180 days after the effective date of ANILCA, and the Native allotment is legislatively approved pursuant to sec. 905(a)(1) of ANILCA, the doctrine of administrative finality precludes a subsequent appeal challenging the validity of the Native allotment when the decision appealed from was issued to conform the Native allotment to BLM's survey of the allotment.

Thelma M. Eckert, 120 IBLA 367 (Sept. 18, 1991)

The assignee of an unapproved assignment of a right-of-way has standing to appeal from a decision increasing the rental of the right-of-way.

Uno Broadcasting Corp., 120 IBLA 380 (Sept. 23, 1991)

In a case where appellants allude to subrogation claims but fail to identify or quantify them or to show that they were presented to the contracting officer for decision, the Board finds that it is without jurisdiction in the matter. The Board notes, however, that even if subrogation claims (properly certified, if required) cognizable as claims under the CDA had been presented to the contracting officer, appellant Federal, as surety, could only recover on such claims if it is shown

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

that the obligations of its principal had been fully satisfied.

Where appellants assert that the completing surety should be recognized as the "contractor" by reason of a de facto takeover agreement but acknowledge that there was no formal takeover agreement and fail to point to any agreement with the Government following the contractor's default on which they rely as a takeover agreement, the Board finds that the surety is without standing to bring this appeal in its own name under the line of cases where takeover agreements were found to exist.

In addition to moving to dismiss the appeals by reason of improper certification, the Government has also moved to dismiss Federal as a party to the instant appeals on the ground that as a surety it is not a contractor within the meaning of sec. 601(4) of the CDA. Subject to proper certification of the claims upon resubmission thereof, the Board finds that the Government was aware of, assented to, and recognizaed the assignment and that the effect of such recognition was to waive the anti-assignment statutes, to make lawful the substitution of the surety for the contractor, and to give standing to the surety to prosecute the instant appeals in its own name as the "contractor" within the meaning of the CDA.

Appeals of Rodgers Construction, Inc., Federal Insurance Co., IBCA-2777 et al. (Oct. 15, 1991) 98 I.D. 281

In order to establish standing to appeal under the provisions of 43 CFR 4.410, one must be a party to a case and must assert a cognizable interest which was adversely affected by the decision sought to be appealed.

The fact that a question may have been the subject of a prior Departmental decision will not prevent a party from establishing standing to appeal a subsequent decision to adhere to the prior precedent, where that party was not a participant in the prior decision.

State of California et al., 121 IBLA 73 (Oct. 28, 1991) 98 I.D. 321

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

The State of Alaska made no showing that it was adversely affected by a BLM decision clarifying an earlier decision rejecting a townsite petition to the extent that it conflicted with a Native allotment. The clarification of the earlier administratively final decision approving the Native allotment application on its merits does not afford the State an opportunity to reopen the earlier decision without a showing that the clarification affected the State's interests.

State of Alaska (Anna Nick), 121 IBLA 155 (Oct. 31, 1991)

The State of Alaska has an interest in assuring that its citizens will have access to lands and resources owned by it, its political subdivisions, or the United States, and to public bodies of water regularly used for transportation purposes. A protest presenting colorable allegations that the State's interest will be adversely affected by a decision is sufficient to give standing to appeal dismissal of a protest. The State has a right to appeal the dismissal of a protest for procedural reasons.

State of Alaska (Harvey Pootoogooluk), 121 IBLA 363 (Dec. 19, 1991)

Standing to appeal a decision of BLM requires that an appellant establish that it is a party to the case adversely affected by the decision.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 17 (Jan. 2, 1992)

A purported assignee of a competitive oil and gas lease lacks standing to appeal from a BLM decision amending the lease to correct an erroneous acreage figure and requiring the lessee to pay additional first year's rental and minimum bonus bid depending on the

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

revised figure, when the purported assignee has failed to sign the assignment document.

Stanley Energy, Inc., 122 IBLA 118 (Jan. 16, 1992)

In order to establish standing to appeal under 43 CFR 4.410, an individual or organization must show that he or she is a party to a case and that a legally cognizable interest has been adversely affected by the appealed decision.

Glenn Grenke v. Bureau of Land Management, 122 IBLA 123 (Jan. 24, 1992)

A person who has participated in the decisionmaking process in the capacity of president of a corporation is party to a case in his personal capacity.

An adverse effect on a competitor's economic interests is a legally cognizable interest sufficient to grant the competitor a right of appeal.

Allen E. Miller, 125 IBLA 139 (Jan. 15, 1993)

A party will not be accorded standing to appeal from a BLM decision where it does not demonstrate that it has a legally cognizable interest which has been adversely affected by that decision. Where the party appeals a BLM record of decision that, by itself, has no consequences, actual or threatened, so far as the environment and any members of the public are concerned because no activity can take place until after preparation of site-specific environmental analyses; and where any adverse consequences would occur, if at all, only if BLM decides to lease particular parcels, the party lacks standing to appeal the ROD because it has not yet been adversely affected by such decision, that is, its appeal is premature.

Colorado Environmental Coalition, 125 IBLA 287 (Feb. 26, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

Standing to appeal requires that an appellant be a party to the case adversely affected by the decision below. Organizations which did not participate in proceedings leading up to the appeal are not "part(es) to a case" within the meaning of 43 CFR 4.410(a) for purposes of appeal and their appeals are properly dismissed for lack of standing.

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

With respect to lands which have been conveyed out of Federal ownership, a decision accepting a Native allotment application as amended is not an adversarial adjudication of entitlement of the applicant to an allotment which is dispositive of the rights of the applicant or adverse parties since DOI lacks jurisdiction to make such a ruling in the absence of legal title. In this context, an appeal by an adverse party is properly dismissed as premature. If the land is reconveyed, any decision adjudicating the amended location will be subject to appeal.

Bay View, Inc., 126 IBLA 281 (June 7, 1993)

Even though an appellant did not actively participate in the process leading to the issuance of the BLM ADC decision, where the appellant expressly requested leave to participate in that process and where BLM led appellant to believe that it would have an opportunity to do so, appellant was a "party to the case" as described in 43 CFR 4.410(a). Further, where the appellant makes a specific, colorable allegation in its notice of appeal that its members use an area affected by BLM's ADC plan, appellant is "adversely affected" within the meaning of 43 CFR 4.410(a). As both elements of that regulation are met, appellant has standing to appeal.

Predator Project, 127 IBLA 50 (July 20, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

When an oil and gas lease operator challenges incidents of noncompliance that have been removed from the record by the decision under appeal and the operator does not contest the fact of violation, the appeal will be dismissed because there is no effective relief that can be afforded to the operator by the Board.

Petro-X Corp., 127 IBLA 111 (Aug. 12, 1993)

In order to have standing to appeal to the Board of Land Appeals, the appellant must have been adversely affected by the decision being appealed. If no right to appeal exists, a party may be granted amicus curiae status.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a), and the decisional law of the Department, and not by judicial determinations on standing.

The appeal of an administrative determination by BLM that a road is a R.S. 2477 right-of-way will be dismissed for lack of standing where the appellant makes no colorable allegation of adverse effect. That a group's organizational interest in protection of the public lands, which its members utilize, might be adversely affected by a BLM action is not subject to dispute. However, the group may not rely on that general organizational interest alone in challenging a BLM action. It must identify how the particular BLM action in question actually adversely affects its interest.

Southern Utah Wilderness Alliance, 127 IBLA 325 (Oct. 14, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

A protest against an exchange of public for private land made pursuant to sec. 206 of FLPMA was properly denied when it was not established, as alleged, that the exchange would violate the Oregon and California Railroad and Reconveyed Coos Bay Grant Lands Act, statutory and regulatory requirements establishing minimum allowable value for exchange lands, or adversely affect local economies directly concerned with the exchange, or contravene the public interest. An allegation that a timber processor would be competitively disadvantaged by an exchange of a timbered tract to another timber company is found to be sufficient to establish standing to appeal from a denial of a protest against the pro-posed exchange but insufficient to establish that the exchange was not in the interest of the United States.

Swanson-Superior Forest Products, Inc., 127 IBLA 379 (Oct. 27, 1993)

In order to establish standing to appeal under 43 CFR 4.410, an organization must show that it is a party to a case and that it has been adversely affected by the appealed decision. Where an appellant has participated before BLM during its consideration of the decision under appeal, it is a party to the case. Where appellant makes a specific, colorable allegation that its members use an area affected by a BLM decision, it is "adversely affected" within the meaning of 43 CFR 4.410(a).

Audubon Society of Portland et al., 128 IBLA 370 (Mar. 11, 1994)

In order for an individual or organization to establish standing to appeal under 43 CFR 4.410, the individual or organization must show that he or she is a party to the case and that a legally cognizable interest is adversely affected by the decision being appealed. In order to show adverse effect, one need only present colorable allegations of injury to a legally cognizable interest.

Where the standing of an organization is challenged in an appeal to the Board of Land Appeals of an ALJ's

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

decision in a grazing case on the basis that the organization is not adversely affected, the Board will find adverse effect where the organization presents colorable allegations of injury through production of the affidavits of three of its members holding grazing authorizations in adjacent or nearby allotments within the same resource area, whose ability to continue grazing livestock is threatened by the legal rulings being challenged.

Nat'l Wildlife Federation, Southern Utah Wilderness Alliance, & Joseph M. Feller (Appellants/Appellees) v. Bureau of Land Management (Respondent/Appellant), American Farm Bureau Federation, Utah Farm Bureau Federation, & Ute Mtn. Ute Indian Tribe (Intervenors/Appellants), 129 IBLA 124 (Apr. 13, 1994)

In order to have standing to appeal, an appellant must be both a party to the decision appealed and adversely affected by the decision. An organization which has not participated in the process for reviewing an EA is not a party to the case and therefore lacks standing to appeal.

Kendall's Concerned Area Residents, 129 IBLA 130 (Apr. 15, 1994)

Where an entity was not named as an "affected interest" under 43 CFR 4100.0-5 concerning a BLM decision to grant a grazing permit and where there is no indication that the entity participated in any other way in any of BLM's dealings with the granting of the permit, it lacks standing to appeal the decision to the Board of Land Appeals, as it was not a "party to the case" under 43 CFR 4.410(a).

An entity that applies for and receives status as an "affected interest" under 43 CFR 4100.0-5 prior to BLM's granting of an application for a grazing permit was a "party to the case" under 43 CFR 4.410(a). Where that entity has alleged and filed supporting evidence showing that its members frequently use and enjoy areas of the grazing allotment affected by the permit for diverse recreational, educational, scientific, and aesthetic pursuits, it has made an adequately specific,

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

colorable allegation that it is "adversely affected" by the appealed decision, completing the showing required for standing under 43 CFR 4.410(a), so that a motion to dismiss for lack of standing is properly denied.

Oregon Natural Resources Council, Oregon Natural Desert Ass'n v. Bureau of Land Management, MC Beaty Butte Grazing Ass'n, 129 IBLA 269 (May 17, 1994)

Under 43 CFR 4.410(a), a person must be both a party to the case and adversely affected by a decision to have standing to appeal to the Board of Land Appeals.

Western Shoshone Nat'l Council, 130 IBLA 69 (July 26, 1994)

An appeal from a decision of BLM denying a protest against a BLM dependent resurvey of corners along a section line by the owners of private land that is tied to one of those corners is properly dismissed for lack of standing where the appellants' land is entirely surrounded by private land and the resurvey only determined the boundaries of distant public land, as they are not adversely affected by BLM's affirmance of the resurvey.

Ron & Margery A. Martin, 130 IBLA 238 (Aug. 5, 1994)

An appeal from a decision of BLM denying a protest against a BLM dependent resurvey of a boundary between two townships by the owners of private land that borders that boundary is properly dismissed for lack of standing where the appellants' land is entirely surrounded by private land and the resurvey only determined the boundaries of distant public land, as they are not adversely affected by BLM's affirmance of the resurvey.

James C. Boussios, Sonia Boussios, 130 IBLA 342 (Sept. 13, 1994)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

Where a provision of a LMU approval document merely informs the lessee and the operator of Federal coal leases that at some time in the future the Department might seek to impose royalty on Federal coal bypassed in violation of an approved resource recovery and protection plan, but there is presently no alleged violation of such a plan or any decision imposing royalty, a dispute does not exist and the case is not ripe for review.

AMAX Coal Co., 131 IBLA 324 (Dec. 14, 1994)

The Board will dismiss an appeal from a BLM decision dismissing a protest of the section line adopted in dependent resurveys where the appellant fails to demonstrate that he has been adversely affected by such dismissal since he has no legally cognizable interest which will be affected by BLM's placement of the line.

Robert M. Sayre, 131 IBLA 337 (Dec. 27, 1994)

Statement of Reasons

Unlike the failure to timely file a notice of appeal, failure to timely file a statement of reasons does not deprive the Board of jurisdiction. Under 43 CFR 4.402, failure to file a statement of reasons within the required time makes the appeal subject to summary dismissal. The Board avoids procedural dismissals when there has been no showing that the delay in filing the statement of reasons prejudiced the adverse party.

James C. Mackey, 114 IBLA 308 (May 14, 1990)

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

Shell Offshore Inc., 116 IBLA 246 (Oct. 17, 1990)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Reasons--Continued

Pursuant to the applicable Departmental regulations, an appeal is subject to summary dismissal where a SOR in support of the appeal is not included in the notice of appeal and is not filed within 30 days after the filing of the notice of appeal. Similarly, a SOR filed in support of an appeal which does not affirmatively point out in what respect the decision appealed from is in error does not meet the requirements of the Department's rules of practice and the appeal is also subject to dismissal.

Burton A. & Mary H. McGregor et al., 119 IBLA 95 (Apr. 15, 1991)

Any party appealing from a decision of an officer of the Bureau of Land Management has the burden of establishing error in the decision under appeal, by a preponderance of the evidence. Conclusory allegations of error, standing alone, do not discharge this burden.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

If an appellant's notice of appeal did not include a SOR for the appeal, the appellant must file such a statement with the Board of Land Appeals within 30 days after the notice of appeal was filed. Where no SOR is ever filed and no reason is offered for the failure to file, the appeal is properly dismissed.

Sybil W. Taylor, 120 IBLA 193 (July 30, 1991)

A decision by BLM may be summarily affirmed where the statement of reasons filed in support of an appeal fails to point out error in the decision under review but instead merely reiterates arguments addressed to BLM in a protest and where the BLM decision on the protest is comprehensive and fully addresses each of the arguments contained in the protest.

In re Mill Creek Salvage Timber Sale, 121 IBLA 360 (Dec. 18, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Reasons--Continued

A protest is subject to dismissal if it is founded on conclusory allegations and no reason is given for halting the proposed action. A protestant cannot later cure the defect by stating reasons for protest for the first time on appeal to this Board.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 17 (Jan. 2, 1992)

A decision by BLM may be affirmed where the SOR filed in support of appeal fails to point out error in the decision under review but instead merely reiterates arguments addressed to BLM in a protest and where our review finds the BLM decision on the protest is comprehensive and correctly addresses each of the arguments contained in the protest.

Oregon Natural Resources Council, 122 IBLA 65 (Jan. 9, 1992)

An appellant who does not with some particularity show adequate reason for appeal, and, as appropriate, support the allegation with argument or evidence showing error, cannot be afforded favorable consideration. Conclusory allegations of error, standing alone, do not suffice.

Glanville Farms, Inc. v. Bureau of Land Management, 122 IBLA 77 (Jan. 14, 1992)

A statement of reasons filed in support of an appeal that does not affirmatively point out how the decision appealed from is in error does not meet the requirements of the Department's rules of practice and the appeal is subject to dismissal.

W. J. & Betty Lo Wells, 122 IBLA 250 (Feb. 28, 1992)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Reasons--Continued

To constitute an adequate SOR, an appellant's document must affirmatively point out error in the appealed decision. If the SOR is deemed inadequate, the appeal will be subject to summary dismissal.

J. W. Weaver, 124 IBLA 29 (Aug. 21, 1992)

The failure to file a SOR subjects an appeal to summary dismissal. 43 CFR 4.402(a). If no SOR or reason for the failure to file a SOR is filed, the appeal is properly dismissed.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

A decision by BLM denying a protest of a timber sale may be affirmed where the SOR filed in support of an appeal merely repeats, with little change, arguments raised in the protest and fails to present any new issues or point out any error in the decision appealed from, and the BLM decision is comprehensive and fully addresses each of the arguments contained in the protest.

In Re Eastside Salvage Timber Sale, 128 IBLA 114 (Dec. 20, 1993)

Where an appellant does not state with some particularity the reason for appeal, and, as appropriate, support the allegation with argument or evidence showing error, the appeal will not be favorably considered. Conclusory allegations of error, standing alone, do not discharge this burden.

American Colloid Co., 128 IBLA 257 (Mar. 4, 1994)

RULES OF PRACTICE--Continued

APPEALS--Continued

Stay

The general regulations governing proceedings before OHA contain a rule, 43 CFR 4.21(a), providing that a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and that the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. The rule specifically provides, however, that it is effective "[e]xcept as otherwise provided by law or other pertinent regulation." An interim final rule, published in the Federal Register on Mar. 13, 1992 (57 FR 9010), 43 CFR 3150.2, provides otherwise by making decisions approving notices of intent to conduct geophysical exploration effective pending appeal.

The interim final rule amending 43 CFR Subpart 3150 to make decisions and approvals of the authorized officer in onshore oil and gas geophysical exploration matters effective pending appeal has the effect of making such BLM determinations final agency action immediately subject to judicial review under the provisions of 5 U.S.C. § 704 (1988). While the interim final rule provides that a petition for stay may be filed with the Board of Land Appeals, a person would not be required to exhaust that procedure before proceeding to District Court.

Southern Utah Wilderness Alliance, 123 IBLA 13 (Apr. 22, 1992)

Review of the merits of a trespass case may be expedited by the Board where the decision is made effective by regulation pending appeal and review of a motion for stay discloses a conflict between the threat of injury to the appellant and the threat of adverse effect to the public interest.

High Desert Communications, Inc., 123 IBLA 20 (Apr. 24, 1992)

RULES OF PRACTICE--Continued

APPEALS--Continued

Stay--Continued

Under BLM's interim final rule, 43 CFR 3165.4(c), promulgated by the Department on Mar. 13, 1992 (57 FR 9010), a petition for a stay of a decision or approval of the authorized officer is required to be filed with the Board of Land Appeals.

Wyoming Wildlife Federation, 123 IBLA 392 (Aug. 7, 1992)

A motion by appellant to stay the effect of a decision pending review by the Board on appeal is generally decided on the basis of certain factors: the likelihood of success on the merits; the threat of irreparable injury to the moving party if the stay is denied; whether the threatened injury to the moving party outweighs the threatened injury to nonmoving parties; and whether the stay is contrary to the public interest. In order to support a preliminary stay the probability of success on the merits need not be free from doubt, but the motion must be supported by a showing of a reasonable basis for challenging the legal soundness of the decision below meriting careful review. In the absence of such a showing, the motion is properly denied.

Jan Wroncy, 124 IBLA 150 (Sept. 30, 1992)

Except as otherwise provided by law or other pertinent regulation, a decision issued before Feb. 18, 1993, will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. It is not necessary to seek a stay of a decision issued prior to Feb. 18, 1993, which is not automatically effective by law or pertinent regulation, and a request for an extension of time in which to file a stay request will be denied.

Committee for Idaho's High Desert, 123 IBLA 301 (Mar. 16, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Stay--Continued

An appeal from a BLM decision to issue a land-use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the U.S., but is instead owned by the applicant. The application for a land-use permit was an admission by the applicant that the land sought was public land.

Lawrence Smart Trust, 127 IBLA 55 (July 20, 1993)

The provisions of 43 CFR 4.21(a), 58 FR 4939, 4942-43 (Jan. 19, 1993), govern the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." Because 43 CFR 4770.3(c) authorizes BLM to place into full force and effect a decision to remove wild horses from public or private land regardless of an appeal, the effect of such removal decisions pending appeal are controlled by that regulation, not 43 CFR 4.21(a), and BLM's failure to place such a decision into full force and effect effectively stays the removal decision pending appeal.

Michael Blake et al., 127 IBLA 109 (Aug. 12, 1993)

Under 43 CFR 4.21(a)(2), 58 FR 4942-43 (Jan. 19, 1993), a decision will be effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for stay pending appeal is filed together with a timely notice of appeal. Where a notice of appeal is timely filed, but the petition for stay is filed after the expiration of the time period for filing an appeal, the petition is untimely and the decision becomes effective on the day after the expiration of the appeal period. However, nothing in the regulations precludes the filing of a subsequent petition for stay, and the Board of Land Appeals, in its discretion, may entertain such a petition.

A petition for stay of a decision denying a mining plan of operations in a WSA, if granted, would not authorize the activities set forth in that plan. The granting of a stay would merely mean that the denial would not be effective during the pendency of the stay;

RULES OF PRACTICE--Continued

APPEALS--Continued

Stay--Continued

it would not constitute approval of the pending plan of operations.

Robert E. Oriskovich, 128 IBLA 69 (Dec. 6, 1993)

The effectiveness of a BLM decision to round up and remove wild horses during the pendency of an appeal to the Board of Land Appeals is controlled by 43 CFR 4770.3(c), not by 43 CFR 4.21(a) (58 FR 4942-43 (Jan. 19, 1993)). Where BLM fails to place its roundup decision into full force and effect on a specified date, pursuant to 43 CFR 4770.3(c), and a notice of appeal of that decision is timely filed, it is error for BLM to proceed with the roundup, as the effect of BLM's decision is stayed during the appeal period and pending the Board's ruling on the appeal.

Animal Protection Institute of America, 128 IBLA 90 (Dec. 10, 1993)

The provisions of 43 CFR 4.21(a), 58 FR 4942-43 (Jan. 19, 1993), govern the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." The regulations governing the administration of forest management decisions, including timber sale decisions, 43 CFR Part 5000, contain a "pertinent regulation" that meets the exception of 43 CFR 4.21(a). Under 43 CFR 5003.1, "[t]he filing of a notice of appeal under part 4 of this title shall not automatically suspend the effect of a decision governing or relating to forest management as described under subparts 5003.2 and 5003.3," and upon denial of a protest, the authorized officer may proceed with implementation of the decision. 43 CFR 5003.3(f).

In Re Eastside Salvage Timber Sale, 128 IBLA 114 (Dec. 20, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Stay--Continued

To be entitled to a stay of a BLM decision denying exemption from payment of rental fees on mining claims, the claimant was required to show there was a likelihood he would succeed on the merits of his appeal. Because his exemption from payment of rental fees imposed by the Act of Oct. 5, 1992, depended on a showing that he was a small miner holding 10 claims or less, his ownership of 13 claims foreclosed the possibility of success on appeal.

Clay Worst, 128 IBLA 165 (Jan. 21, 1994)

In promulgating a revision to 43 CFR 4.21 in 1993, the Department intended that the revised procedure involving the petitioning for a stay of a decision would apply to appeals filed on or after the effective date of that revision, i.e., Feb. 18, 1993.

The provisions of revised 43 CFR 4.21(a) govern the effect of a decision pending appeal, "[e]cept as otherwise provided by law or pertinent regulation." The regulations governing grazing procedures contain a "pertinent regulation" that meets the exception of 43 CFR 4.21(a). Under 43 CFR 4.477(a), an appeal shall suspend the effect of the decision from which it is taken pending final action on the appeal unless the decision appealed from is made immediately effective.

Nat'l Wildlife Federation, Southern Utah Wilderness Alliance, & Joseph M. Feller (Appellants/Appellees) v. Bureau of Land Management (Respondent/Appellant), American Farm Bureau Federation, Utah Farm Bureau Federation, & Ute Mtn. Ute Indian Tribe (Intervenors/Appellants), 128 IBLA 231 (Mar. 1, 1994)

Because rights-of-way appeals regulation 43 CFR 2884.1 provides that decisions involving mineral leasing rights-of-way will be given immediate effect and will not be stayed pending appeal unless otherwise ordered, the general stay regulation provided at 43 CFR 4.21(a) does not apply to such rights-of-way appeals.

Texaco Trading & Transportation Inc., 128 IBLA 239 (Mar. 2, 1994)

RULES OF PRACTICE--Continued

APPEALS--Continued

Stay--Continued

No grace period is allowed by Departmental regulation 43 CFR 3833.0-5(m) in which to file the certificate required by 43 CFR 3833.1-7 of persons seeking the small miner's exemption from payment of the annual claim rental fee. Since the rental fee for the claims at issue was not paid, and the claimant seeking exemption from payment did not timely file qualifying documentation of entitlement to exemption on or before the due date for such filing, her claims affected by the failure to pay or file were extinquished automatically by operation of law albeit she did not intend to relinquish them.

Nannie Edwards, 130 IBLA 59 (July 19, 1994)

The provisions of 43 CFR 4.21(a), 58 FR 4942-43 (Jan. 19, 1993), govern the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." The regulations governing the administration of rights-of-way, including communication sites rights-of-way, 43 CFR Part 2800, contain a "pertinent regulation" that meets the exception of 43 CFR 4.21(a). Under 43 CFR 2804.1(b), "[a]ll decisions of the authorized officer under this part shall remain effective pending appeal unless the Secretary rules otherwise."

London Bridge Broadcasting, Inc., 130 IBLA 73 (July 26, 1994)

No grace period is allowed by Departmental regulation 43 CFR 3833.0-5(m) in which to file the certificate required by 43 CFR 3833.1-7(b) of persons seeking the small miners exemption from payment of the annual claim rental fee. The claims at issue were extinguished automatically by operation of law by failure to timely file documentation establishing qualification for exemption from payment or pay the annual fee.

William Harding et al., 130 IBLA 90 (Aug. 1, 1994)

RULES OF PRACTICE--Continued

APPEALS--Continued

Stay--Continued

Since no grace period is allowed by Departmental regulation 43 CFR 3833.0-5(m) in which to file the small miners annual rental fee exemption certificate required by 43 CFR 3833.1-5, an extension of time to file was not available to claimants seeking to correct their failure to file the required certificates.

Jack S. Brooks et al., 130 IBLA 116 (Aug. 2, 1994)

It is error for BLM to repossess a wild horse and allow it to be readopted prior to notice to the original adopter of the repossession of the horse and cancellation of the private maintenance and care agreement. Such action by BLM defeats the ability of the adopter to reclaim the repossessed animal through the administrative review process.

Noel Benoist, 131 IBLA 138 (Oct. 31, 1994)

Timely Filing

A request for review by a State Director of the Bureau of Land Management under 43 CFR 3165.3(b) is properly dismissed as untimely when it is filed more than 20 business days after the date a notice of violation or assessment or instruction, order, or decision issued under 43 CFR 3165.3(a) is received.

Han-San, Inc., 113 IBLA 361 (Mar. 22, 1990)

A Minerals Management Service decision dismissing an appeal of a royalty payment order as untimely will be reversed where it appears that the order was merely implementing a prior royalty valuation decision issued to the same lessee, covering the same production from the same leases, which was at the time the subject of a timely filed appeal.

Walter Van Norman, Jr., 114 IBLA 56 (Apr. 6, 1990)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

While during the pendency of an appeal from a decision of the Minerals Management Service dismissing an appeal as untimely, the regulations are amended to provide that a delay in filing a notice of appeal to the Director, Minerals Management Service, will be waived if the notice of appeal is filed not later than 10 days after it was required to be filed and it is determined that the notice of appeal was transmitted to the proper office before the end of the time required for filing by 30 CFR 290.3(a)(1), the Board may, in the absence of intervening rights of others or prejudice to the interests of the United States, apply the amendment to pending cases.

Conoco, Inc., 115 IBLA 105 (June 27, 1990)

Pursuant to 43 CFR Subpart 4160, a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

An untimely appeal from the rejection of an Indian allotment application must be dismissed.

James Robert Burchard v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 254 (Mar. 8, 1991)

Refusal to accept personal delivery of a BLM decision does not vitiate service of the decision. A notice of appeal transmitted more than 30 days after personal service of the decision being appealed is untimely and the appeal must be dismissed.

Humane Society of Southern Nevada, 119 IBLA 216 (May 13, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board of Land Appeals). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with the Board, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Thelma M. Eckert, 120 IBLA 367 (Sept. 18, 1991)

Under 25 CFR 166.6, stocking rates on Indian range units are to be monitored and adjusted as conditions warrant. Accordingly, an appeal from a stocking rate is not necessarily untimely merely because it was not filed when the grazing permit was issued.

Gilbert Keester v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 20 IBIA 277 (Sept. 24, 1991)

Pursuant to 43 CFR 3185.1 and 43 CFR 3165.3, where a party to a unit agreement files a request for technical and procedural review by a State Director of BLM, the request is properly dismissed as untimely pursuant to 43 CFR 3165.3(b) when it is filed more than 20 business days after the date the decision of the authorized officer was received or deemed to be received by the aggrieved party.

Global Natural Resources Corp., 121 IBLA 286 (Nov. 22, 1991)

A notice of appeal will not be considered untimely filed under 43 CFR 4.411(a) where there is proof that it was mailed in sufficient time to have been received by BLM within the required 30-day period and in fact it was received within that period by the named adverse party, and the only evidence of receipt by BLM is a handwritten

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

notation by an unidentified individual on the appeal notice.

Missouri Coalition for the Environment et al., 124 IBLA 211 (Oct. 23, 1992)

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal or that appellant had actual notice of the decision for more than 30 days before notice of appeal was filed.

Animal Protection Institute of America, 124 IBLA 231 (Oct. 28, 1992)

As used in 43 CFR 4.401(a), which provides a grace period for documents untimely filed, a document is "transmitted or probably transmitted" when custody and control of the document is surrendered to an agency charged with delivering the document to the proper office.

United States Forest Service, Alaska Region, 124 IBLA 336 (Nov. 18, 1992)

An appeal filed by means of a FAX machine is properly considered to have been transmitted on the day of filing in the absence of any evidence the notice of appeal was transmitted earlier. Hence, a notice of appeal received by FAX machine 1 day beyond the appeal period set forth in 43 CFR 4.411 will be dismissed as untimely where there is no indication that the notice of appeal was transmitted or probably transmitted before

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

the end of the period in which it was required to be filed.

Ron Williams Construction Co., 124 IBLA 340 (Nov. 25, 1992)

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

An individual's request "to add her name" to a timely filed appeal by an organization is properly denied if not filed within the 30-day timeframe established by regulation. Where the individual indicates that she has been an interested party to Wyoming's management of wild horses for several years, she may either provide input to the organization so that it may incorporate her views or may request permission to appeal as amicus curiae.

Animal Protection Institute of America, 128 IBLA 90 (Dec. 10, 1993)

The Board of Land Appeals is without jurisdiction to review the merits of a decision that is not timely appealed. A decision to designate appellant as a principal user of a communication site right-of-way and to fix rent for this right-of-way is not reviewable absent a timely appeal.

King Broadcasting Co., 129 IBLA 265 (May 16, 1994)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

A BLM decision denying as untimely a protest of the approval of a phosphate prospecting permit application without any no-surface occupancy stipulations will be affirmed where approval occurred by decision 3 years prior to the filing of the protest, the appellant had knowledge of the approval, and the appellant did not appeal the earlier approval.

Chevron Chemical Co., F.S. Industries, Ltd., 131 IBLA 132 (Oct. 25, 1994)

The Departmental appeal regulation at 43 CFR 4.411 requires that an appeal of a decision be filed within 30 days of receipt of the decision. This requirement is jurisdictional and, hence, an untimely appeal is properly dismissed.

Gifford H. Allen et al., 131 IBLA 195 (Nov. 9, 1994)

A party seeking review by the State Director of a NOV pursuant to 43 CFR 3165.3(b) must file a request for such review within 20 business days of the date such NOV was received. Where, in connection with an appeal involving State Director review of other NOVs, a party seeks to challenge issuance of a NOV for which State Director review was not timely sought, such a challenge must be rejected as not within the Board's jurisdiction.

Conley P. Smith Oil Producers, 131 IBLA 313 (Dec. 13, 1994)

EVIDENCE

The Board has full authority to reverse findings of fact made by an Administrative Law Judge. However, when the resolution of disputed facts is influenced by the Judge's findings of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best

RULES OF PRACTICE--Continued

EVIDENCE--Continued

position to judge the weight to be given to conflicting testimony.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

A petition for permission to appeal an interlocutory ruling by an Administrative Law Judge that a party is not precluded from introducing evidence on the issue of whether his mining operation caused damage off the permit is properly denied when the governing law has changed and a significant time has elapsed between the finding in a state proceeding that the operation did cause such damage and the issuance of a Federal notice of violation.

Muskingum Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Delbert Lacy (Intervenor), 113 IBLA 352 (Mar. 22, 1990)

In an appeal from a decision by an Administrative Law Judge on motion for summary judgment after argument by the parties, the appellant has the burden of showing the existence of an issue of material fact which might alter the outcome of the proceedings or an error of law in the decision.

Pete Stamatakis v. Bureau of Land Management, 115 IBLA 69 (June 15, 1990)

A Government motion for summary judgment filed in connection with a contractor's unilateral mistake in bid claim is denied where the Government fails to show that the release language included in a modification to the contract (relied upon by the Government for its affirmative defenses of abandonment, novation, release and accord, and satisfaction) either expressly or by implication refers to any mistake in bid claim where the Board finds that an affidavit filed by appellant raises a genuine issue of material fact as to the intention of the parties at the time the modification containing the release in question was negotiated and executed. The Government's motion for summary judgment is also denied

RULES OF PRACTICE--Continued

EVIDENCE--Continued

on the alternative ground that subsequent to the execution of the release the parties showed by their conduct that they never considered the release as constituting an abandonment or the mistake in bid claim.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990)
97 I.D. 193

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented the claimant must present sufficient evidence to overcome the Government's case by a preponderence of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

RULES OF PRACTICE--Continued

EVIDENCE--Continued

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a minor distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is rebutted where the mining claimant provides copies of affidavits of assessment work timely filed with BLM for 45 claims, a copy of a document filed with BLM stating that evidence of assessment work for 52 claims was being filed along with $260, and a "Receipt and Accounting Advice" acknowledging receipt of that amount of money, and BLM has not refunded any of that money. Such evidence of assessment work was filed for all 52 claims.

Silver King Mining Co., 122 IBLA 357 (Mar. 19, 1992)

Sec. 102(a) of FOGRMA, 30 U.S.C. § 1712(a) (1988), requires a lessee to notify the Secretary of the assignment of the obligation to pay royalty. Sec. 3(7) of FOGRMA, 30 U.S.C. § 1702(7) (1988), defines lessee as including any person who has been assigned an obligation to make a royalty or other payment required by a lease. Under secs. 102(a) and 3(7) of FOGRMA, for a person who holds no interest in a lease to be liable for the lessee's royalty payments, the lessee and the person must have agreed to an assignment of the obligation to pay royalty, and notice of that assignment or either evidence of or notice of an assignment, and filing a PIF, without more, does not render the person filing it

RULES OF PRACTICE--Continued

EVIDENCE--Continued

a lessee under sec. 3(7) of FOGRMA, 30 U.S.C. § 1702(7) (1988). There must be a document assigning the obligation to make royalty payments or a contract or agreement stating this obligation.

The assignment of the obligation to make royalty payments is not related to an assignment of a lease or an interest in a lease that must be approved by BIA under 25 CFR 212.22.

The making of royalty payments and the filing of PIFs are not sufficient evidence to indicate an intent to be bound as an agent by lessees' obligation to pay royalty.

Mesa Operating Ltd Partnership, 125 IBLA 28 (Dec. 31, 1992) 99 I.D. 272

An appraisal will not be set aside unless an appellant shows error in the method of appraisal or shows by convincing evidence that the charges are excessive. When the decision of an ALJ does not clearly apply to this standard, the Board will review the evidence and the arguments of the parties to determine whether the result reached should be considered erroneous.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

A continuance of a hearing into the validity of a mining claim will only be granted where the mining claimant presents sufficient reason to justify the grant of an additional opportunity to present his case, i.e., where circumstances have placed a substantial constraint upon his ability to obtain or offer samples or other evidence of a discovery.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties, 127 IBLA 181 (Sept. 7, 1993)

RULES OF PRACTICE--Continued

EVIDENCE--Continued

Although an appellant bears the burden of demonstrating error where BLM has determined that a proposed action is not likely to affect a threatened or endangered species, the record on appeal must support BLM's action, and where BLM concludes that the drilling of a natural gas well will not affect the bald eagle because no active eyries or nests were located during the survey of the area, but the record fails to show that searches for bald eagles were conducted in the winter and early spring when bald eagles are known to inhabit the area, BLM's determination will be set aside and the case remanded.

Where, in response to a challenge to approval of an APD to drill a natural gas well, BLM states that no special status plant species, including threatened and endangered plants, were found during a survey of the proposed project area, such a determination must be supported by the record. When the record on appeal contains no evidence of who conducted the survey, any field report, or any description of the methodology employed in making the determination, that determination will be set aside and the case remanded.

A determination by BLM that approval of an APD to drill a natural gas well will not eliminate a river from eligibility for potential inclusion within the National Wild and Scenic River System, pursuant to sec. 5(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1276(d) (1988), is supported by the record where there is no evidence in the record that drilling the well in question would adversely affect all the river's outstandingly remarkable values so as to render it ineligible for consideration.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

In the absence of a regulation and a PIF explicitly stating that filing the form constitutes the assumption of the lessee's obligation to pay royalty by the person filing it, a document evidencing the person's agreement to accept this responsibility is necessary.

RULES OF PRACTICE--Continued

EVIDENCE--Continued

A division order may constitute evidence that the obligation to pay royalty has been assigned.

Mesa Operating Ltd. Partnership (On Reconsideration), 128 IBLA 174 (Feb. 3, 1994) 101 I.D. 8

Under 43 CFR 4.31, if a person submitting a document in a proceeding before the Department claims that some or all of the information contained in the document is confidential information the disclosure of which to another party in the proceeding is prohibited by law, notwithstanding that party's agreement to keep the information confidential, the submitter of the document has the burden of demonstrating why disclosure of the information is prohibited by law. That the information falls within an exemption from disclosure under FOIA, 5 U.S.C. § 552(b) (1988), does not suffice to establish that disclosure of the information is prohibited by law.

Yates Petroleum Corp., et al., 131 IBLA 230 (Nov. 18, 1994)

GOVERNMENT CONTESTS

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

RULES OF PRACTICE--Continued

GOVERNMENT CONTESTS--Continued

Where a Government contest complaint against a mining claim contains charges which, if proved, would render the claim invalid, and the contestee fails to timely file an answer to the complaint in accordance with Departmental regulations, the allegations of the complaint will be taken as admitted by the contestee and the claim is properly declared null and void.

When the Government issues a mining claim contest complaint to more than one contestee and subsequently issues a decision declaring the interests in the claim of those contestees null and void for failure to file a timely answer to the complaint, a contestee appealing that decision has no standing to challenge it on the basis of failure to properly serve another contestee, where the appealing contestee has affirmatively alleged that he does not represent the other contestee.

Robert D. McGoldrick et al., 115 IBLA 242 (July 18, 1990)

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the claimed land for a minimum of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the record does not establish applicant's qualifying use, the Bureau of Land Management shall initiate a Government contest so that the factual issues can be resolved at a hearing.

State of Alaska, 117 IBLA 148 (Dec. 13, 1990)

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

RULES OF PRACTICE--Continued

GOVERNMENT CONTESTS--Continued

On appeal, the Forest Service urges a finding that too much weight was given to claimant's evidence. It does not, however, allege that there is any contrary evidence or tender any proof that it possesses evidence which would lead to a different result if another hearing were held. If an appellant seeks another hearing it must tender sufficient evidence indicating a discovery (or lack thereof) to convince this Board that such a further hearing is warranted. Without such offer, no hearing will be ordered.

In a contest not involving a patent application, when the Government raises an issue not set out in the complaint during the hearing or in its posthearing brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the doctrine of res judicata, that issue should be addressed if an adverse ruling on the issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

Until patent has issued, the rights of the mining claimant are limited by the statutes and regulations under which those rights are acquired and maintained. The title to the lands subject to unpatented mining claims remains in the United States. As the title owner, the United States may regulate mining activities in national forests in order to protect the surface resources. Therefore, the motivation of the managing Government agency in initiating a contest against a mining claim is irrelevant.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

The determination of whether or not the Government has presented a prima facie case of invalidity in the contest of a mining claim is made solely on the basis of the evidence introduced in the Government's case-in-chief, which includes testimony elicited in cross examination. If, upon the completion of the Government's presentation, the evidence is such that, were it to remain unrebutted, a finding of invalidity would

RULES OF PRACTICE--Continued

GOVERNMENT CONTESTS--Continued

properly issue, a prima facie case has been presented and the burden devolves on the claimant to overcome this showing by a preponderance of the evidence.

Since it may generally be assumed that, given the varying economic conditions present over a period of years, a mining claim will usually be developed unless it is not commercially feasible to profitably do so, a Government showing that there has been an absence of production from a mining claim for an extended period of time is sufficient, without more, to establish a prima facie case of invalidity.

United States v. Rich Knoblock et al., 131 IBLA 48 (Oct. 18, 1994) 101 I.D. 123

HEARINGS

When a hearing is held pursuant to 43 CFR 3563.4(c), affording a sodium preference right lease applicant an opportunity to demonstrate entitlement, the applicant has both the burden of going forward and the ultimate burden of proof of showing that a valuable sodium deposit has been discovered. If there is an appeal from the Administrative Law Judge decision following the hearing, the appealing party has the burden of showing error in the Administrative Law Judge's decision.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

Where an appellant seeks to rebut the presumption of regularity attending the official acts of public officers upon an offer of proof that her Native allotment application was filed, and that procedures operative in the Bureau of Indian Affairs during the mid-to-latter part of 1970 resulted in the absence of her Native allotment application from the file, a fact-finding hearing is warranted.

June I. Degnan (On Reconsideration), 114 IBLA 373 (May 24, 1990)

RULES OF PRACTICE--Continued

HEARINGS--Continued

Where an application for review of a permit is pending before an Administrative Law Judge and the permittee and OSMRE agree to the nature of the issue remaining after settlement by them of the other issues raised by the application, such agreement will not preclude consideration of any of the settled issues at the behest of an intervenor in the proceeding, whether intervention occurred before or after the settlement.

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of that statute, if that question was not addressed by the Judge.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 115 IBLA 249 (July 19, 1990)

Sealaska Corp., 115 IBLA 257 (July 19, 1990)

A stipulation by counsel for the Forest Service and a mineral claimant that there was some limestone "of sufficient carbonate content to be located under the 1872 Mining Law" does not prevent review of the record on appeal to determine if there was a valid location of a mineral on the claim under the mining law.

RULES OF PRACTICE--Continued

HEARINGS--Continued

A prima facie case showing invalidity of a limestone mining claim located after July 23, 1955, for use as decorative stone is established by proof that the stone is a common variety lacking any property giving it distinct and special value.

New evidence offered in support of an application for a rehearing must tend to show that the party seeking rehearing has some likelihood of success if the application is to be allowed. The applicant for a rehearing must also explain why the evidence offered on appeal was not presented at the original hearing, if the evidence could have been available then.

United States v. Sherman C. Smith & Lynda K. Sellers Smith, 115 IBLA 398 (Aug. 22, 1990)

Although 43 CFR 2912.1-1(c) appears to provide that notice and an opportunity for a hearing are only available to a recreation and public purpose lessee when BLM is contemplating termination of the lease for an inconsistent use, but not where there is nonuse, the preamble to the final promulgation of 43 CFR 2912.1-1(c) clearly indicates that the Department intended that notice and opportunity for a hearing be extended to the lessee where termination is sought for inconsistent use or for nonuse.

The purpose of providing a person with notice and an opportunity for a hearing prior to termination of a recreation and public purpose lease is to guarantee that person's right to due process prior to finalization of the action of termination. The "opportunity for a hearing" does not mean, however, that in all cases the Department must conduct a factfinding hearing. A hearing is not required in the absence of assertions of fact which, if proved true, would entitle the person to the relief sought.

Dona Ana Board of County Commissioners, 116 IBLA 108 (Sept. 18, 1990)

RULES OF PRACTICE--Continued

HEARINGS--Continued

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented the claimant must present sufficient evidence to overcome the Government's case by a preponderence of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a minor distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

On appeal, the Forest Service urges a finding that too much weight was given to claimant's evidence. It does not, however, allege that there is any contrary evidence or tender any proof that it possesses evidence

RULES OF PRACTICE--Continued

HEARINGS--Continued

which would lead to a different result if another hearing were held. If an appellant seeks another hearing it must tender sufficient evidence indicating a discovery (or lack thereof) to convince this Board that such a further hearing is warranted. Without such offer, no hearing will be ordered.

In a contest not involving a patent application, when the Government raises an issue not set out in the complaint during the hearing or in its posthearing brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the doctrine of res judicata, that issue should be addressed if an adverse ruling on the issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

Where, after final proof of use and occupancy has been filed and equitable title has passed to the applicant, BLM determines that the land in the application is not subject to conveyance because it is mineral in character, e.g., valuable for placer gold, it may not reject the application without affording the applicant notice and an opportunity to contest the mineral-in-character classification, as required by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

Mary Johansen, 122 IBLA 344 (Mar. 11, 1992)

The holder of a right-of-way issued under the Act of Mar. 3, 1891, is entitled to a factfinding hearing prior to cancellation for failure to construct improvements within 5 years of issuance as required by sec. 20 of that Act, where the case record does not demonstrate that improvements were not timely constructed, and where the right-of-way holder has expressly asserted that construction has been completed. In such hearing, BLM, as

RULES OF PRACTICE--Continued

HEARINGS--Continued

the proponent of the invalidity of the right-of-way, has the burden of proving that authorized improvements were not timely constructed.

John C. Urquidi, 124 IBLA 353 (Dec. 4, 1992)

In referring a case for a hearing, the Board will normally identify the subject matter and one or more issues. Such instructions do not preclude an ALJ from receiving evidence on and considering all relevant matters. The fact the Board does not comment on or rule upon all aspects of a case when referring it for a hearing does not mean that they are accepted as correct or made the law of the case.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

Although the Board has discretionary authority to order a hearing before an ALJ pursuant to 43 CFR 4.415, a hearing is necessary only when there is a material issue of fact requiring resolution through the introduction of testimony and other evidence.

Vanderbilt Gold Corp., 126 IBLA 72 (Apr. 19, 1993)

When presenting evidence to overcome a Government's prima facie case that the claim is not supported by a discovery the claimants are not limited to rebutting the evidence submitted by the mineral examiners, and may present evidence of the location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners.

United States v. Estate of Melvin E. Viles, Mary S. Viles, 126 IBLA 162 (May 10, 1993)

RULES OF PRACTICE--Continued

HEARINGS--Continued

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

Although authorized under 43 CFR 4.415, a fact-finding hearing will be ordered only when the record before the Board presents conflicting issues of fact that cannot be resolved on the basis of that record. Where appellant fails to submit all available evidence to the Board, it is not possible to conclude that the evidence is irreconcilable, and the request for hearing is properly denied.

Pine Grove Farms, 126 IBLA 269 (June 3, 1993)

RULES OF PRACTICE--Continued

HEARINGS--Continued

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 127 IBLA 22 (July 15, 1993)

Sealaska Corp., 127 IBLA 59 (July 20, 1993)

If the applicable statute does not expressly require a formal evidentiary hearing "on the record" and no contrary Congressional intent is evident, formal proceedings before an ALJ are not mandated. The language of 43 U.S.C. § 1732(c) (1988), allowing for revocation or suspension of a special recreation use permit after "notice and hearing," does not dictate a formal hearing before an ALJ, and a special recreation permittee's hearing rights under 43 U.S.C. § 1732(c) (1988), are satisfied when the permittee is given notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

A continuance of a hearing into the validity of a mining claim will only be granted where the mining claimant presents sufficient reason to justify the grant of an additional opportunity to present his case, i.e., where circumstances have placed a substantial constraint upon his ability to obtain or offer samples or other evidence of a discovery.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties, 127 IBLA 181 (Sept. 7, 1993)

RULES OF PRACTICE--Continued

HEARINGS--Continued

For summary judgment there must be no true issue of fact when all factual inferences are drawn in the light most favorable to the opposing party. Therefore, the party seeking permission to file an interlocutory appeal from the denial of a motion for summary dismissal, pursuant to 43 CFR 4.28, must show that there is no true issue of fact and that an immediate appeal from the denial order will materially advance the final decision. The degree to which a FWS Biological Opinion may or may not have foreclosed BLM's obligation and discretionary authority to act in accordance with the Taylor Grazing Act and other applicable laws is an unresolved issue of sufficient magnitude and import to justify denying a motion for summary dismissal.

Edwin O. Larson v. Bureau of Land Management (On Reconsideration), 129 IBLA 250 (May 2, 1994)

Although the Board has discretionary authority to order a hearing before an ALJ pursuant to 43 CFR 4.415, it normally orders a hearing only when an appellant presents a material issue of fact requiring resolution through the introduction of testimony and other evidence not readily obtainable through the ordinary appeal procedure. If no oral testimony is required and an appeal can be resolved relying on documentary submissions, a request for a hearing is properly denied.

Felix F. Vigil, 129 IBLA 345 (June 2, 1994)

Except to the extent expressly delineated in its decision or order, when the Board of Land Appeals remands a case to the Hearings Division for the taking of additional evidence, the ALJ to whom the matter is assigned has full authority to admit such evidence as is deemed relevant and probative and to enter such rulings as judged appropriate.

Once the Government has presented a prima facie case as to the invalidity of a challenged mining claim, the burden of overcoming this showing, by a preponderance of the evidence, devolves upon the claimant as the proponent of the claim's validity. A claimant may be deemed to have preponderated even in the face of directly conflicting evidence where the factfinder

RULES OF PRACTICE--Continued

HEARINGS--Continued

determines that evidence presented by the claimant is more credible than that submitted by the Government.

United States v. J. Gary Feezor et al., 130 IBLA 146 (Aug. 4, 1994)

PRIVATE CONTESTS

A contest complaint is required to contain a statement in clear and concise language of the facts constituting the grounds of the contest. A party seeking a hearing as to the mineral character of land which has been subject to a prior Departmental hearing must make a distinct showing of development made since the prior hearing, such as, if supported by the evidence at the hearing applied for, would clearly demonstrate that since such prior hearing mineral has been discovered in such quantities, and by such thorough work on the premises, as to overcome the effect of the previous judgment as to the character of the land.

An affidavit by a contest complainant is not a substitute for an affidavit of a witness corroborating the factual allegations of the complaint as required by 43 CFR 4.450-4(c). In the absence of an affidavit of a corroborating witness, a private contest complaint is properly dismissed.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

A timely filed state protest of a Native allotment pursuant to ANILCA, sec. 905, prevents legislative approval of the allotment from taking effect.

William J. Felix, 114 IBLA 86 (Apr. 11, 1990)

RULES OF PRACTICE--Continued

PROTESTS

Where legislative approval of a Native allotment was prevented by timely and effective state protest, adjudication of the ensuing contest proceeding must conform to regulations governing contests without further application of provisions of ANILCA.

An extension of time to file an answer is permitted under Departmental regulations governing contest procedure. Where application for extension of time to answer contest complaint was timely filed with BLM by a Native allotment applicant, it was error to fail to consider and grant the request which was made in conjunction with a motion to dismiss.

William J. Felix, 114 IBLA 86 (Apr. 11, 1990)

Withdrawal of patent applications prior to adjudication of a protest against issuance of patent requires dismissal without prejudice of the protest proceedings.

Sunshine Mining Co. v. State of Idaho, 114 IBLA 317 (May 14, 1990)

Pursuant to 43 CFR Subpart 4160, a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

BLM is required to fully adjudicate a protest against a proposed land sale where it raises reasonable doubt about the correctness of BLM's proposed action. BLM should specifically address the substantive questions in its decision ruling on the protest and, if it decides to reject them, should explain its reasons for doing so.

Joyce & Tony Padilla, 119 IBLA 33 (Mar. 25, 1991)

RULES OF PRACTICE--Continued

PROTESTS--Continued

A supplemental plat of survey, approved in 1968, may not be challenged years later by a protest filed under 43 CFR 4.450-2 because that section of the regulations identifies a protest as any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau. The previous approval and filing of a plat of survey is not an action proposed to be taken.

MM Holdings, Inc., 121 IBLA 26 (Oct. 7, 1991)

The State of Alaska has an interest in assuring that its citizens will have access to lands and resources owned by it, its political subdivisions, or the United States, and to public bodies of water regularly used for transportation purposes. A protest presenting colorable allegations that the State's interest will be adversely affected by a decision is sufficient to give standing to appeal dismissal of a protest. The State has a right to appeal the dismissal of a protest for procedural reasons.

BLM has authority to review the legal sufficiency of a protest filed by the State of Alaska under subsec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1988), and to dismiss a protest which it finds to be insufficient. Disagreement with facts asserted in a protest is not a proper basis for dismissal.

State of Alaska (Harvey Pootoogooluk), 121 IBLA 363 (Dec. 19, 1991)

Departmental regulation 43 CFR 3120.1-3 provides that no action taken pursuant to regulations governing competitive oil and gas leasing in Subpart 3120 shall be suspended under 43 CFR 4.21(a), which would otherwise suspend the effect of decisions after appeal or while an appeal could be filed. Although BLM's authorized officer may suspend offering a particular lease parcel while a protest or appeal is considered, BLM properly refused to suspend sale of 37 lease parcels where objection was made on the day of sale but no reason was stated for the protest.

A protest is subject to dismissal if it is founded on conclusory allegations and no reason is given for halting the proposed action. A protestant cannot later

RULES OF PRACTICE--Continued

PROTESTS--Continued

cure the defect by stating reasons for protest for the first time on appeal to this Board.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 17 (Jan. 2, 1992)

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

Only an objection to an action proposed to be taken by BLM is cognizable as a protest under 43 CFR 4.450-2. An objection filed after BLM has taken action is an untimely protest. BLM properly dismisses a protest of an action that is not proposed to be taken but has already occurred.

Lazaro Mendieta, 126 IBLA 394 (July 6, 1993)

BLM properly denied a request to file a late protest of a final river management plan, EIS, and record of decision after notice of the availability of the final plan and EIS for comment was published in the Federal Register and appellants were mailed copies of the plan, EIS, and record of decision.

Lawrence V. Smart Trust et al., 129 IBLA 351 (June 6, 1994)

RULES OF PRACTICE--Continued

PROTESTS--Continued

Challenges to the approval or amendment of a RMP and its related EIS are accorded administrative review only in conformity with the protest procedures prescribed by 43 CFR Part 1600. Such challenges are properly distinguished from an appeal challenging implementing actions undertaken without preparation of a supplemental EIS which may be appealed to the Board of Land Appeals.

Colorado Environmental Coalition, 130 IBLA 61 (July 22, 1994)

In adjudicating a protest against an application for communications right-of-way, BLM is required by 43 CFR 4.450-2 only to consider and decide matters which are proposed to be done. Where an application for right-of-way has already matured into a functioning use, a protest against the proposal upon which the use was initiated must be dismissed.

Confidential Communications Co., 131 IBLA 188 (Nov. 7, 1994)

SUPERVISORY AUTHORITY OF THE SECRETARY

In exercising the authority of the Secretary of the Interior to review decisions issued by officials of the BIA, the Board of Indian Appeals is not limited by the standards of review set forth in the APA, 5 U.S.C. § 706 (1988), for review of agency decisionmaking by the Federal courts.

Ute Indian Tribe of the Uintah & Ouray Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 24 (Oct. 22, 1991)

WITNESSES

An appraiser's interest in a case is a proper subject for cross-examination, however, a claim of bias on the part of an appraiser must be based on personal interest rather than employment.

RULES OF PRACTICE--Continued

WITNESSES--Continued

An appraiser's training and experience are properly considered in determining the weight to be given testimony. When an appraisal lacks an analysis showing why a specific value was selected from a range of values, the ALJ who presides at a hearing is in the best position to decide the weight to be accorded the appraiser's testimony.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

SCHOOL LANDS
(See also State Selections)

GENERALLY

Even where school land grant acts, such as the Act of Mar. 3, 1853, ch. 145, 10 Stat. 244, which granted secs. 16 and 36 to the State of California for the purpose of public schools, did not specifically mention that lands mineral in character were executed from the grant, sections known to be mineral in character by the time of survey were excepted.

The validity of a lode mining claim located partially on school grant lands depends on whether the discovery point is on land open to mineral location.

Butte Lode Mining Co., 131 IBLA 284 (Nov. 30, 1994)

MINERAL LANDS

Even where school land grant acts, such as the Act of Mar. 3, 1853, ch. 145, 10 Stat. 244, which granted secs. 16 and 36 to the State of California for the purpose of public schools, did not specifically mention that lands mineral in character were executed from the grant, sections known to be mineral in character by the time of survey were excepted.

There is a presumption that land granted to a state for school purposes was of the character contemplated by the grant, and that title to the land consequently passed to the state. If a mining claimant contends that land within a state school grant was mineral in character when survey was completed, and was therefore

SCHOOL LANDS--Continued

MINERAL LANDS--Continued

excluded from the statutory grant, the mining claimant bears the burden of proving the land was mineral in character.

Where, on appeal from a decision declaring mining claims abandoned and void ab initio on the basis that they were located on school lands, the claimant tenders persuasive evidence in support of its contention that the lands in question were known mineral in character on the date of acceptance of the survey, but there is no evidence in the record regarding the position of the state and/or its successors-in-interest on the issue, we will decline to make a definitive determination on that issue and set aside BLM's decision and refer the case to the Hearings Division.

Butte Lode Mining Co., 131 IBLA 284 (Nov. 30, 1994)

SECRETARY OF THE INTERIOR
(See also Administrative Authority)

Where the Secretary proposes to use water developed by the Bureau of Reclamation for irrigation purposes and wildlife purposes without specific legislative directives, the Secretary must answer two questions: (1) does the Secretary, through the Fish and Wildlife Service, have authority to acquire Project water rights and use them for fish and wildlife purposes at Stillwater; and, (2) if the answer to the first question is in the affirmative, does the Secretary, through the Bureau of Reclamation, have authority to transport water so acquired through Project facilities to Stillwater Wildlife Management Area.

There is sufficient authority under the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq.; the National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd; the Migratory Bird Conservation Act, 16 U.S.C. § 715d; the Fish and Wildlife Improvement Act of 1978, 16 U.S.C. § 742f(a)(4); and the Endangered Species Act, 16 U.S.C. § 1534, for the Secretary to acquire water rights for fish and wildlife purposes for Stillwater Wildlife Management Area.

The Secretary has sufficient authority to transport water to Stillwater Wildlife Management Area for wildlife purposes based upon the Washoe Project authorization, 43 U.S.C. § 614, the Reclamation Project

SECRETARY OF THE INTERIOR--Continued

Act of 1939, 43 U.S.C. § 389, and the Water Project Recreation Act, 16 U.S.C. § 460l-18(a).

Authority to Provide Water to Stillwater Wildlife Management Area, M-36967 (July 10, 1989) 97 I.D. 32

Once jurisdiction over an appeal has been lodged in the Board of Land Appeals by the timely filing of a notice of appeal, the supervisory authority provided by 43 CFR 4.5 may be exercised only by the Secretary, Deputy Secretary, or Director, Office of Hearings and Appeals.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

Where the Colorado State Director, BLM, issued a decision approving a record of decision for an EIS regarding a vegetative treatment program for 13 western states, insofar as it related to public lands administered by BLM in Colorado, and the Ass't Secretary, Land and Minerals Management, subsequently concurred in selection of the vegetative treatment program, that concurrence amounted to Secretarial approval of the vegetative treatment program for BLM lands in 13 western states, including Colorado. Accordingly, the Board of Land Appeals lacks jurisdiction to consider an appeal of the Colorado State Director's decision file subsequent to the Ass't Secretary's action.

The Wilderness Society, 122 IBLA 162 (Feb. 6, 1992)

The Board of Indian Appeals has no authority to review acts or decisions of the Secretary of the Interior, except as referred to the Board by the Secretary under 43 CFR 4.330(a)(2).

Perry Murdock v. Acting Phoenix Area Director, Bureau of Indian Affairs, 22 IBIA 130 (June 18, 1992)

SECRETARY OF THE INTERIOR--Continued

A decision that is approved by the Secretary of the Interior is not subject to review by the Board of Land Appeals.

Power River Basin Resource Council, Wyoming Chapter of the Sierra Club, Wyoming Outdoor Council, 124 IBLA 83 (Sept. 15, 1992)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

SEGREGATION

A decision rejecting a desert land entry application on the ground that the land is within an unpatented mining claim will be reversed and remanded where no final certificate of mineral entry was in effect at the time the desert land entry application was filed and where BLM records strongly suggest that

SEGREGATION--Continued

the unpatented mining claims are invalid and, therefore, have no segregative effect.

Nancy M. Swallow, A. Dean Martineau, 112 IBLA 321 (Jan. 12, 1990)

BLM properly declares a placer mining claim null and void ab initio where, at the time it was located, the affected land was segregated from mineral entry by the filing of an application for a public airport lease, even though such application had later been relinquished.

Boyad Tanner et al., 113 IBLA 387 (Mar. 28, 1990)

The Federal District Court injunction issued in National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), cert. granted sub nom., Lujan v. National Wildlife Federation, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990) (No. 89-640), is without effect as to land for which BLM issued a purported Oct. 29, 1981, termination of classification, when the classification had in fact automatically terminated pursuant to sec. 4 of the Classification and Multiple Use Act of 1964 prior to the effective date of the injunction.

Pursuant to the Classification and Multiple Use Act of 1964 the segregative effect of a disposal classification for a tract of land larger than 2,500 acres terminated automatically 2 years after publication of the notice of proposed classification, unless a continuance was obtained. This Board will not apply the "notation" or "tract book" rule in a manner which thwarts this clear congressional intent.

Phelps Dodge Corp., 115 IBLA 214 (July 3, 1990)

A decision rejecting a desert land entry application on the ground that the land is appropriated by unpatented mining claims will be reversed where a final certificate of mineral entry has not been issued for the land at the time the desert land entry application was filed.

Bobby L. Franklin, 116 IBLA 29 (Aug. 27, 1990)

SEGREGATION--Continued

BLM properly declared a group of unpatented mining claims null and void ab initio because official land status records of the Department noted that the land was, when the claims were located, encompassed by a State selection, valid on its face, which thereby segregated the land from mineral entry even though the selection was void or voidable, since the land was within a national forest.

Hyak Mining Co., 119 IBLA 1 (Mar. 15, 1991)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a withdrawal or segregation of lands pursuant to a first-form reclamation withdrawal, thereby reinstating the terms of the withdrawal, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

A mining claim located at a time when the land is segregated from appropriation under the mining law by a small tract classification is properly declared null and void ab initio.

Patsy A. Brings, 119 IBLA 319 (June 18, 1991)

A BLM decision declaring lode mining claims null and void ab initio because they were located on land withdrawn by the President on Oct. 12, 1910, pursuant to sec. 1 of the Act of June 25, 1910, ch. 421, 36 Stat. 847, will be reversed if it cannot be shown that the claims were located solely for nonmetalliferous minerals.

A BLM decision declaring lode mining claims null and void ab initio because they were located on land subject to a Nov. 23, 1910, GLO coal-land classification order will be set aside if BLM has not afforded the claimant an opportunity to dispute the coal-land classification.

Jonathan Z. Herod et al., 121 IBLA 339 (Dec. 13, 1991)

SEGREGATION--Continued

Mining claims located on land segregated from appropriation under the mining law by a proposed classification decision made pursuant to 43 CFR 2741.4(h) (1985) are null and void ab initio.

Edgar Sebastian Roberts, 127 IBLA 217 (Sept. 21, 1993)

SETTLEMENTS ON PUBLIC LANDS

BLM properly rejected a homesite purchase application where the applicant failed to show in conformity to 43 U.S.C. §§ 687a and 687a-1 (1982), that he had occupied a habitable house at his site for not less than 5 months each year for 3 years within 5 years of the date he filed his notice of claim.

Robert E. Billstrom, 129 IBLA 108 (Apr. 7, 1994)

SODIUM LEASES AND PERMITS
(See also Mineral Leasing Act)

LEASES

To establish the discovery of a valuable deposit of sodium, a preference right lease applicant must show the existence of a mineral deposit within the permit area of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. This test is almost identical to the objective standard for determining whether a person locating a claim under the 1872 Mining Law (30 U.S.C. § 21 (1982)) has perfected his claim by the discovery of a valuable mineral. The "marketability test" is also applied to determine if there is a reasonable prospect for developing a "paying mine." This requires a showing of a reasonable prospect that the "valuable mineral" can be extracted, removed, and marketed at a profit.

The "prudent person" and "marketability" tests require a showing that as a present fact (considering historic price and cost factors and assuming those factors will continue) there is a reasonable likelihood that a paying mine can be developed. Actual successful exploitation need not be shown, and a preference right lease applicant is not required to show that mineral of

sufficient quantity and quality has been exposed to demonstrate that a profitable mining operation can be developed. He need only show, based upon the mineralization exposed and reasonable geologic and market projections, that a person of ordinary prudence would expend further labor and means with the reasonable expectation that a profitable mine will thereby be developed.

If, at any time during mineral exploration, it is deemed prudent to commence development, the initiation of development activities is justified, even though further exploration may be warranted. However, if not enough is known about either the size or quality of the mineralization to justify commencing development, and it would be possible to have a paying mine if the size of the mineralized body or value of the mineral could be increased, further exploration is warranted. A determination that further exploration is warranted is not sufficient to establish the discovery of a valuable deposit of a mineral.

There is a clear distinction between "exploration" and "development" as those terms relate to discovery under the mining laws. The separate stages of mining activity serve as a basis for determining what further mining activity a prudent man would be justified in undertaking. Exploration work is that work which is undertaken to determine whether valuable minerals exist in sufficient quality and quantity that there is a reasonable prospect that a paying mine could be developed. Development work is undertaken only after this determination has been made. A preference right lease applicant must show that a discovery either existed or could reasonably have been anticipated prior to the expiration of the prospecting permits.

When further exploration work would not materially increase the reasonably projected quantity or quality of the sodium deposit, a discovery determination must be based on the showing that there is a reasonable prospect that the deposit can be mined, processed, and marketed at a profit. This determination must be made as of the date the preference right lease applicant fulfilled all the prerequisites for determining entitlement to a preference right lease. Thus evidence concerning subsequent costs and market conditions have relevance only to the extent they reflect what may reasonably have been anticipated at the expiration of the prospecting permits. When making a final showing,

the applicants must also show that there is a reasonable probability that the mineralization can be mined in a manner which will be in compliance with the proposed lease terms.

When determining whether it can reasonably be expected that a preference right lease applicant would be able to profitably market the leased products, given the costs of mining the deposit and producing the products, it is not necessary to know the exact cost of production or the exact price which might be received. This determination may be based upon a reasonable and rational estimate of the cost of production and a reasonable and rational estimate of the market price for the product.

It is reasonable to expect that during the course of mine development the operator will find it necessary to modify and further refine its mining plan. Thus, it is improper for BLM to reject an application because the data submitted by the preference right lease applicant was not sufficiently specific to form the basis for an assurance that a paying mine could be developed. The probability that there will be modifications does not so negate cost and price estimates so as to make them meaningless because the information concerning the anticipated costs and returns need not be exact. The applicable legal standard does not require an applicant to prove with absolute certainty that a paying mine will result. The applicant need only prove that a prudent person would expend additional labor and means with a reasonable prospect of success in developing a paying mine.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

The date of expiration of the permits is the critical date for determination of a discovery on sodium prospecting permits entitling the holder to the issuance of sodium preference right leases. Evidence concerning costs and market conditions after that date have relevance only to the extent they reflect what may have reasonably been anticipated at the expiration of the

permits. Yankee Gulch Joint Venture v. BLM, 113 IBLA 106 (1990).

Where the Board has held that a hearing is required before an ALJ to determine whether a valuable deposit of sodium has been shown by a prospecting permittee applying for a preference right lease, evidence of the quantity and quality of the deposit is admissible to the extent it tends to show whether the deposit can be mined, processed, and marketed at a profit. A prior stipulation by BLM as to the sufficiency of the initial showing as to quantity and quality will not preclude evidence on the quantity and quality of the deposit of sodium.

The text for determining whether a permittee has discovered a valuable deposit of sodium justifying issuance of a preference right lease is similar to the test for determining whether the locator of a mining claim under the 1872 Mining Law, 30 U.S.C. § 21 (1988), has discovered a valuable mineral deposit, i.e., whether the mineral deposit found within the limits of the claim is of such quantity and quality that a prudent person would be justified in the further expenditure of his labor and funds with a reasonable prospect of success in developing a paying mine. This standard has been further refined to include a showing of marketability, a reasonable expectation that the mineral can be extracted, processed, and marketed at a profit.

Bureau of Land Management v. Eugene Simons, 128 IBLA 99 (Dec. 20, 1993)

PERMITS

To establish the discovery of a valuable deposit of sodium, a preference right lease applicant must show the existence of a mineral deposit within the permit area of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. This test is almost identical to the objective standard for determining whether a person locating a claim under the 1872 Mining Law (30 U.S.C. § 21 (1982)) has perfected his claim by the discovery of a valuable mineral. The "marketability test" is also applied to determine if there is a reasonable prospect for developing a "paying

mine." This requires a showing of a reasonable prospect that the "valuable mineral" can be extracted, removed, and marketed at a profit.

The "prudent person" and "marketability" tests require a showing that as a present fact (considering historic price and cost factors and assuming those factors will continue) there is a reasonable likelihood that a paying mine can be developed. Actual successful exploitation need not be shown, and a preference right lease applicant is not required to show that mineral of sufficient quantity and quality has been exposed to demonstrate that a profitable mining operation can be developed. He need only show, based upon the mineralization exposed and reasonable geologic and market projections, that a person of ordinary prudence would expend further labor and means with the reasonable expectation that a profitable mine will thereby be developed.

If, at any time during mineral exploration, it is deemed prudent to commence development, the initiation of development activities is justified, even though further exploration may be warranted. However, if not enough is known about either the size or quality of the mineralization to justify commencing development, and it would be possible to have a paying mine if the size of the mineralized body or value of the mineral could be increased, further exploration is warranted. A determination that further exploration is warranted is not sufficient to establish the discovery of a valuable deposit of a mineral.

There is a clear distinction between "exploration" and "development" as those terms relate to discovery under the mining laws. The separate stages of mining activity serve as a basis for determining what further mining activity a prudent man would be justified in undertaking. Exploration work is that work which is undertaken to determine whether valuable minerals exist in sufficient quality and quantity that there is a reasonable prospect that a paying mine could be developed. Development work is undertaken only after this determination has been made. A preference right lease applicant must show that a discovery either existed or could reasonably have been anticipated prior to the expiration of the prospecting permits.

When further exploration work would not materially increase the reasonably projected quantity or quality of the sodium deposit, a discovery determination must

be based on the showing that there is a reasonable prospect that the deposit can be mined, processed, and marketed at a profit. This determination must be made as of the date the preference right lease applicant fulfilled all the prerequisites for determining entitlement to a preference right lease. Thus evidence concerning subsequent costs and market conditions have relevance only to the extent they reflect what may reasonably have been anticipated at the expiration of the prospecting permits. When making a final showing, the applicants must also show that there is a reasonable probability that the mineralization can be mined in a manner which will be in compliance with the proposed lease terms.

When determining whether it can reasonably be expected that a preference right lease applicant would be able to profitably market the leased products, given the costs of mining the deposit and producing the products, it is not necessary to know the exact cost of production or the exact price which might be received. This determination may be based upon a reasonable and rational estimate of the cost of production and a reasonable and rational estimate of the market price for the product.

It is reasonable to expect that during the course of mine development the operator will find it necessary to modify and further refine its mining plan. Thus, it is improper for BLM to reject an application because the data submitted by the preference right lease applicant was not sufficiently specific to form the basis for an assurance that a paying mine could be developed. The probability that there will be modifications does not so negate cost and price estimates so as to make them meaningless because the information concerning the anticipated costs and returns need not be exact. The applicable legal standard does not require an applicant to prove with absolute certainty that a paying mine will result. The applicant need only prove that a prudent person would expend additional labor and means with a reasonable prospect of success in developing a paying mine.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

BLM properly rejected sodium prospecting permit applications for lands withdrawn from sodium leasing (except if the Secretary or his delegate should find that development of the sodium would not adversely affect oil shale values) when BLM concluded that additional information from operations on existing leases was needed to determine whether sodium production would significantly damage oil shale resources.

Harry E. McCarthy et al., 128 IBLA 36 (Nov. 16, 1993)

The date of expiration of the permits is the critical date for determination of a discovery on sodium prospecting permits entitling the holder to the issuance of sodium preference right leases. Evidence concerning costs and market conditions after that date have relevance only to the extent they reflect what may have reasonably been anticipated at the expiration of the permits. Yankee Gulch Joint Venture v. BLM, 113 IBLA 106 (1990).

Where the Board has held that a hearing is required before an ALJ to determine whether a valuable deposit of sodium has been shown by a prospecting permittee applying for a preference right lease, evidence of the quantity and quality of the deposit is admissible to the extent it tends to show whether the deposit can be mined, processed, and marketed at a profit. A prior stipulation by BLM as to the sufficiency of the initial showing as to quantity and quality will not preclude evidence on the quantity and quality of the deposit of sodium.

The text for determining whether a permittee has discovered a valuable deposit of sodium justifying issuance of a preference right lease is similar to the test for determining whether the locator of a mining claim under the 1872 Mining Law, 30 U.S.C. § 21 (1988), has discovered a valuable mineral deposit, i.e., whether the mineral deposit found within the limits of the claim is of such quantity and quality that a prudent person would be justified in the further expenditure of his labor and funds with a reasonable prospect of success in developing a paying mine. This standard has been further refined to include a showing of marketability, a

reasonable expectation that the mineral can be extracted, processed, and marketed at a profit.

Bureau of Land Management v. Eugene Simons, 128 IBLA 99 (Dec. 20, 1993)

PREFERENCE RIGHT LEASES

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be increased, further exploration is warranted. A determination that further exploration is warranted is not sufficient to establish the discovery of a valuable deposit of a mineral.

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When further exploration work would not materially increase the reasonably projected quantity or quality of the sodium deposit, a discovery determination must be based on the showing that there is a reasonable prospect that the deposit can be mined, processed, and marketed at a profit. This determination must be made as of the date the preference right lease applicant fulfilled all the prerequisites for determining entitlement to a preference right lease. Thus evidence concerning subsequent costs and market conditions have relevance only to the extent they reflect what may reasonably have been anticipated at the expiration of the prospecting permits. When making a final showing, the applicants must also show that there is a reasonable probability that the mineralization can be mined in a manner which will be in compliance with the proposed lease terms.

When determining whether it can reasonably be expected that a preference right lease applicant would be able to profitably market the leased products, given the costs of mining the deposit and producing the products, it is not necessary to know the exact cost of production or the exact price which might be received. This determination may be based upon a reasonable and rational estimate of the cost of production and a reasonable and rational estimate of the market price for the product.

It is reasonable to expect that during the course of mine development the operator will find it necessary

to modify and further refine its mining plan. Thus, it is improper for BLM to reject an application because the data submitted by the preference right lease applicant was not sufficiently specific to form the basis for an assurance that a paying mine could be developed. The probability that there will be modifications does not so negate cost and price estimates so as to make them meaningless because the information concerning the anticipated costs and returns need not be exact. The applicable legal standard does not require an applicant to prove with absolute certainty that a paying mine will result. The applicant need only prove that a prudent person would expend additional labor and means with a reasonable prospect of success in developing a paying mine.

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Bureau of Land Management v. Eugene Simons, 128 IBLA 99 (Dec. 20, 1993)

SPECIAL USE PERMITS

"Providing an unauthorized trip." Where the holder of a special recreation permit for commercial use of a wild and scenic river, during the 1987 period of regulated use of the river, put boats into the water on the day of a scheduled river trip, but did not load passengers and begin the scheduled trip downriver until 2 days later, the trip was unauthorized as that term is used by an operating plan governing such excursions.

The holder of a special recreation permit for commercial use on a wild and scenic river may be required to forfeit two scheduled trips where it is established the permittee provided an unauthorized trip by starting a trip on an unscheduled date without reporting his departure as required by an operating plan made part of his permit.

Galand Haas, 114 IBLA 198 (Apr. 24, 1990)

If a party protests and refuses to comply with a requirement that is found to be incorrect on review, he is not subject to sanctions for not complying. Thus, where a special use permittee refuses to pay use fees and demands a deduction, he is not subject to sanctions for failure to pay timely if BLM allows his request for deduction.

A decision by BLM to suspend special use permits will be affirmed where a special use permittee violates the terms of his permit by failing to provide BLM with timely trip logs containing relevant trip data and by failing to report in writing an accident in which a person suffered an injury requiring medical attention

SPECIAL USE PERMITS--Continued

beyond first aid, and where the permit expressly provides for suspension of the permits and the procedural steps set out in the stipulation and substantially followed.

A BLM decision suspending yearly special use permits issued for commercial river rafting is properly reversed insofar as it purports to affect a period beyond the expiration date of the permits.

Patrick G. Blumm, dba Rio Grande Rapid Transit, 116 IBLA 321 (Oct. 29, 1990)

A party seeking a waiver of fees due for a special recreation permit is not barred from receiving the waiver simply because it is engaged in "commercial use" as that term is defined in the regulations. Rather, the party may receive the waiver if it meets the criteria set out in 43 CFR 8372.4(c)(1) and (2).

Pacific Crest Outward Bound School, 117 IBLA 309 (Jan. 23, 1991)

Issuance of a special recreation permit for off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impact to cultural resources was carefully considered, routes were altered accordingly, and protective stipulations were attached to the permit.

A finding of no significant environmental impact associated with a special recreation use permit for an off-road vehicle tour may be affirmed where the record establishes that BLM took a "hard look" at the environmental impacts of the activity authorized by the permit, considered reasonable alternatives, and applied mitigating measures to avoid significant adverse environmental impacts.

Owen Severance et al., 118 IBLA 381 (Mar. 15, 1991)

SPECIAL USE PERMITS--Continued

The issuance of special use permits is discretionary, and BLM may properly reject a permit application for an organized off-road motorcycle event when there is evidence that the event would result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the impacted public lands.

American Motorcycle Ass'n, District 37, 119 IBLA 196 (May 7, 1991)

If payment is required for use of the public lands, either with or without prior approval of the Department, a fair market rental value determination must be made pursuant to 43 CFR 2920.

Fair market rental value may be assessed from a flat rate fee schedule established by BLM appraisal staff.

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)

The provisions of 43 CFR 2920.1-2 concerning trespass do not apply to violations of 43 CFR 8372.0-7(a) governing special recreation permits. Rather, the appropriate penalties are provided by 43 CFR 8372.0-7(b).

Summit Quest, Inc., 120 IBLA 374 (Sept. 19, 1991)

The regulations governing special recreation permits do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. A decision by a BLM Area Office adversely affecting a party to a case is subject to immediate appeal to the Board of Land Appeals under 43 CFR 4.410(a).

The issuance of a special recreation use permit is discretionary, and, where necessary to avoid adverse impacts on wildlife, BLM may restrict use on the Rio Grande River during the period it is revising a management plan for the river, by issuing a limited number of special recreation permits. Where appellant does not

SPECIAL USE PERMITS--Continued

show that the authorized officer's decision was unreasonable, BLM's decision will be affirmed.

Patrick G. Blumm, dba Rio Grande Rapid Transit, 121 IBLA 169 (Oct. 31, 1991)

Where required rental is not paid under a special use permit which provides for cancellation of the permit when the rent due, or any part thereof, is in arrears and unpaid for 30 days, the permit is properly terminated.

In the matter of Florence Gorman, 9 OHA 137 (Mar. 19, 1992)

The Board will not substitute its judgment for that of the duly authorized BLM official exercising discretion to reject a special recreation permit application on the ground that it conflicts with BLM objectives, responsibilities, or program for management of the public lands involved where the facts of record support the decision. However, where two criminal convictions which were substantially relied upon as a basis for the BLM decision are reversed on appeal subsequent to the BLM decision, and the record contains little factual detail of the basis for rejection, the case is properly remanded.

Red Rock Hounds, Inc., 123 IBLA 314 (June 29, 1992)

Where BLM's decision not to transfer commercial use privileges to noncommercial use on the wild section of the Rogue River is supported by the record, sound management policies, and applicable precedent, it will not be disturbed on appeal.

Nat'l Organization for River Sports, 124 IBLA 38 (Aug. 26, 1992)

SPECIAL USE PERMITS--Continued

Under sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), and the implementing regulations in 43 CFR Subpart 2920, BLM has discretion to reject a proposal for use of lands which conflicts with BLM policy for management of the public lands involved. BLM properly rejects a proposal for a permit authorizing the use of assault weapons on public lands where such rejection is based on the State Director's IM. No. CA-90-155 in which he establishes a policy of closing BLM lands in California to the possession of assault weapons as defined by State law.

Where, under the authority of the Secretary of the Interior to issue permits pursuant to sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), and 43 CFR Subpart 2920, BLM rejects a proposal for a permit authorizing the use of assault weapons on public lands based on the State Director's IM No. CA-90-155 in which he establishes a policy of closing BLM land in California to the possession of assault weapons as defined by State law, on challenging that determination must provide compelling reasons for modification or reversal. Failure to do so will result in the determination being affirmed on appeal when it is supported by the record.

Organized Sportsmen of Lassen County, 124 IBLA 325 (Nov. 6, 1992)

Where, in an appeal of a decision to issue an outfitter and guide permit to a third party for the 1990 season, the appellant seeks to raise issues relating to the original issuance in 1987 of such a permit to the third party in 1987, such a challenge is barred by the doctrine of administrative finality.

The issuance of a special recreation use permit to conduct commercial outfitter and guide services on public land is discretionary, and the Department may accept or reject a permit application in furtherance of the objectives, responsibililies, and programs for management of the public lands involved. In light of this discretionary authority, BLM may use such restrictions as deemed necessary, including the imposition of a moratorium on the issuance of such permits while it is developing a management plan for outfitter and guide services.

Keith Rush dba Rush's Lakeview Ranch, Kevin Rush, 125 IBLA 346 (Mar. 29, 1993)

SPECIAL USE PERMITS--Continued

BLM has the discretionary authority under 43 U.S.C. § 1732(b) (1988), and 43 CFR Subpart 8372 to issue special recreation use permits for commercial float boating operations and to set permit conditions. There must be a compelling reason for modification or reversal of an exercise of this discretionary authority, and the Board will affirm a decision exercising this authority if the decision is not arbitrary, capricious, or an abuse of discretion.

BLM may limit commercial jet back service during the peak summer use period to protect public safety. The fact that BLM was contemplating revisions to the recreation management plan concerning commercial jet back services when the restrictions were imposed did not render the imposition arbitrary, capricious, or an abuse of discretion.

The Exodus Corp., 126 IBLA 1 (Apr. 1, 1993)

Issuance of a special recreation permit for off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impacts were carefully considered and protective stipulations and mitigating measures were applied to avoid significant adverse environmental impacts.

Eastern Sierra Audubon Society, 126 IBLA 222 (May 21, 1993)

Issuance of a special recreation permit is discretionary, and BLM properly rejects an application for a permit for an organized off-road motorcycle event when there is evidence that the event could result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the public lands involved.

Checker Motorcycle Club, 126 IBLA 251 (June 1, 1993)

SPECIAL USE PERMITS--Continued

If the applicable statute does not expressly require a formal evidentiary hearing "on the record" and no contrary Congressional intent is evident, formal proceedings before an ALJ are not mandated. The language of 43 U.S.C. § 1732(c) (1988), allowing for revocation or suspension of a special recreation use permit after "notice and hearing," does not dictate a formal hearing before an ALJ, and a special recreation permittee's hearing rights under 43 U.S.C. § 1732(c) (1988), are satisfied when the permittee is given notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals.

Decisions imposing sanctions for violation of permit terms, waiving permit terms, or excusing noncompliance will be upheld unless it is shown that the decision was arbitrary, capricious, or based upon a mistake of fact or law.

A special recreation permit holder is subject to any permit condition or stipulation BLM deems necessary to protect the public interests. If BLM notifies a permittee of sanctions for failure to comply, it may invoke those sanctions upon noncompliance.

BLM has the discretionary authority to invoke penalties for a pattern of violation of a recreational use permit stipulation by placing a permittee on probationary status. However, the record must demonstrate a pattern of stipulation violations, the number and the relative severity of those violations, and a basis for selecting the chosen remedy.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

The regulations governing special land-use permits, 43 CFR Part 2920, do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. A decision by a BLM Area Manager refusing to renew a land-use permit is subject to immediate appeal by the permittee to the Board of Land Appeals under 43 CFR 4.410(a).

Carl S. Hansen, 130 IBLA 369 (Sept. 15, 1994)

STARE DECISIS

Where a prior final Departmental administrative decision has expressly declined to consider an issue, the doctrine of res judicata or its administrative counterpart, the doctrine of administrative finality, ordinarily will not bar an appellant from raising the issue in a subsequent appeal. Further, the Secretary, acting through the Board, is not estopped by the principles of finality of administrative adjudication from correcting or reversing an erroneous decision by his subordinates or predecessors in interest.

Seldovia Native Ass'n, Inc., 113 IBLA 218 (Feb. 27, 1990)

STATE COURTS

The Federal Government is not bound by a State court decision to which the Federal Government was not a party.

Scott W. Bradshaw et al. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 339 (July 3, 1990)

STATE EXCHANGES
(See also Exchanges of Land)

GENERALLY

Regulations governing state land exchanges under sec. 8 of the Taylor Grazing Act required publication of notice in local newspapers providing an opportunity to protest the exchange application. Where the record discloses exchanges were not protested and were approved by a final decision, the doctrine of administrative finality precludes review of the propriety of the terms of the conveyances at the behest of a mining claimant who located claims on the lands more than 40 years later.

UOP, 127 IBLA 105 (Aug. 9, 1993)

STATE EXCHANGES--Continued

LANDS SUBJECT TO

Regulations governing state land exchanges under sec. 8 of the Taylor Grazing Act required publication of notice in local newspapers providing an opportunity to protest the exchange application. Where the record discloses exchanges were not protested and were approved by a final decision, the doctrine of administrative finality precludes review of the propriety of the terms of the conveyances at the behest of a mining claimant who located claims on the lands more than 40 years later.

UOP, 127 IBLA 105 (Aug. 9, 1993)

STATE GRANTS

There is a presumption that land granted to a state for school purposes was of the character contemplated by the grant, and that title to the land has consequently passed to the state. Where a mining claimant contends that land within a state school grant was mineral in character when surveyed, and was therefore excluded from the grant, the mining claimant bears the burden of proving the land was mineral in character.

This Department will not entertain review of an appeal from a determination that land located by a mineral claimant was not Federally owned where the appeal is made under circumstances indicating that an opinion is sought to facilitate issuance of a lease to the same land from the state and where appellant fails to point to error in the BLM decision appealed from.

George McDevitt, 113 IBLA 287 (Mar. 12, 1990)

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in

STATE GRANTS--Continued

lands presently and actually occupied by the United States under claim of right."

The Supreme Court has articulated a two-pronged test to determine whether a Federal reservation of public land defeats a state's equal footing entitlement: (1) that Congress clearly intended to include land beneath navigable waters (or tideland) within the reservation and (2) affirmatively intended to defeat future state title to such land.

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

Land which has been conveyed to a state without a reservtion of minerals to the U.S. is not available for the location of mining claims, and a mining claim located on such land after it is so conveyed is null and void ab initio. The locator of a lode mining claim partly located on school grant lands acquires no surface or mineral rights for that portion of the claims.

David A. Smith, 128 IBLA 249 (Mar. 2, 1994)

STATE LANDS

Title to the bed of navigable rivers is held in trust for future states and passes to them upon admission to the Union. A placer mining claim is properly declared null and void to the extent that it includes the bed of a navigable river.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

STATE LANDS--Continued

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

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State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

STATE LAWS

The Board of Indian Appeals has no authority to declare a Federal statute violative of the United States Constitution or in conflict with a state constitution.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992)
99 I.D. 219

STATE SELECTIONS
(See also School Lands, Swamplands)

The Board will affirm BLM's rejection of State selection applications filed for land which, at the time of selection, was withdrawn by a public land order from State selection pursuant to sec. 17(d)(1) of the Alaska Native Claims Settlement Act, where the question of the validity of the order was determined as a result of the

STATE SELECTIONS--Continued

dismissal with prejudice of a prior judicial proceeding in which the order was expressly challenged, and as a result of an agreement between the appellant and the United States not to challenge the order in the future.

State of Alaska, 113 IBLA 86 (Feb. 13, 1990)

BLM properly declared a group of unpatented mining claims null and void ab initio because official land status records of the Department noted that the land was, when the claims were located, encompassed by a State selection, valid on its face, which thereby segregated the land from mineral entry even though the selection was void or voidable, since the land was within a national forest.

Hyak Mining Co., 119 IBLA 1 (Mar. 15, 1991)

STATE TAXES

The distinction between a real property tax and a special assessment is that a tax is levied against all similarly situated property for purposes which will benefit the public generally and a special assessment is levied only against the specific property which benefits from the improvement financed by the assessment.

Tohono O'Odham Nation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 22 IBIA 220 (Aug. 14, 1992)

STATUTE OF LIMITATIONS

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within DOI.

Quality Broadcasting Corp., Unicom Broadcasting, Inc., 126 IBLA 174 (May 11, 1993)

ARCO Oil & Gas Co., 131 IBLA 299 (Dec. 2, 1994)

STATUTE OF LIMITATIONS--Continued

MMS' demands for additional royalty on Federal offshore oil and gas leases are administrative actions that are not covered by 28 U.S.C. § 2415(a) (1988). Further, a lessee has a duty to compile and voluntarily chose to retain beyond 6 years, so that, notwithstanding the 6-year limit on recordkeeping imposed by 30 U.S.C. § 1713(b) (1988), MMS is not barred from making demands for payment of additional royalty where the lessee has retained relevant documents. The provisions of 30 U.S.C. § 1755 (1988), bar actions to recover penalties and, thus, do not relate to MMS demands for collection of additional royalty.

Chevron U.S.A., Inc., 129 IBLA 151 (Apr. 19, 1994)

STATUTES

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations, and reliance on allegedly incomplete or inaccurate information provided by Federal employees cannot create any rights not authorized by law.

Magness Petroleum Corp., 113 IBLA 214 (Feb. 23, 1990)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Jack Hammer dba Hammer Oil Co., 114 IBLA 340 (May 22, 1990)

Self-executing legislation contains the standards necessary for its enforcement without the need for implementing regulations.

White Earth Band of Chippewa Indians v. Minneapolis Area Director, Bureau of Indian Affairs, 23 IBIA 216 (Mar. 3, 1993)

STATUTES--Continued

Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, P.L. 102-381, 106 Stat. 1374, 1378-79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual payment of the claim rental fee as required by the Act shall conclusively constitute an abandonment of the unpatented mining claim, millsite, or tunnel site. Failure to pay the fee in accordance with the Act and implementing regulations results in a conclusive presumption of abandonment. Neither the claimant's lack of actual knowledge of the statutory requirement to pay rental fees nor BLM's failure to advise the claimant of that statutory requirement excuses the claimant's lack of compliance with the rental fee requirement since all persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Lester W. Pullen, 131 IBLA 271 (Nov. 23, 1994)

STATUTORY CONSTRUCTION

GENERALLY

The general requirement of 16 U.S.C. § 1274(b) (1988), that the boundaries of each component of the national wild and scenic rivers systems designated by 16 U.S.C. § 1274(a) (1988), shall include an average of not more than 320 acres per mile on both sides of the river does not apply to river areas that Congress has specifically defined by reference to a map.

Joe Trow, 123 IBLA 96 (May 12, 1992)

In a case where the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters, the intention of the drafters, rather than the strict language, controls.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992)
99 I.D. 219

STATUTORY CONSTRUCTION--Continued

ADMINISTRATIVE CONSTRUCTION

It is within the authority of the Department to interpret its own regulations, and its interpretation should be given great deference. Normally an interpretive ruling stating the accounting procedures to be used for royalty calculation may be given retroactive effect. However, when it appears from the record that: (1) for several years the lessee had applied an accounting procedure which conformed with a reasonable interpretation of the applicable regulations when calculating the royalty due for oil produced and removed from the lease; (2) the Department had accepted lessee's royalty accounting procedure for several years before issuing an interpretive ruling that required a different accounting procedure; (3) the new procedure was an abrupt departure from a well-established practice, and not an attempt to fill a void in an unsettled area of the law; and (4) the prejudice to the lessee affected by retroactive application of the new interpretation substantially outweighs the statutory interest and purposes sought to be protected, then the new MMS accounting procedure should be applied prospectively.

Sun Exploration & Production Co., 112 IBLA 373 (Jan. 19, 1990) 97 I.D. 1

An obligation to pay oil royalty for March 1985 using actual production to compute a royalty rate pursuant to 30 CFR 202.101 (1984) did not arise until 1987 when MMS ordered such payment to be made following an audit of the 1985 account.

Eighty-Eight Oil Co., 115 IBLA 386 (Aug. 16, 1990)

Normally an interpretive ruling stating the accounting procedures to be used for royalty calculation may be given retroactive effect. However, an exception exists when certain conditions are met. If (1) for several years the lessee had applied an accounting procedure which conformed with a reasonable interpretation of the applicable regulations when calculating the royalty due for products removed from the lease; (2) the Department had accepted the lessee's royalty accounting procedure for several years before issuing an interpretive ruling that required a different accounting procedure; (3) the new procedure was an abrupt departure from a well-established practice, and

STATUTORY CONSTRUCTION--Continued

ADMINISTRATIVE CONSTRUCTION--Continued

not an attempt to fill a void in an unsettled area of the law; and (4) the prejudice to the lessee affected by retroactive application of the new interpretation substantially outweighs the statutory interest and purposes sought to be protected, then the new MMS accounting procedure should be applied prospectively only.

Union Oil Co. of California, Union Exploration Partners, Ltd., 116 IBLA 8 (Aug. 24, 1990)

In interpreting a statute that attempts to address two conflicting Federal policies, the BIA must be cognizant of the inherent tension within the statute.

Dahlstrom Lumber Co. v. Portland Area Director, Bureau of Indian Affairs & Mayr Brothers Logging Co., Inc., et al., Portland Area Director, Bureau of Indian Affairs, 20 IBIA 143 (July 17, 1991)

In order to correct prior error, an official of the BIA may change an administrative interpretation of a statute as long as the reason for the change is clearly set forth to show that the departure from the prior administrative position is not arbitrary or capricious.

Hopi Indian Tribe v. Director, Office of Trust & Economic Development, Bureau of Indian Affairs, 22 IBIA 10 (Apr. 7, 1992)

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

Courts commonly give deference to the construction of a statute by the agency charged with its administration, particularly one which was contemporaneous with the statute and has been consistently followed by the agency.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992)
99 I.D. 219

STATUTORY CONSTRUCTION--Continued

ADMINISTRATIVE CONSTRUCTION--Continued

ities, Bureau of Indian Affairs, 24 IBIA 65 (June 22, 1993)

IMPLIED REPEALS

The Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), was not repealed by the Alaska Statehood Act, 72 Stat. 339.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992)
99 I.D. 219

Absent convincing evidence, the Board cannot conclude that the requirement for approval of tribal legislation in sec. 28 of the Five Tribes Act of Apr. 26, 1906, 34 Stat. 137, was impliedly repealed by the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (1988).

Seminole Nation of Oklahoma v. Acting Director, Office of Tribal Services, Bureau of Indian Affairs, 24 IBIA 209 (Sept. 23, 1993)

INDIANS

Where Congress, in amending an existing statutory provision, indicates an intent to clarify that provision, the amendment and its legislative history may be used in construing the original enactment.

Estate of Peter Alvin Ward, 19 IBIA 196 (Feb. 5, 1991)
98 I.D. 14

Doubtful or ambiguous expressions in statutes enacted for the benefit of Indians must be interpreted in favor of the Indians.

Dahlstrom Lumber Co. v. Portland Area Director, Bureau of Indian Affairs & Mayr Brothers Logging Co., Inc., et al., Portland Area Director, Bureau of Indian Affairs, 20 IBIA 143 (July 17, 1991)

STATUTORY CONSTRUCTION--Continued

INDIANS--Continued

In a case where the interests of an Indian tribe are arguably in conflict with the interests of some members of the tribe, the Board of Indian Appeals declines to invoke the canon regarding construction of statutory ambiguities in favor of Indians.

Where a statute concerning Indians manifests two competing purposes, an expansive reading of the statute should be avoided if that reading would disserve one of the two purposes.

By analogy to the canon that a state may tax Indians only when congressional consent to such taxation is unmistakably clear, the Board of Indian Appeals finds that a state may share in the oil and gas royalties from tribal property only when Congress has given its unequivocal consent.

In determining whether an instrument is a tribal lease for purposes of a particular Federal statute, the critical inquiry is whether it has the characteristics Congress had in mind when employing the term "tribal lease" in the statute.

State of Utah, Board of Indian Affairs & Division of Indian Affairs v. Navajo Area Director, Bureau of Indian Affairs, 21 IBIA 282 (Mar. 31, 1992) 99 I.D. 39

In determining whether charges imposed by an irrigation district are real property taxes for purposes of a particular Federal statute, the critical inquiry is whether such charges have the characteristics Congress had in mind in employing the term "real property taxes" in the statute.

When Congress enacts legislation providing for the trust acquisition of land for an Indian tribe, it should be deemed to intend that the normal title standards for trust acquisitions will apply unless it provides otherwise in the statute.

Tohono O'Odham Nation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 22 IBIA 220 (Aug. 14, 1992)

STATUTORY CONSTRUCTION--Continued

INDIANS--Continued

The Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), was not repealed by the Alaska Statehood Act, 72 Stat. 339.

The legislative history of the Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), makes it clear that Congress intended to reserve the reindeer industry in Alaska for the exclusive benefit of Alaska Natives.

Ambiguities in the Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), must be construed in favor of the Alaska Natives who are the intended beneficiaries of the Act.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992) 99 I.D. 219

Absent convincing evidence, the Board cannot conclude that the requirement for approval of tribal legislation in sec. 28 of the Five Tribes Act of Apr. 26, 1906, 34 Stat. 137, was impliedly repealed by the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (1988).

Seminole Nation of Oklahoma v. Acting Director, Office of Tribal Services, Bureau of Indian Affairs, 24 IBIA 209 (Sept. 23, 1993)

LEGISLATIVE HISTORY

Where Congress, in amending an existing statutory provision, indicates an intent to clarify that provision, the amendment and its legislative history may be used in construing the original enactment.

Estate of Peter Alvin Ward, 19 IBIA 196 (Feb. 5, 1991) 98 I.D. 14

STATUTORY CONSTRUCTION--Continued

LEGISLATIVE HISTORY--Continued

The legislative history of the Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), makes it clear that Congress intended to reserve the reindeer industry in Alaska for the exclusive benefit of Alaska Natives.

Reindeer Herders Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 23 IBIA 28 (Nov. 13, 1992)
99 I.D. 219

In enacting sec. 102(a) of FOGRMA, 30 U.S.C. § 1712(a) (1988), Congress did not expand the Secretary's authority but allowed him to determine, under existing authority of law, which person is responsible for making royalty payments.

Mesa Operating Ltd Partnership, 125 IBLA 28 (Dec. 31, 1992)
99 I.D. 272

STOCK-RAISING HOMESTEADS
(See also Homesteads (Ordinary))

In determining the appropriate amount of a bond for the protection of the owner of the surface estate of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. §§ 291-301 (1976), BLM properly considers possible damages from projected mining operations within the entirety of the mining claims sought to be re-entered and occupied, relying on the current value of tangible improvements and of the projected lost grazing use of that land from such operations and subsequent reclamation. However, where BLM improperly discounts the value of future lost grazing use, the Board will recompute that value and set the proper bond amount.

William C. Hayes et ux., 122 IBLA 68 (Jan. 10, 1991)

STOCK-RAISING HOMESTEADS--Continued

If lands possess "known mineral values," the mineral estate for such lands may nevertheless be conveyed to the record owner of the surface under sec. 209(b) of FLPMA if the reservation of mineral rights in the United States would interfere with appropriate "nonmineral development" of the land, provided that the nonmineral development is a more beneficial use of the land than mineral development. However, use of the surface of lands patented under the Stock-Raising Homestead Act for grazing is not "nonmineral development" under the meaning of the statute.

Wayne D. Klump et al., 123 IBLA 51 (May 11, 1992)
99 I.D. 64

Under Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), gravel is a mineral reserved to the U.S. by sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1988). When an Indian tribe receives title to minerals reserved under this provision, it receives title to the reserved gravel.

Sampsel J. Bitz v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 286 (Apr. 6, 1993)

A right to select lieu lands under the authority of sec. 13 of the Act of Mar. 13, 1921, 41 Stat. 1239, was a claim required to be recorded with the Department within 2 years from the effective date of the Act of Aug. 5, 1955, 69 Stat. 534. Failure to present the claim within the time established by the 1955 Recordation Act barred acquisition of the land. Filing a selection application in 1946 did not constitute compliance with the 1955 recordation requirement.

Tommy Chavez, 127 IBLA 395 (Nov. 2, 1993)

SUBMERGED LANDS

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in

SUBMERGED LANDS--Continued

lands presently and actually occupied by the United States under claim of right."

The Supreme Court has articulated a two-pronged test to determine whether a Federal reservation of public land defeats a state's equal footing entitlement: (1) that Congress clearly intended to include land beneath navigable waters (or tideland) within the reservation and (2) affirmatively intended to defeat future state title to such land.

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

SUBMERGED LANDS ACT

GENERALLY

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

STATE LAWS

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in

SUBMERGED LANDS ACT--Continued

STATE LAWS--Continued

lands presently and actually occupied by the United States under claim of right."

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

STATE SOVEREIGNTY

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

GENERALLY

A party claiming estoppel must demonstrate that it relied on its adversary's conduct in such a manner as to change his position for the worse.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of that statute, if that question was not addressed by the Judge.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

GENERALLY--Continued

A party claiming estoppel must demonstrate that it relied on its adversary's conduct in such a manner as to change its position for the worse.

Eastern Minerals Internat'l, Inc., 117 IBLA 221 (Dec. 21, 1990)

The "physically related site" criteria, which were promulgated in 30 CFR 700.11(b)(2) on July 2, 1982 (47 FR 33431), may be applied retroactively to determine whether operations in 1981 are eligible for the 2-acre exemption.

Under 30 CFR 700.11(b), a surface coal mining operation is not exempt from regulation under SMCRA under the "2-acre exemption" where that operation, together with any "related" operation, has or will have an affected area of 2 acres or more. Under 30 CFR 700.11(b)(2), operations are deemed "related" if (1) they occur within 12 months of each other; (2) they are "physically related"; and (3) they are under "common control." The second criterion is met when OSM makes an unrebutted prima facie showing that both operations drain into the same watershed. The third criterion is met when OSM presents evidence indicating that one person engaged in mining at both operations and that he was in control of both operations. The operator is properly found to be in control of an operation where he flagged it for mining, created a highwall, and exposed and augered coal, notwithstanding that another person also engaged in mining activity on that operation for a portion of the time the operation was underway.

Where the facts demonstrate that one person retained control over an operation, he is properly cited for failure to reclaim the site. Even assuming arguendo that he and another person shared control of the operation for a portion of the time the site was being mined, he is still properly cited, as, in such circumstances, both parties are jointly and severally liable for compliance with any applicable performance standards.

W. D. Martin (dba Martin Coal) v. Office of Surface Mining Reclamation & Enforcement, 120 IBLA 279 (Aug. 30, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

GENERALLY--Continued

An operation is exempt from SMCRA if extraction of coal is incidental to extraction of other materials and constitutes less than 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use and sale. If an operation is not exempt, mining without a valid permit would constitute a violation.

Robert L. Clewell et al., 123 IBLA 253 (June 18, 1992)
99 I.D. 100

One element for invoking estoppel is that the person asserting it must be ignorant of the true facts. Where appellant had constructive knowledge of regulation 30 CFR 701.5 and the conditions under which the Virginia program obtained primacy, which included the requirement to conform to 30 CFR 701.5, and where appellant had actual knowledge that OSM would require reclamation in accordance with applicable program standards, appellant cannot be said to be ignorant of the true facts.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

Sec. 522(e) of SMCRA, 30 U.S.C. § 1271(e), prohibits only "surface coal mining operations, within areas designated by Congress for special protection, subject to certain exceptions. Since subsidence is not included in the term "surface coal mining operations," subsidence is not prohibited by sec. 522(e).

Applicability of Sec. 522(e) of the Surface Mining Control & Reclamation Act to Subsidence, M-36971 (July 10, 1991)
100 I.D. 85

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ABATEMENT

Generally

When, after OSM provided notice of a failure to reclaim highwalls contrary to State law, the State failed to take appropriate action to abate the cited violation, OSM was required to take enforcement action although the State exercised primary enforcement authority under SMCRA.

Fremont Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 130 IBLA 41 (July 12, 1994)

Remedial Actions

Regulation 30 CFR 817.121(c)(1), requiring an operator to correct any material damage resulting from subsidence caused to surface lands, and regulation 405 KAR 18:210 § 3(2)(a), modelled thereon, are supported by sec. 516(b)(1) of SMCRA, 30 U.S.C. § 1266(b)(1) (1988), which requires that each permit require the operator to adopt measures consistent with known technology in order to, inter alia, prevent subsidence causing material damage to the extent technologically and economically feasible and to maintain the value and reasonably foreseeable use of surface lands.

Harlan Cumberland Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 123 IBLA 129 (May 21, 1992)

ADMINISTRATIVE PROCEDURE

Generally

If a party has moved for certification of a ruling by an Administrative Law Judge that does not finally dispose of a case in accordance with 43 CFR 4.1124, the party may petition the Board for permission to appeal from the interlocutory ruling by the Administrative Law Judge in accordance with 43 CFR 4.1272. The Board may grant the petition if the correctness of the ruling sought to be reviewed involves a controlling issue of law the resolution of which will materially advance final disposition of the case.

A petition for permission to appeal an interlocutory ruling by an Administrative Law Judge that a party

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

is not precluded from introducing evidence on the issue of whether his mining operation caused damage off the permit is properly denied when the governing law has changed and a significant time has elapsed between the finding in a state proceeding that the operation did cause such damage and the issuance of a Federal notice of violation.

Muskingum Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Delbert Lacy (Intervenor), 113 IBLA 352 (Mar. 22, 1990)

Departmental regulation 43 CFR 4.1273 provides that an appellant's brief is due within 30 days of the filing of a notice of appeal and that failure to file a timely brief subjects the appeal to summary dismissal. However, the failure to file a brief is not fatal if the notice of appeal contains sufficient grounds to support an appeal.

Where an appellant fails to appear at a hearing and an Administrative Law Judge issues a decision sustaining an NOV, the Board will not order a new hearing and the appeal will be dismissed if the appellant's notice of appeal or brief fails to state why the NOV should not be sustained.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 114 (June 27, 1990)

When an applicant for review of NOVs and a CO fails to appear at a scheduled review hearing, and does not justify such failure, the ALJ properly decides the case based upon the record completed at the hearing, despite the absence of evidence in support of the applicant's case.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 119 IBLA 111 (Apr. 18, 1991)

If a citizen files a complaint with OSM alleging that a permittee has no right to enter and mine upon his land and that state program action has not been appropriate, pursuant to sec. 521(a)(1) of SMCRA, OSM has authority to issue a 10-day notice to the state, and to review resulting state program action to determine whether the state has taken "appropriate action to cause said violation to be corrected or has shown good cause for such failure" under 30 U.S.C. § 1271(a)(1) (1988).

Pursuant to SMCRA, this Board has no authority to award damages for trespass. While sec. 520 of the Act permits a damage action by "[a]ny person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter," the Act provides that, in the event of operator error, malfeasance, or damage to a citizen's private property, the citizen's remedy is with the courts. 30 U.S.C. § 1270(f) (1988).

Under SMCRA, a permit applicant is required to file legal documentation of a right to mine an area under consideration, and maps which accurately depict the area within which the applicant possesses the legal right to mine. 30 U.S.C. § 1257(b)(9) (1988). These requirements come within sec. 521(a)(1) of the Act (30 U.S.C. § 1271(a)(1) (1988)), providing that, "[w]henever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority," and the state authority shall take "appropriate action."

If a citizen alleges and provides evidence that a state program has granted a permit to enter and mine where the permittee has not obtained a legal right to enter and mine, a state is required by sec. 521(a)(1) (30 U.S.C. § 1271(a)(1) (1988)) and sec. 507(b)(9) (30 U.S.C. § 1257(b)(9) (1988)) of SMCRA to take any "appropriate action" short of adjudication of property title disputes.

Where a landowner provides evidence that an initial decision that an operator has a right to enter and mine an area that has been permitted may be in error, state authorities must assure that the operator has the right

to enter and mine before the area is mined, and state action which fails to do so will be deemed inappropriate action pursuant to sec. 521(a)(1) of the Act. 30 U.S.C. § 1257(b)(9) (1988); 30 U.S.C. § 1271(a)(1) (1988). So long as the operator retains full authority to mine the disputed area under a validly issued permit, the intent and purpose of the Act as stated in sec. 201(b) (30 U.S.C. § 1202(b) (1988)) to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations" is jeopardized.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991) 98 I.D. 231

A letter from counsel for OWM to an operator that (1) speaks only of "considering the possibility of settlement," (2) cautions that remedial action required by the NOVs must be completed and failure-to-abate COs terminated before any settlement can be negotiated, and (3) invites the operator to contact him after completion of reclamation if it is still interested in settlement, creates no basis on which the operator may reasonably rely that OSM agreed that the civil penalties for the NOVs would be settled when reclamation was completed. Where an offer to settle is made by counsel for OSM following completion of reclamation, but is not accepted by the operator, there is no basis to consider estopping OSM from collecting civil penalties for the NOVs.

J&M Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 122 IBLA 90 (Jan. 14, 1992)

A settlement agreement is properly approved if the settlement is fair, adequate, reasonable, and appropriate under the particular facts. The Board will affirm an ALJ's approval of a settlement unless the objecting party demonstrates that the Judge made a harmful error of law or a meaningful error in judgment. In evaluating the appropriateness of a settlement agreement, deference should be paid to the judgment of the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

Government agency which has proposed and submitted the compromise.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, The Hopi Tribe, Maxine Kescoli, & The Navajo Nation (Intervenors), 125 IBLA 107 (Jan. 14, 1993)

When as a result of a citizen's complaint the state regulatory authority is notified by OSM in a TDN that there is a dispute regarding whether a state permittee has a legal right to mine private land subject to permit but the state refuses within 10 days of receipt thereof to suspend mining under the permit pending resolution of that dispute, OSM should direct suspension of mining.

Marion A. Taylor, 125 IBLA 271 (Feb. 19, 1993)

Where OSM has issued a 10-day notice to a state agency pursuant to 30 U.S.C. § 1271(a)(1) (1988), concerning an offsite processing facility operating within buffer zones prohibited under 30 U.S.C. § 1272(e) (1988), and the state agency declines to take action on the ground that the operation was in existence on Aug. 3, 1977, and that it had valid existing rights, the state's response will be found to be arbitrary and capricious when at least one essential factor for a valid existing rights determination is unaddressed.

Lois J. Armstrong, Elizabeth Hillmann, 130 IBLA 228 (Aug. 5, 1994)

Burden of Proof

In a proceeding concerning an application for review of a notice of violation, the burden of going forward to establish a prima facie case rests with OSMRE. Although the ultimate burden of persuasion rests with the applicant for review, the notice of violation will be affirmed only where OSMRE meets its burden of establishing a prima facie case. OSMRE makes a prima facie case when it presents sufficient

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

evidence to establish essential facts from which it may be determined that a violation of pertinent requirements has occurred.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

OSMRE establishes a prima facie case in support of the issuance of a cessation order by showing that the mining operations of the person cited in the order caused subsidence which resulted in damage to residences and which condition created an imminent danger to the public health and safety.

M & J Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 8 (June 4, 1990)

OSMRE is required to establish a prima facie case as to the validity of a cessation order. When OSMRE asserts that a state permit was improperly issued for less than 2 acres because an area reclaimed by prior removal of material from the site should have been included as area affected under the permit, OSMRE is required to show as an initial fact that the operations were connected because there was either a direct relation between the parties or they were engaged in a joint venture.

Madeline Maynard, NOR Mining, & Blackhawk Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 49 (June 12, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

In a proceeding concerning a petition for review of a proposed civil penalty, the issue of the validity of the underlying notice of violation may be raised. In such proceeding, the burden of going forward to establish a prima facie case that the violation occurred as alleged rests with OSM. The ultimate burden of persuasion to show that no violation occurred rests with the petitioner for review.

In civil penalty proceedings, OSM bears the ultimate burden of persuasion regarding the amount of the civil penalty. OSM must establish the basis for determination of the appropriate civil penalty charged an operator for allowing gullies to develop in an access road, including the basis for its implicit conclusion that existence of gullies is likely to endanger either use of the roadway or the surrounding land. Where the sum of the evidence reveals only that the gullies temporarily affected access along a small portion of the access road, and where there is no evidence that the gullies threatened adjacent land, OSM's conclusion and its accompanying assignment of 11 points for the seriousness of the violation are properly set aside.

Intersouth Mineral Co., Inc. v. Office of Surface Mining Reclamation & Enforcement (Appellant), 118 IBLA 14 (Feb. 14, 1991)

In a proceeding involving an application for review of a NOV, OSM has the burden of going forward to make a prima facie showing that the person named in the notice is engaged in a surface coal mining operation and violated SMCRA, the regulations, or a permit condition. The ultimate burden of persuasion rests with the applicant for review, and if OSM's evidence is not overcome by a preponderance of the evidence, the NOV will be affirmed.

Where OSM presents evidence that an applicant for review was engaged in surface coal mining operations under a permit; that it had disturbed "adjacent land"; and that the disturbance was incidental to its coal extraction activities on the permit, a prima facie case in support of a violation of 30 CFR 773.17(a) is established. However, where the applicant shows by a preponderance of the evidence that its activity outside

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

the permit boundaries does not constitute surface coal mining operations, the violation is properly vacated.

Rith Energy, Inc. v. Office of Surface Mining Reclamation and Enforcement, 119 IBLA 83 (Apr. 9, 1991)

An operator challenging OSM's jursidiction on the grounds that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption. OSM's determination that more than 2 acres have been disturbed at related minesites will be affirmed on appeal where the operator fails to show the contrary.

J&M Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 122 IBLA 90 (Jan. 14, 1992)

Under 43 CFR 4.1366(a), when a permit applicant seeks review of a permit condition imposed by OSM, OSM has the burden of going forward to establish a prima facie case as to the failure of the permit applicant to comply with applicable requirements of the Act or regulations or the appropriateness of the permit condition, and the applicant shall have the ultimate burden of persuasion as to its entitlement to the permit or the inappropriateness of the permit condition. To establish a prima facie case, OSM must introduce evidence that will justify but not compel a finding that the condition is an appropriate response to a failure of the permit application to satisfy a specified statutory or regulatory standard or is otherwise appropriate.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 123 IBLA 195 (June 5, 1992)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

A person challenging OSM's jurisdiction to issue a CO on the grounds that its mining activities fell within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

Mary Herald v. Office of Surface Mining Reclamation & Enforcement, 123 IBLA 334 (July 14, 1992)

An operator challenging OSM's jurisdiction on the basis that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

Under 30 CFR 700.11(b), a surface coal mining and reclamation operation is not exempt from regulation under SMCRA where that operation, together with any "related" operation, has or will have an affected area of 2 or more acres. Where OSM issues COs for two mine sites on the basis of relatedness, but during the review proceeding it is admitted that each site is more than 2 acres, the necessity to make a relatedness determination in order to sustain the enforcement action is negated.

Where OSM's abatement requirement for a CO includes elimination of a highwall, but the evidence at a review hearing shows that the highwall predated the surface coal mining operation and OSM fails to show that the mining operation resulted in any adverse physical impact on that pre-existing highwall, elimination of that highwall may not be required.

Barwick Coal Co., Inc., 127 IBLA 86 (July 23, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

Issuance of a NOV will be affirmed only where OSM makes a prima facie case by presenting evidence sufficient to establish facts essential to justify a finding that there were violations of SMCRA as alleged in the NOV.

Delmar Adkins v. Office of Surface Mining Reclamation & Enforcement, 128 IBLA 1 (Nov. 2, 1993)

In an appeal from a decision that a prima facie case was not established, OSM has the burden of showing that the ALJ erred.

In a hearing held in response to an application for review of a NOV, OSM has the burden of presenting a prima facie case that the NOV is valid by submitting sufficient evidence to establish the essential facts of the violation. If OSM establishes a prima facie case, the evidence will sustain the violation if it is not rebutted.

To sustain a NOV alleging material damage to the hydrologic balance caused by the mining operations resulting in discharge of water from an underground coal mining operation violating State and Federal water quality laws and effluent limitations, OSM must establish that there was material damage to the hydrologic balance and that the damage was caused by the acts of the operator cited in the NOV.

When OSM presents a prima facie case, the mining operator need only present sufficient evidence to overcome OSM's case by proving, by the preponderance of the evidence, either that the violation cited in the NOV did not occur, or that the violation was not caused by its operations.

Roblee Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 130 IBLA 268 (Aug. 18, 1994)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

In response to a citizen's complaint that blasting at a coal mining operation had damaged his house, OSM properly declined further enforcement action after investigation revealed there was insufficient evidence to show there was blasting damage.

Estill Estep, 130 IBLA 291 (Aug. 18, 1994)

Findings

The applicable regulation, 43 CFR 4.1273(c), requires an appellant to "state specifically the rulings to which there is an objection, the reasons for such objections, and the relief requested." The regulation applies to both petitions for discretionary review and appeals arising under the Surface Mining Control and Reclamation Act of 1977.

Madeline Maynard, NOR Mining, & Blackhawk Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 49 (June 12, 1990)

Intervention

Where an application for review of a permit is pending before an Administrative Law Judge and the permittee and OSMRE agree to the nature of the issue remaining after settlement by them of the other issues raised by the application, such agreement will not preclude consideration of any of the settled issues at the behest of an intervenor in the proceeding, whether intervention occurred before or after the settlement.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Scope of Review

A litigant's failure to timely seek review of a notice of violation does not bar it from challenging OSMRE's jurisdictional authority to issue the underlying notice of violation in an application for review of a cessation order subsequently issued for failure to abate the violations set out in the NOV.

Stipulations in a proceeding in which a second party did not appear should not serve as the basis for concluding there was privity between the second party and a party to the previous action (a prerequisite for applying collateral estoppel) because the second party was not a party to the proceeding in which the stipulations were entered.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

The Interior Board of Land Appeals is not the proper forum to decide constitutional issues.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

APPEALS

Generally

If a party has moved for certification of a ruling by an Administrative Law Judge that does not finally dispose of a case in accordance with 43 CFR 4.1124, the party may petition the Board for permission to appeal from the interlocutory ruling by the Administrative Law Judge in accordance with 43 CFR 4.1272. The Board may grant the petition if the correctness of the ruling sought to be reviewed involves a controlling issue of law the resolution of which will materially advance final disposition of the case.

A petition for permission to appeal an interlocutory ruling by an Administrative Law Judge that a party is not precluded from introducing evidence on the issue of whether his mining operation caused damage off the permit is properly denied when the governing law has

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

APPEALS--Continued

Generally--Continued

changed and a significant time has elapsed between the finding in a state proceeding that the operation did cause such damage and the issuance of a Federal notice of violation.

Muskingum Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Delbert Lacy (Intervenor), 113 IBLA 352 (Mar. 22, 1990)

An Office of Surface Mining Reclamation and Enforcement decision to disapprove an application for a significant revision of a permit in a Federal-program state is properly reviewed in accordance with the regulations at 43 CFR 4.1370-.1379, rather than regulations at 43 CFR 4.1280. Expedited review in accordance with proposed regulations at 54 FR 9852-55 (Mar. 8, 1989), is required by order of the Director of the Office of Hearings and Appeals.

Pacific Coast Coal Co., Inc., 113 IBLA 384 (Mar. 28, 1990)

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within 10 business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

APPEALS--Continued

Generally--Continued

Challenges to the validity of a national rule promulgated by the Secretary under the Surface Mining Control and Reclamation Act of 1977 may only be brought to the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1982). The Board of Land Appeals does not have jurisdiction to rule on such a challenge. The Board is bound by a duly promulgated regulation of the Secretary and is not authorized to declare it invalid.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

The applicable regulation, 43 CFR 4.1273(c), requires an appellant to "state specifically the rulings to which there is an objection, the reasons for such objections, and the relief requested." The regulation applies to both petitions for discretionary review and appeals arising under the Surface Mining Control and Reclamation Act of 1977.

Madeline Maynard, NOR Mining, & Blackhawk Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 49 (June 12, 1990)

Departmental regulation 43 CFR 4.1273 provides that an appellant's brief is due within 30 days of the filing of a notice of appeal and that failure to file a timely brief subjects the appeal to summary dismissal. However, the failure to file a brief is not fatal if the notice of appeal contains sufficient grounds to support an appeal.

Where an appellant fails to appear at a hearing and an Administrative Law Judge issues a decision sustaining an NOV, the Board will not order a new hearing and the appeal will be dismissed if the appellant's notice of appeal or brief fails to state why the NOV should not be sustained.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 114 (June 27, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

APPEALS--Continued

Generally--Continued

Pursuant to 43 CFR 4.1282(a), notice of appeal is filed with the office of the OSM official whose decision is appealed and a copy is at the same time filed with the Board of Land Appeals. Nonetheless, 43 CFR 4.1107(c) requires that notice of appeal need only be filed with the Board. This apparent conflict between rules governing notices of appeal from OSM decisions is resolved in favor of the appellant who files only with the Board.

An appeal from an OSM decision mailed to this Board within 30 days after issuance of the decision at issue is timely filed pursuant to 43 CFR 4.1107(g).

Marion A. Taylor, 124 IBLA 80 (Sept. 14, 1992)

Where, consistent with the provisions of 30 CFR 700.11(d)(1), a state has made a written determination that reclamation has been fully completed at an interim permit site pursuant to Subchapter B of Chapter 7 of Title 30 and the period of extended liability for revegetation has run, OSM may not assert jurisdiction absent a showing that the written determination was based upon fraud, collusion, or a misrepresentation of a material fact.

Appolo Fuels, Inc. v. Office of Surface Mining Reclamation & Enforcement, 125 IBLA 369 (Mar. 31, 1993)
100 I.D. 63

When OSM inspects a surface coal mining operation in response to an inspection request, it is required by 30 CFR 842.12(d)(1) to send to the person requesting the inspection within 10 days thereafter a description of the enforcement action taken or an explanation why no enforcement action was taken. An explanation that no enforcement action was taken because more time was needed to review the matter will be affirmed if the explanation is reasonable and does not result in undue delay.

Citizens Coal Council, Water Information Network, The Dineh-Hopi Alliance, 129 IBLA 148 (Apr. 19, 1994)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

APPEALS--Continued

Generally--Continued

An appeal taken pursuant to 43 CFR 4.1280 from a decision requiring payment of additional reclamation fees will be dismissed where the decision did not specifically grant a right of appeal to the Board.

Terry Eagle Coal Co., 129 IBLA 367 (June 7, 1994)

State primacy does not deprive OSM of enforcement jurisdiction because 30 U.S.C. § 1254(b) (1988), provides a separate and distinct basis for Federal inspection and enforcement authority against individual mining operations during state primacy in addition to that authority which OSM may exercise after asserting Federal primacy under sec. 1271(b).

Lois J. Armstrong, Elizabeth Hillmann, 130 IBLA 228 (Aug. 5, 1994)

Under 43 CFR 4.1281, any person who is or may be adversely affected by a written decision of the Director of OSM or his delegate may appeal to the Board when the decision specifically grants such right of appeal. The Board does not have jurisdiction to review the failure of OSM to conclude informal review within the 30-day period established in 30 CFR 842.15(b).

West Virginia Highlands Conservancy, 130 IBLA 295 (Aug. 25, 1994)

APPLICABILITY

Generally

The "physically related site" criteria, which were promulgated in 30 CFR 700.11(b)(2) on July 2, 1982 (47 FR 33431), may be applied retroactively to determine whether operations in 1981 are eligible for the 2-acre exemption.

Under 30 CFR 700.11(b), a surface coal mining operation is not exempt from regulation under SMCRA under the "2-acre exemption" where that operation,

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

APPLICABILITY--Continued

Generally--Continued

together with any "related" operation, has or will have an affected area of 2 acres or more. Under 30 CFR 700.11(b)(2), operations are deemed "related" if (1) they occur within 12 months of each other; (2) they are "physically related"; and (3) they are under "common control." The second criterion is met when OSM makes an unrebutted prima facie showing that both operations drain into the same watershed. The third criterion is met when OSM presents evidence indicating that one person engaged in mining at both operations and that he was in control of both operations. The operator is properly found to be in control of an operation where he flagged it for mining, created a highwall, and exposed and augered coal, notwithstanding that another person also engaged in mining activity on that operation for a portion of the time the operation was underway.

W. D. Martin (dba Martin Coal) v. Office of Surface Mining Reclamation & Enforcement, 120 IBLA 279 (Aug. 30, 1991)

APPROXIMATE ORIGINAL CONTOUR

Generally

In response to a citizen's complaint charging that an area disturbed by surface coal mining operations has not been restored to its approximate original contour, OSM properly declines to undertake a further inspection of the minesite and enforcement action where it determines that the land has been so restored, and where the appellant presents no evidence to the contrary.

Peter J. Rosati, 119 IBLA 219 (May 14, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ATTORNEY FEES/COSTS AND EXPENSES

Generally

Sec. 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1988), authorizes the award of attorneys' fees "as determined by the Secretary to have been reasonably incurred" for or in connection with a person's participation in an administrative proceeding under the Act.

Any fee-setting inquiry begins with the lodestar, the number of hours reasonably expended multiplied by a reasonable hourly rate. Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980). The reasonable hourly rate will usually be considered that rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."

The value of an attorney's time is generally reflected in his typical billing rate, and this rate is highly relevant in determining the prevailing community rate. The burden is on the fee applicant to produce satisfactory evidence, in addition to the attorney's own affidavits, that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

No rationale exists to justify an award of attorneys' fees from a permittee for work performed by petitioner's counsel challenging OSM's decision to vacate a NOV issued to the permittee.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, June S. Stout (Intervenor), 131 IBLA 212 (Nov. 15, 1994)

Standards for Award

In order for one who participates in an administrative proceeding reviewing an enforcement action to receive an award of costs and expenses under 43 CFR 4.1294(a)(1), there must be a determination that (1) a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed; (2) the participant made a substantial contribution to the full

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ATTORNEY FEES/COSTS AND EXPENSES--Continued

Standards for Award--Continued

and fair determination of the issues; and (3) the contribution was separate and distinct from the contribution made by the person initiating the proceeding.

Where a participating party seeking an award of costs and expenses, including attorneys' fees, under 43 CFR 4.1294(a)(1), alleges that it made a separate and distinct contribution but fails to describe with specificity what that separate and distinct contribution was and the case record does not demonstrate such a contribution, the request for an award will be denied.

Where the contribution of an intervenor is different than that of OSM, it still may not be considered "separate and distinct" under 43 CFR 4.1294(a)(1), when that contribution relates to a subsidiary issue that is decided favorably to the permittee, and the intervenor's contribution to the ultimate issue for resolution is minimal or merely cumulative to that of OSM.

Where a person intervenes in support of OSM in an administrative proceeding reviewing an enforcement action, and, thereafter, takes a position opposed to OSM, that person must be a prevailing party on that issue in order to be eligible for an award of costs and expenses, including attorneys' fees, for that issue from the permittee under 43 CFR 4.1294(a)(1).

Save Our Cumberland Mountains, Bledsoe County Chapter, 127 IBLA 245 (Sept. 28, 1993)

Substantial Contribution

Where a participating party seeking an award of costs and expenses, including attorneys' fees, under 43 CFR 4.1294(a)(1), alleges that it made a separate and distinct contribution but fails to describe with specificity what that separate and distinct contribution was and the case record does not demonstrate such a contribution, the request for an award will be denied.

Where the contribution of an intervenor is different than that of OSM, it still may not be considered "separate and distinct" under 43 CFR 4.1294(a)(1), when that contribution relates to a subsidiary issue that is

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ATTORNEY FEES/COSTS AND EXPENSES--Continued

Substantial Contribution--Continued

decided favorably to the permittee, and the intervenor's contribution to the ultimate issue for resolution is minimal or merely cumulative to that of OSM.

Save Our Cumberland Mountains, Bledsoe County Chapter, 127 IBLA 245 (Sept. 28, 1993)

BACKFILLING AND GRADING REQUIREMENTS

Generally

In response to a citizen's complaint charging that an area disturbed by surface coal mining operations has not been restored to its approximate original contour, OSM properly declines to undertake a further inspection of the minesite and enforcement action where it determines that the land has been so restored, and where the appellant presents no evidence to the contrary.

Peter J. Rosati, 119 IBLA 219 (May 14, 1991)

Highwall Elimination

Where OSM's abatement requirement for a CO includes elimination of a highwall, but the evidence at a review hearing shows that the highwall predated the surface coal mining operation and OSM fails to show that the mining operation resulted in any adverse physical impact on that pre-existing highwall, elimination of that highwall may not be required.

Barwick Coal Co., Inc., 127 IBLA 86 (July 23, 1993)

When, after OSM provided notice of a failure to reclaim highwalls contrary to State law, the State failed to take appropriate action to abate the cited violation, OSM was required to take enforcement action

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

BACKFILLING AND GRADING REQUIREMENTS--Continued

Highwall Elimination--Continued

although the State exercised primary enforcement authority under SMCRA.

Fremont Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 130 IBLA 41 (July 12, 1994)

BONDS

Generally

A performance bond issued in 1981, during the interim program when a bond was required by the State but was not required by SMCRA, and evidently used again as the bond required by the State's surface mining act and by SMCRA for granting of permanent program permit, is a statutory bond pursuant to SMCRA. Such a bond remains enforceable by OSM despite repeal of the State's surface mining act.

Exchange Mutual Insurance Co., 119 IBLA 296 (June 11, 1991)

Where reclamation costs exceed the amounts forfeited under a bond, the Board will not affirm an OSM decision that a state agency has taken appropriate action under 30 U.S.C. § 1271(a)(1) (1988), simply because a bond was ordered forfeited.

Robert L. Clewell et al., 123 IBLA 253 (June 18, 1992)
99 I.D. 100

A performance bond, issued in 1981 during the interim program, when a bond was required by the State but was not required by SMCRA, and utilized again as the bond required by the State's surface mining act and by SMCRA for the grant of a permanent program permit, is a statutory bond pursuant to SMCRA. Such a bond remains

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

BONDS--Continued

Generally--Continued

enforceable by OSM despite repeal of the State's surface mining act.

Exchange Mutual Insurance Co. (On Reconsideration), Exchange Mutual Insurance Co., 124 IBLA 72 (Sept. 2, 1992)

Departmental regulation 30 CFR 800.21 does not allow hypothecation of real property not owned by a permittee to insure mine reclamation.

Pacific Coast Coal Co., Inc., 124 IBLA 370 (Dec. 9, 1992)

Release of

Where OSM determines the percentage of vegetative ground cover within an area covered by a surface mining permit being reclaimed for use as pasture to be less than 90 percent, in violation of 30 CFR 942.816(f)(1), and where the permittee fails to challenge this determination or the methodology used to make it, OSM's decision disapproving the permittee's application for a Phase II bond release will be affirmed.

Newtex Management Corp., 117 IBLA 380 (Feb. 13, 1991)

Where, consistent with the provisions of 30 CFR 700.11(d)(1), a state has made a written determination that reclamation has been fully completed at an interim permit site pursuant to Subchapter B of Chapter 7 of litle 30 and the period of extended liability for revegetation has run, OSM may not assert jurisdiction absent a showing that the written determination was based upon fraud, collusion, or a misrepresentation of a material fact.

Appolo Fuels, Inc. v. Office of Surface Mining Reclamation & Enforcement, 125 IBLA 369 (Mar. 31, 1993)
100 I.D. 63

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CESSATION ORDERS

The doctrines of collateral estoppel and res judicata will not preclude OSM from taking enforcement action in a primacy state where similar state regulatory authority enforcement actions have been resolved through settlement, since the statutory scheme of SMCRA evidences a countervailing statutory policy against the application of those doctrines in such situations. Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not be applicable when the violations are not fully litigated before the state agency, but are resolved through a settlement agreement, and there is no privity between OSM and the state.

Annaco, Inc. v. Office of Surface Mining Reclamation & Enforcement, 119 IBLA 158 (Apr. 30, 1991)

Generally

The record on appeal establishes that the mineral and surface owner was cited and served with notices of violation. Therefore, subsequent cessation orders issued for failure to abate the NOVs were not invalid for failure to cite and serve the underlying NOVs on said mineral and surface owner.

A surface coal mining operation which commences prior to the formulation of a state permanent program must comply with the Federal interim regulatory program after the state permanent program is effective if the mine operator has not sought and received a permit to operate under the applicable state permanent program. 30 CFR 710.11(a)(3)(iii).

OSMRE is not divested of its authority to carry out the statutory mandate to issue failure to abate cessation orders because it fails to immediately issue such orders.

A litigant's failure to timely seek review of a notice of violation does not bar it from challenging OSMRE's jurisdictional authority to issue the underlying notice of violation in an application for review of a cessation order subsequently issued for failure to abate the violations set out in the NOV.

Stipulations in a proceeding in which a second party did not appear should not serve as the basis for

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CESSATION ORDERS--Continued

Generally--Continued

concluding there was privity between the second party and a party to the previous action (a prerequisite for applying collateral estoppel) because the second party was not a party to the proceeding in which the stipulations were entered.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

The doctrines of collateral estoppel and equitable estoppel will not preclude OSMRE from issuing its own cessation order in situations where a similar notice of violation and cessation order was issued and litigated by the state regulatory authority since the statutory scheme of SMCRA evidences a countervailing statutory policy against application of those doctrines in such a situation.

A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

Where OSMRE determines that any condition or practice exists which creates an imminent danger to the health or safety of the public, it is required to immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). Where a 10-day notice has been issued to the State and OSMRE determines during the 10-day period that an imminent danger situation exists, OSMRE is not required to wait until the 10-day period elapses before issuing a cessation order.

Under 30 CFR 842.11(b)(1) (1986), an immediate Federal inspection is required where the authorized representative has reason to believe on the basis of information available to him or her (other than

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CESSATION ORDERS--Continued

Generally--Continued

information resulting from a previous Federal inspection) that there exists any condition or practice which creates an imminent danger to the health or safety of the public, and the person supplying the information supplies adequate proof that an imminent danger to the public health and safety exists and that the State regulatory authority has failed to take appropriate action.

Under 30 CFR 842.11(b)(1)(C) (1986), the person supplying information to OSMRE must prove adequate proof that an imminent danger to the public health and safety exists and that the State regulatory authority has failed to take appropriate action. What constitutes adequate proof must be determined on a case-by-case basis.

OSMRE establishes a prima facie case in support of the issuance of a cessation order by showing that the mining operations of the person cited in the order caused subsidence which resulted in damage to residences and which condition created an imminent danger to the public health and safety.

M & J Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 8 (June 4, 1990)

When, on the basis of a Federal inspection, the permittee is found to be in violation of any requirement of SMCRA, and the violation does not create an imminent danger to the health and safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the inspector shall issue a notice to the permittee or its agent fixing a reasonable time for abatement. If, when the period for abatement expires, the violation remains unabated, cessation of surface coal mining and reclamation operations shall be ordered.

Unless and until the permittee gives proper notice of a change or designation of a party or parties authorized to receive a notice of violation or cessation order, delivery of a notice of violation or cessation order to one of the parties named as owner or agent of the applicant in the application for a surface mining permit will

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CESSATION ORDERS--Continued

Generally--Continued

constitute service of the notice of violation or cessation order.

Roy E. Mehaffey v. Office of Surface Mining Reclamation & Enforcement, 117 IBLA 350 (Jan. 31, 1991)

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own cessation order in situations where a similar cessation order was issued and litigated by a state regulatory authority because the statutory scheme of SMCRA evidences a countervailing statutory policy against application of those doctrines in such a situation.

R.C.T. Engineering, Inc. v. Office of Surface Mining Reclamation & Enforcement, 121 IBLA 142 (Oct. 28, 1991)

Sec. 528(2) of SMCRA, P.L. 95-87, 91 Stat. 445, 514 (1977), formerly provided that the Act would not apply to "the extraction of coal for commercial purposes when the surface mining operation affects two acres or less." Under 30 CFR 700.11(b), the exemption does not apply where the operation, together with any "related" operation, has or will have an affected area of 2 acres or more. Under 30 CFR 700.11(b)(2), operations are deemed "related" if (1) they occur within 12 months of each other; (2) they are "physically related"; and (3) they are under "common control."

The permittee of a surface mining operation is ordinarily responsible for violations of SMCRA and the regulations committed by the operator on the permitted site. The issuance of a CO to the holder of a 2-acre permit for failure to obtain a permit under the Act and reclaim the highwall as required under the Act which is predicated on the mining of physically related sites under common control totalling in excess of 2 acres within 12 months will be reversed where the record establishes that the permittee of the 2-acre site had no

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CESSATION ORDERS--Continued

Generally--Continued

ownership or control of operations on the physically related sites.'

Mary Herald v. Office of Surface Mining Reclamation & Enforcement, 123 IBLA 334 (July 14, 1992)

The fact that the primary regulatory responsibility for enforcement of surface coal mining reclamation operations has been assumed by a state under sec. 503 of SMCRA does not oust OSM of jurisdiction to issue a CO where an oversight inspection discloses the existence of a violation which can be expected to create significant, imminent environmental harm.

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own CO in situations where the violation which is the basis of the CO was cited and litigated by a state regulatory authority because the statutory scheme of sec. 521(a)(2) of SMCRA mandates issuance of a CO in such a situation where the Federal oversight inspection discloses an unabated violation which is causing or can be expected to cause imminent environmental harm.

The doctrines of res judicata or collateral estoppel do not ordinarily preclude review of a CO issued by OSM for operations conducted without a valid permit where the state regulatory agency agreed to a settlement of the same violation which did not require performance of the reclamation mandated by law. OSM is neither a party to the case nor in privity with the state regulatory agency where the latter adopts a position inconsistent with that required by OSM.

Triple R Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 310 (June 16, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CESSATION ORDERS--Continued

Generally--Continued

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own CO in a situation where a similar order for the same violation was issued and litigated by a state regulatory authority because the statutory scheme of SMCRA evidences a countervailing statutory policy against application of those doctrines in such a situation.

Ron Deaton/Barwick Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 320 (June 16, 1993)

Under 30 CFR 700.11(b), a surface coal mining and reclamation operation is not exempt from regulation under SMCRA where that operation, together with any "related" operation, has or will have an affected area of 2 or more acres. Where OSM issues COs for two mine sites on the basis of relatedness, but during the review proceeding it is admitted that each site is more than 2 acres, the necessity to make a relatedness determination in order to sustain the enforcement action is negated.

If a question arises concerning who is responsible for compliance with the Act and regulations at the site of a surface coal mining operation, it is proper for an OSM inspector issuing a NOV or a CO to name all parties who may be responsible. If a party challenges the notice or order on the basis that it is not a responsible party, OSM bears the burden of going forward to establish that the challenging party is responsible. The challenging party then bears the ultimate burden of persuasion by a preponderance of the evidence that it is not responsible for the cited violation.

Where OSM's abatement requirement for a CO includes elimination of a highwall, but the evidence at a review hearing shows that the highwall predated the surface coal mining operation and OSM fails to show that the mining operation resulted in any adverse physical impact on that pre-existing highwall, elimination of that highwall may not be required.

Barwick Coal Co., Inc., 127 IBLA 86 (July 23, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CITIZEN COMPLAINTS

Generally

In response to a citizen's complaint charging that an area disturbed by surface coal mining operations has not been restored to its approximate original contour, OSM properly declines to undertake a further inspection of the minesite and enforcement action where it determines that the land has been so restored, and where the appellant presents no evidence to the contrary.

Peter J. Rosati, 119 IBLA 219 (May 14, 1991)

If a citizen files a complaint with OSM alleging that a permittee has no right to enter and mine upon his land and that state program action has not been appropriate, pursuant to sec. 521(a)(1) of SMCRA, OSM has authority to issue a 10-day notice to the state, and to review resulting state program action to determine whether the state has taken "appropriate action to cause said violation to be corrected or has shown good cause for such failure" under 30 U.S.C. § 1271(a)(1) (1988).

Pursuant to SMCRA, this Board has no authority to award damages for trespass. While sec. 520 of the Act permits a damage action by "[a]ny person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter," the Act provides that, in the event of operator error, malfeasance, or damage to a citizen's private property, the citizen's remedy is with the courts. 30 U.S.C. § 1270(f) (1988).

Under SMCRA, a permit applicant is required to file legal documentation of a right to mine an area under consideration, and maps which accurately depict the area within which the applicant possesses the legal right to mine. 30 U.S.C. § 1257(b)(9) (1988). These requirements come within sec. 1257(b)(9) of the Act (30 U.S.C. § 1271(a)(1) (1988)), providing that, "[w]henever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CITIZEN COMPLAINTS--Continued

Generally--Continued

State regulatory authority," and the state authority shall take "appropriate action."

If a citizen alleges and provides evidence that a state program has granted a permit to enter and mine where the permittee has not obtained a legal right to enter and mine, a state is required by sec. 521(a)(1) (30 U.S.C. § 1271(a)(1) (1988)) and sec. 507(b)(9) (30 U.S.C. § 1257(b)(9) (1988)) of SMCRA to take any "appropriate action" short of adjudication of property title disputes.

Where a landowner provides evidence that an initial decision that an operator has a right to enter and mine an area that has been permitted may be in error, state authorities must assure that the operator has the right to enter and mine before the area is mined, and state action which fails to do so will be deemed inappropriate action pursuant to sec. 521(a)(1) of the Act. 30 U.S.C. § 1257(b)(9) (1988); 30 U.S.C. § 1271(a)(1) (1988). So long as the operator retains full authority to mine the disputed area under a validly issued permit, the intent and purpose of the Act as stated in sec. 102(b) (30 U.S.C. 1202(b) (1988)) to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations" is jeopardized.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991) 98 I.D. 231

Under 30 CFR 842.11(b)(2), OSM has reason to believe that a violation, condition, or practice exists if the facts alleged by an informant would, if true, constitute a condition, practice, or violation of SMCRA, Departmental regulations at 30 CFR ch. VII, the applicable state program, or any condition of a permit or exploration approval. Once a citizen's complaint gives OSM reason to believe that a violation of the Act has occurred, OSM is required by 30 U.S.C. § 1271(a)(1) (1988), to notify the state regulatory authority thereof.

Under 30 CFR 842.11(b)(1)(iii)(A), OSM is required to immediately notify the state regulatory authority in writing when in response to a 10-day notice the state regulatory authority fails to take appropriate action to

cause a violation to be corrected or to show good cause for such failure. If the state regulatory authority disagrees with the authorized representative's written determination, it may file a request in writing for informal review of that determination by the Deputy Director within 5 days from receipt of OSM's written determination. While a final determination as to whether a state agency has failed to take appropriate action or shown good cause may be delayed until the review process is exhausted, nothing in the language of the regulation authorizes OSM to withhold its initial determination.

The 10-day notification period in 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(iii)(A) establishes the response time for state regulatory authorities. The allowance of additional time beyond the 10-day period for the state agency to take appropriate action or show good cause would not only violate the regulation but the plain language of the statute as well.

Where reclamation costs exceed the amounts forfeited under a bond, the Board will not affirm an OSM decision that a state agency has taken appropriate action under 30 U.S.C. § 1271(a)(1) (1988), simply because a bond was ordered forfeited.

If outstanding violations remain on a minesite, the operator is bankrupt, and forfeited reclamation bonds are insufficient to abate the violations, a state will not ordinarily be considered to have taken appropriate action or shown good cause for failure to do so under 30 U.S.C. § 1271(a)(1) (1988), unless it is diligently pursuing or has exhausted all appropriate enforcement provisions of the state program and is taking action to ensure that the operator and its owners and principals will be precluded from receiving future permits while violations continue at the site.

Under 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(i) and (ii)(C), OSM is required to conduct an immediate inspection when the person informing OSM provides adequate proof that imminent danger of significant environmental harm exists and that the state has failed to take appropriate action. If OSM receives adequate proof, an immediate inspection is mandatory; the

statute gives OSM no discretion to defer an inspection when an imminent danger is involved.

Where a particular violation constitutes a significant, imminent environmental harm by definition, a signed statement setting forth the violation may constitute adequate proof of the existence of such a harm under 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(i) and (ii)(C). A signed statement showing that the state had improperly licensed the operation as exempt from SMCRA reclamation requirements is adequate proof that the state had failed to take appropriate action as of the date the inspection request was filed.

Robert L. Clewell et al., 123 IBLA 253 (June 18, 1992)
99 I.D. 100

When as a result of a citizen's complaint the state regulatory authority is notified by OSM in a TDN that there is a dispute regarding whether a state permittee has a legal right to mine private land subject to permit but the state refuses within 10 days of receipt thereof to suspend mining under the permit pending resolution of that dispute, OSM should direct suspension of mining.

Marion A. Taylor, 125 IBLA 271 (Feb. 19, 1993)

When OSM issues a 10-day notice to a state regulatory authority pursuant to sec. 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1988), in response to a citizen's complaint alleging that the quality of a well water supply has not been replaced to that existing before commencement of nearby surface coal mining activities, this Board will affirm OSM's decision declining to take Federal enforcement action where the record shows that the water supply is potable and has been restored to comparable premining quality. In such a situation, the water supply has been replaced within the meaning of 30 CFR 816.42(h).

Martha & Roy A. McBride, 129 IBLA 112 (Apr. 11, 1994)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CITIZEN COMPLAINTS--Continued

Generally--Continued

When OSM inspects a surface coal mining operation in response to an inspection request, it is required by 30 CFR 842.12(d)(1) to send to the person requesting the inspection within 10 days thereafter a description of the enforcement action taken or an explanation why no enforcement action was taken. An explanation that no enforcement action was taken because more time was needed to review the matter will be affirmed if the explanation is reasonable and does not result in undue delay.

Citizens Coal Council, Water Information Network, The Dineh-Hopi Alliance, 129 IBLA 148 (Apr. 19, 1994)

OSM is required to consider citizens' complaints involving alleged violations arising from permitting improper recognition of valid existing rights or operations existing on Aug. 3, 1977. The exhaustion of state administrative remedies is not a prerequisite for the filing of a citizen complaint, and a citizen's failure to do so is not a valid reason for OSM to disregard a complaint.

Where OSM has issued a 10-day notice to a state agency pursuant to 30 U.S.C. § 1271(a)(1) (1988), concerning an offsite processing facility operating within buffer zones prohibited under 30 U.S.C. § 1272(e) (1988), and the state agency declines to take action on the ground that the operation was in existence on Aug. 3, 1977, and that it had valid existing rights, the state's response will be found to be arbitrary and capricious when at least one essential factor for a valid existing rights determination is unaddressed.

Lois J. Armstrong, Elizabeth Hillmann, 130 IBLA 228 (Aug. 5, 1994)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CITIZEN COMPLAINTS--Continued

Generally--Continued

An OSM decision on informal review upholding a determination that the State regulatory authority had shown good cause for not taking enforcement action in response to a 10-day notice of a citizen's complaint charging damage to improvements from subsidence caused by an underground coal mining operation will be affirmed on appeal where the complainant fails to show the State regulatory authority's action was arbitrary, capricious, or an abuse of discretion.

Ronald Maynard, 130 IBLA 260 (Aug. 17, 1994)

In response to a citizen's complaint that blasting at a coal mining operation had damaged his house, OSM properly declined further enforcement action after investigation revealed there was insufficient evidence to show there was blasting damage.

Estill Estep, 130 IBLA 291 (Aug. 18, 1994)

Under 43 CFR 4.1281, any person who is or may be adversely affected by a written decision of the Director of OSM or his delegate may appeal to the Board when the decision specifically grants such right of appeal. The Board does not have jurisdiction to review the failure of OSM to conclude informal review within the 30-day period established in 30 CFR 842.15(b).

West Virginia Highlands Conservancy, 130 IBLA 295 (Aug. 25, 1994)

CIVIL PENALTIES

Generally

In a proceeding concerning a petition for review of a proposed civil penalty, the issue of the validity of the underlying notice of violation may be raised. In such proceeding, the burden of going forward to establish a prima facie case that the violation occurred as

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CIVIL PENALTIES--Continued

Generally--Continued

alleged rests with OSM. The ultimate burden of persuasion to show that no violation occurred rests with the petitioner for review.

Intersouth Mineral Co., Inc. v. Office of Surface Mining Reclamation & Enforcement (Appellant), 118 IBLA 14 (Feb. 14, 1991)

The value of the land on which the minesites are located is not germane to the process of assessing civil penalties.

Where OSM has determined that two minesites are related and that their combined acreages exceed 2 acres, so that the operations are not exempt from regulation under SMCRA, and where OSM has issued two NOVs at different times citing the operator of the two minesites for identical violations at both sites, the second NOV will be vacated and treated as an amendment to the first for the purposes of calculating the civil penalty due for the violations.

J&M Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 122 IBLA 90 (Jan. 14, 1992)

Amount

Under 30 CFR 845.13(b)(4)(i), from 1 to 10 points may be deducted in the assessment of a civil penalty where the person to whom the notice or order was issued achieved rapid compliance after notification of the violation. Rapid compliance requires that the person took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set. Where an operator allows several days to elapse before responding to an imminent danger cessation order, extraordinary measures to abate have not been shown.

M & J Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 8 (June 4, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CIVIL PENALTIES--Continued

Good Faith

Under 30 CFR 845.13(b)(4)(i), from 1 to 10 points may be deducted in the assessment of a civil penalty where the person to whom the notice or order was issued achieved rapid compliance after notification of the violation. Rapid compliance requires that the person took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set. Where an operator allows several days to elapse before responding to an imminent danger cessation order, extraordinary measures to abate have not been shown.

M & J Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 8 (June 4, 1990)

ENFORCEMENT PROCEDURES

Generally

A surface coal mining operation which commences prior to the formulation of a state permanent program must comply with the Federal interim regulatory program after the state permanent program is effective if the mine operator has not sought and received a permit to operate under the applicable state permanent program. 30 CFR 710.11(a)(3)(iii).

OSMRE is not divested of its authority to carry out the statutory mandate to issue failure to abate cessation orders because it fails to immediately issue such orders.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

Where an Office of Surface Mining Reclamation and Enforcement finding that a state regulatory authority took appropriate action in response to a 10-day notice is contradicted by the record developed by the agency, the decision to deny Federal enforcement action is reversed and inspection ordered.

W. E. Carter et al., 116 IBLA 262 (Oct. 18, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

The effects flowing from issuance of a permanent program permit operate prospectively from the date the permit is secured or issued and do not operate to deny OSM the authority to enforce a notice of violation issued during the interim program for a violation arising during the interim program.

An applicant seeking to take advantage of the valid existing rights exception to the application of 30 U.S.C. § 1272(e)(4) and (5) (1988), bears the burden of proving the existence of the rights giving rise to such entitlement.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, June S. Stout (Intervenor), 118 IBLA 129 (Mar. 6, 1991) 98 I.D. 70

In response to a citizen's complaint charging that an area disturbed by surface coal mining operations has not been restored to its approximate original contour, OSM properly declines to undertake a further inspection of the minesite and enforcement action where it determines that the land has been so restored, and where the appellant presents no evidence to the contrary.

Peter J. Rosati, 119 IBLA 219 (May 14, 1991)

Pursuant to SMCRA, this Board has no authority to award damages for trespass. While sec. 520 of the Act permits a damage action by "[a]ny person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter," the Act provides that, in the event of operator error, malfeasance, or damage to a citizen's private property, the citizen's remedy is with the courts. 30 U.S.C. § 1270(f) (1988).

OSM is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency refuses to take action because it does not consider the activity to be surface mining

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

or a related activity, and thus finds a permit is not required, but the interpretation of the statute advanced by the state is contrary to both the intent of the Act and a reasonable interpretation of state law, it is proper for OSM to order a Federal inspection. If, after Federal inspection, OSM determines that the activity is in violation of any requirement of the Act, OSM may issue a notice of violation to the operator or cessation order, fixing a reasonable time for abatement.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991) 98 I.D. 231

When OSM and a coal miner agree that OSM will suspend enforcement of SMCRA while the miner pursues litigation in Federal court to determine whether a Federal coal mining permit is needed, enforcement may proceed when the Federal court litigation is ended.

The Board does not make initial adjudication of the existence of valid existing rights to mine that has not first been submitted to and decided by OSM, the agency with jurisdiction of the subject matter involved, nor does the Board render advisory opinions.

Gabriel Energy Corp. v. Office of Surface Mining Reclamation & Enforcement, 122 IBLA 316 (Mar. 11, 1992)

Under 30 CFR 842.11(b)(2), OSM has reason to believe that a violation, condition, or practice exists if the facts alleged by an informant would, if true, constitute a condition, practice, or violation of SMCRA, Departmental regulations at 30 CFR ch. VII, the applicable state program, or any condition of a permit or exploration approval. Once a citizen's complaint gives OSM reason to believe that a violation of the Act has occurred, OSM is required by 30 U.S.C. § 1271(a)(1) (1988), to notify the state regulatory authority thereof.

Under 30 CFR 842.11(b)(1)(iii)(A), OSM is required to immediately notify the state regulatory authority in writing when in response to a 10-day notice the state regulatory authority fails to take appropriate action to cause a violation to be corrected or to show good cause

for such failure. If the state regulatory authority disagrees with the authorized representative's written determination, it may file a request in writing for informal review of that determination by the Deputy Director within 5 days from receipt of OSM's written determination. While a final determination as to whether a state agency has failed to take appropriate action or shown good cause may be delayed until the review process is exhausted, nothing in the language of the regulation authorizes OSM to withhold its initial determination.

The 10-day notification period in 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(iii)(A) establishes the response time for state regulatory authorities. The allowance of additional time beyond the 10-day period for the state agency to take appropriate action or show good cause would not only violate the regulation but the plain language of the statute as well.

Where reclamation costs exceed the amounts forfeited under a bond, the Board will not affirm an OSM decision that a state agency has taken appropriate action under 30 U.S.C. § 1271(a)(1) (1988), simply because a bond was ordered forfeited.

If outstanding violations remain on a minesite, the operator is bankrupt, and forfeited reclamation bonds are insufficient to abate the violations, a state will not ordinarily be considered to have taken appropriate action or shown good cause for failure to do so under 30 U.S.C. § 1271(a)(1) (1988), unless it is diligently pursuing or has exhausted all appropriate enforcement provisions of the state program and is taking action to ensure that the operator and its owners and principals will be precluded from receiving future permits while violations continue at the site.

Under 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(i) and (ii)(C), OSM is required to conduct an immediate inspection when the person informing OSM provides adequate proof that imminent danger of significant environmental harm exists and that the state has

failed to take appropriate action. If OSM receives adequate proof, an immediate inspection is mandatory; the statute gives OSM no discretion to defer an inspection when an imminent danger is involved.

Where a particular violation constitutes a significant, imminent environmental harm by definition, a signed statement setting forth the violation may constitute adequate proof of the existence of such a harm under 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(i) and (ii)(C). A signed statement showing that the state had improperly licensed the operation as exempt from SMCRA reclamation requirements is adequate proof that the state had failed to take appropriate action as of the date the inspection request was filed.

Robert L. Clewell et al., 123 IBLA 253 (June 18, 1992)
99 I.D. 100

Where, consistent with the provisions of 30 CFR 700.11(d)(1), a state has made a written determination that reclamation has been fully completed at an interim permit site pursuant to Subchapter B of Chapter 7 of Title 30 and the period of extended liability for revegetation has run, OSM may not assert jurisdiction absent a showing that the written determination was based upon fraud, collusion, or a misrepresentation of a material fact.

Appolo Fuels, Inc. v. Office of Surface Mining Reclamation & Enforcement, 125 IBLA 369 (Mar. 31, 1993)
100 I.D. 63

Since the initial definition of "affected area" promulgated in Mar. 1979, the intent of the Federal law has been to include surface areas above underground workings as "affected areas" within the meaning of the Act. The Virginia program was approved on Dec. 15, 1981, on the condition that it define "affected area" to include that land overlying underground mine workings. States are not permitted to modify their programs without the Secretary's approval. 30 CFR 732.17(g). Where a mining operation under the jurisdiction of Virginia

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

reclamation authorities included a surface disturbance of 1.65 acres and an underground "shadow" disturbance of 19.2 acres, the area affected is greater than 2 acres; the operator therefore is required to reclaim the area in accordance with applicable program standards for minesites in excess of 2 acres.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

OSM properly issued a NOV to a surface coal mine operator in a state where the principal authority to regulate such mining was exercised by state authorities when a Federal inspection established a continuing violation of SMCRA and applicable state law and state authorities refused to take corrective action after notice was given to them of the violation of the state program.

Consolidation Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 127 IBLA 192 (Sept. 14, 1993)

When, after OSM provided notice of a failure to reclaim highwalls contrary to State law, the State failed to take appropriate action to abate the cited violation, OSM was required to take enforcement action although the State exercised primary enforcement authority under SMCRA.

Fremont Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 130 IBLA 41 (July 12, 1994)

OSM is required to consider citizens' complaints involving alleged violations arising from permitting improper recognition of valid existing rights or operations existing on Aug. 3, 1977. The exhaustion of state administrative remedies is not a prerequisite for the filing of a citizen complaint, and a citizen's failure

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

to do so is not a valid reason for OSM to disregard a complaint.

Lois J. Armstrong, Elizabeth Hillmann, 130 IBLA 228 (Aug. 5, 1994)

In response to a citizen's complaint that blasting at a coal mining operation had damaged his house, OSM properly declined further enforcement action after investigation revealed there was insufficient evidence to show there was blasting damage.

Estill Estep, 130 IBLA 291 (Aug. 18, 1994)

ENVIRONMENTAL HARM

Generally

If outstanding violations remain on a minesite, the operator is bankrupt, and forfeited reclamation bonds are insufficient to abate the violations, a state will not ordinarily be considered to have taken appropriate action or shown good cause for failure to do so under 30 U.S.C. § 1271(a)(1) (1988), unless it is diligently pursuing or has exhausted all appropriate enforcement provisions of the state program and is taking action to ensure that the operator and its owners and principals will be precluded from receiving future permits while violations continue at the site.

Under 30 CFR 843.11(a)(2), surface mining operations conducted without a valid permit constitute a condition or practice that causes or can reasonably be expected to cause significant, imminent environmental harm.

Under 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(i) and (ii)(C), OSM is required to conduct an immediate inspection when the person informing OSM provides adequate proof that imminent danger of significant environmental harm exists and that the state has failed to take appropriate action. If OSM receives adequate proof, an immediate inspection is mandatory; the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ENVIRONMENTAL HARM--Continued

Generally--Continued

statute gives OSM no discretion to defer an inspection when an imminent danger is involved.

Where a particular violation constitutes a significant, imminent environmental harm by definition, a signed statement setting forth the violation may constitute adequate proof of the existence of such a harm under 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(i) and (ii)(C). A signed statement showing that the state had improperly licensed the operation as exempt from SMCRA reclamation requirements is adequate proof that the state had failed to take appropriate action as of the date the inspection request was filed.

Robert L. Clewell et al., 123 IBLA 253 (June 18, 1992)
99 I.D. 100

EVIDENCE

Generally

In a proceeding concerning an application for review of a notice of violation, the burden of going forward to establish a prima facie case rests with OSMRE. Although the ultimate burden of persuasion rests with the applicant for review, the notice of violation will be affirmed only where OSMRE meets its burden of establishing a prima facie case. OSMRE makes a prima facie case when it presents sufficient evidence to establish essential facts from which it may be determined that a violation of pertinent requirements has occurred.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

EVIDENCE--Continued

Generally--Continued

To show that parties were engaged in a joint venture there must be evidence of (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

OSMRE is required to establish a prima facie case as to the validity of a cessation order. When OSMRE asserts that a state permit was improperly issued for less than 2 acres because an area reclaimed by prior removal of material from the site should have been included as area affected under the permit, OSMRE is required to show as an initial fact that the operations were connected because there was either a direct relation between the parties or they were engaged in a joint venture.

Madeline Maynard, NOR Mining, & Blackhawk Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 49 (June 12, 1990)

In a proceeding concerning a petition for review of a proposed civil penalty, the issue of the validity of the underlying notice of violation may be raised. In such proceeding, the burden of going forward to establish a prima facie case that the violation occurred as alleged rests with OSM. The ultimate burden of persuasion to show that no violation occurred rests with the petitioner for review.

In civil penalty proceedings, OSM bears the ultimate burden of persuasion regarding the amount of the civil penalty. OSM must establish the basis for determination of the appropriate civil penalty charged an operator for allowing gullies to develop in an access road, including the basis for its implicit conclusion that existence of gullies is likely to endanger either use of the roadway or the surrounding land. Where the sum of the evidence reveals only that the gullies temporarily affected access along a small portion of the access road, and where there is no evidence that the gullies threatened adjacent land, OSM's conclusion and

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

EVIDENCE--Continued

Generally--Continued

its accompanying assignment of 11 points for the seriousness of the violation are properly set aside.

Intersouth Mineral Co., Inc. v. Office of Surface Mining Reclamation & Enforcement (Appellant), 118 IBLA 14 (Feb. 14, 1991)

In a proceeding involving an application for review of a NOV, OSM has the burden of going forward to make a prima facie showing that the person named in the notice is engaged in a surface coal mining operation and violated SMCRA, the regulations, or a permit condition. The ultimate burden of persuasion rests with the applicant for review, and if OSM's evidence is not overcome by a preponderance of the evidence, the NOV will be affirmed.

Where OSM presents evidence that an applicant for review was engaged in surface coal mining operations under a permit; that it had disturbed "adjacent land"; and that the disturbance was incidental to its coal extraction activities on the permit, a prima facie case in support of a violation of 30 CFR 773.17(a) is established. However, where the applicant shows by a preponderance of the evidence that its activity outside the permit boundaries does not constitute surface coal mining operations, the violation is properly vacated.

Rith Energy, Inc. v. Office of Surface Mining Reclama- and Enforcement, 119 IBLA 83 (Apr. 9, 1991)

If a question arises concerning who is responsible for compliance at a surface coal mining operation, it is proper for the OSM inspector issuing a NOV to cite all parties who may be responsible. When a cited party challenges such a notice on the basis that it is not a responsible party, OSM bears the burden of going forward to establish a prima facie case that such party is responsible. The challenging party, however, bears the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

EVIDENCE--Continued

Generally--Continued

burden of persuasion by a preponderance of the evidence that it is not responsible for the cited violations.

W. P. Corp. v. Office of Surface Mining Reclamation & Enforcement, 119 IBLA 130 (Apr. 22, 1991)

Where, consistent with the provisions of 30 CFR 700.11(d)(1), a state has made a written determination that reclamation has been fully completed at an interim permit site pursuant to Subchapter B of Chapter 7 of Title 30 and the period of extended liability for revegetation has run, OSM may not assert jurisdiction absent a showing that the written determination was based upon fraud, collusion, or a misrepresentation of a material fact.

Appolo Fuels, Inc. v. Office of Surface Mining Reclamation & Enforcement, 125 IBLA 369 (Mar. 31, 1993)
100 I.D. 63

Issuance of a NOV will be affirmed only where OSM makes a prima facie case by presenting evidence sufficient to establish facts essential to justify a finding that there were violations of SMCRA as alleged in the NOV.

Delmar Adkins v. Office of Surface Mining Reclamation & Enforcement, 128 IBLA 1 (Nov. 2, 1993)

In an appeal from a decision that a prima facie case was not established, OSM has the burden of showing that the ALJ erred.

In a hearing held in response to an application for review of a NOV, OSM has the burden of presenting a prima facie case that the NOV is valid by submitting sufficient evidence to establish the essential facts of the violation. If OSM establishes a prima facie case,

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

EVIDENCE--Continued

Generally--Continued

the evidence will sustain the violation if it is not rebutted.

To sustain a NOV alleging material damage to the hydrologic balance caused by the mining operations resulting in discharge of water from an underground coal mining operation violating State and Federal water quality laws and effluent limitations, OSM must establish that there was material damage to the hydrologic balance and that the damage was caused by the acts of the operator cited in the NOV.

When OSM presents a prima facie case, the mining operator need only present sufficient evidence to overcome OSM's case by proving, by the preponderance of the evidence, either that the violation cited in the NOV did not occur, or that the violation was not caused by its operations.

Roblee Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 130 IBLA 268 (Aug. 18, 1994)

EXEMPTIONS

2-Acre

A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

OSMRE is required to establish a prima facie case as to the validity of a cessation order. When OSMRE asserts that a state permit was improperly issued for less than 2 acres because an area reclaimed by prior removal of material from the site should have been included as area affected under the permit, OSMRE is required to show as an initial fact that the operations

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

EXEMPTIONS--Continued

2-Acre--Continued

were connected because there was either a direct relation between the parties or they were engaged in a joint venture.

Madeline Maynard, NOR Mining, & Blackhawk Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 49 (June 12, 1990)

The "physically related site" criteria, which were promulgated in 30 CFR 700.11(b)(2) on July 2, 1982 (47 FR 33431), may be applied retroactively to determine whether operations in 1981 are eligible for the 2-acre exemption.

Under 30 CFR 700.11(b), a surface coal mining operation is not exempt from regulation under SMCRA under the "2-acre exemption" where that operation, together with any "related" operation, has or will have an affected area of 12 acres or more. Under 30 CFR 700.11(b)(2), operations are deemed "related" if (1) they occur within 12 months of each other; (2) they are "physically related"; and (3) they are under "common control." The second criterion is met when OSM makes an unrebutted prima facie showing that both operations drain into the same watershed. The third criterion is met when OSM presents evidence indicating that one person engaged in mining at both operations and that he was in control of both operations. The operator is properly found to be in control of an operation where he flagged it for mining, created a highwall, and exposed and augered coal, notwithstanding that another person also engaged in mining activity on that operation for a portion of the time the operation was underway.

W. D. Martin (dba Martin Coal) v. Office of Surface Mining Reclamation & Enforcement, 120 IBLA 279 (Aug. 30, 1991)

EXEMPTIONS--Continued

2-Acre--Continued

Until its amendment in 1987, sec. 528(2) of SMCRA, 30 U.S.C. § 1278(2) (1988), provided that SMCRA would not apply to the extraction of coal for commercial purposes where the surface mining operation affected 2 acres or less. Departmental regulations at 30 CFR 700.11(b), implementing the 2-acre exemption, provide that SMCRA applies to all surface mining and reclamation activities except the extraction of coal for commercial purposes where the surface coal mining and reclamation operation, together with any related operations, has or will have an affected area of 2 acres or less. Operations are deemed related if they (1) occur within 12 months of each other, (2) are physiclly related, and (3) are under common control.

An operator challenging OSM's jursidiction on the grounds that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption. OSM's determination that more than 2 acres have been disturbed at related minesites will be affirmed on appeal where the operator fails to show the contrary.

Where OSM has determined that two minesites are related and that their combined acreages exceed 2 acres, so that the operations are not exempt from regulation under SMCRA, and where OSM has issued two NOVs at different times citing the operator of the two minesites for identical violations at both sites, the second NOV will be vacated and treated as an amendment to the first for the purposes of calculating the civil penalty due for the violations.

J&M Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 122 IBLA 90 (Jan. 14, 1992)

Sec. 528(2) of SMCRA, P.L. 95-87, 91 Stat. 445, 514 (1977), formerly provided that the Act would not apply to "the extraction of coal for commercial purposes when the surface mining operation affects two acres or less." Under 30 CFR 700.11(b), the exemption does not apply where the operation, together with any "related" operation, has or will have an affected area of 2 acres or more. Under 30 CFR 700.11(b)(2), operations are deemed "related" if (1) they occur within 12 months of each other; (2) they are "physically related"; and (3) they

EXEMPTIONS--Continued

2-Acre--Continued

are under "common control."

The permittee of a surface mining operation is ordinarily responsible for violations of SMCRA and the regulations committed by the operator on the permitted site. The issuance of a CO to the holder of a 2-acre permit for failure to obtain a permit under the Act and reclaim the highwall as required under the Act which is predicated on the mining of physically related sites under common control totalling in excess of 2 acres within 12 months will be reversed where the record establishes that the permittee of the 2-acre site had no ownership or control of operations on the physically related sites.

Mary Herald v. Office of Surface Mining Reclamation & Enforcement, 123 IBLA 334 (July 14, 1992)

Until its amendment in 1987, sec. 528(2) of SMCRA, 30 U.S.C. § 1278(2) (1988), provided that SMCRA would not apply to the extraction of coal for commercial purposes where the surface mining operation affected 2 acres or less. "Affected area" as defined by 30 CFR 701.5 includes "the area located above underground workings."

An operator challenging OSM's jurisdiction on the basis that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

Since the initial definition of "affected area" promulgated in Mar. 1979, the intent of the Federal law has been to include surface areas above underground workings as "affected areas" within the meaning of the Act. The Virginia program was approved on Dec. 15, 1981, on the condition that it define "affected area" to include that land overlying underground mine workings. States are not permitted to modify their programs without the Secretary's approval. 30 CFR 732.17(g). Where a mining operation under the jurisdiction of Virginia reclamation authorities included a surface disturbance of 1.65 acres and an underground "shadow" disturbance of 19.2 acres, the area affected is greater than 2 acres; the operator therefore is required to reclaim the area

in accordance with applicable program standards for minesites in excess of 2 acres.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

The fact that the primary regulatory responsibility for enforcement of surface coal mining reclamation operations has been assumed by a state under sec. 503 of SMCRA does not oust OSM of jurisdiction to issue a CO where an oversight inspection discloses the existence of a violation which can be expected to create significant, imminent environmental harm.

Triple R Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 310 (June 16, 1993)

Where a permittee operating pursuant to a state 2-acre permit receives authorization from a state inspector to reclaim an adjacent previously mined area, those two sites cannot be considered related under 30 CFR 700.11(b)(2), where there is no evidence that they were mined within 12 months of one another or that they were under common ownership and control.

Where a permittee operating pursuant to a state 2-acre permit receives authorization from a state inspector to reclaim an adjacent previously mined area, that previously mined area will not be considered part of the "affected area," as defined in 30 CFR 701.5, where the reclamation undertaken thereon was not necessary or incidental to the permittee's surface coal mining operation.

Hearsay evidence is admissible in an administrative proceeding reviewing issuance by OSM of a CO for exceeding the acreage limitations of a 2-acre permit, if it is relevant and material, and may constitute "substantial evidence" within the meaning of 5 U.S.C. § 706(2)(E) (1988), if it is reliable and probative. However, where such evidence is the sole basis for issuance of the CO, a multifactor analysis is used to

assure its reliability, and when such evidence fails to withstand such analysis, the CO cannot be sustained.

Ron Deaton/Barwick Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 320 (June 16, 1993)

Under 30 CFR 700.11(b), a surface coal mining and reclamation operation is not exempt from regulation under SMCRA where that operation, together with any "related" operation, has or will have an affected area of 2 or more acres. Where OSM issues COs for two mine sites on the basis of relatedness, but during the review proceeding it is admitted that each site is more than 2 acres, the necessity to make a relatedness determination in order to sustain the enforcement action is negated.

Barwick Coal Co., Inc., 127 IBLA 86 (July 23, 1993)

EXPEDITED REVIEW

Generally

An Office of Surface Mining Reclamation and Enforcement decision to disapprove an application for a significant revision of a permit in a Federal-program state is properly reviewed in accordance with the regulations at 43 CFR 4.1370-.1379, rather than regulations at 43 CFR 4.1280. Expedited review in accordance with proposed regulations at 54 FR 9852-55 (Mar. 8, 1989), is required by order of the Director of the Office of Hearings and Appeals.

Pacific Coast Coal Co., Inc., 113 IBLA 384 (Mar. 28, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

FEDERAL LANDS

Generally

"Federal lands." "Indian lands." The term "Indian lands," as defined by sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1291(9) (1982)), includes non-Federal lands satisfying the statutory criteria that they either be situated within the exterior boundaries of a Federal Indian Reservation or held in trust for or supervised by an Indian tribe. By the same token, lands owned by the United States are "Indian lands" under SMCRA only if they meet these statutory criteria.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

Cooperative Agreements

OSMRE properly applies state program requirements in determining whether or not to approve a permit application in a state with a cooperative agreement, and where, at the time of permit approval, the applicant complies with those requirements for the disclosures of entities and their compliance histories and OSMRE makes the necessary findings based thereon, an application for a permit is properly approved.

Northern Plains Resource Council et al. v. Office of Surface Mining Reclamation & Enforcement, Montco (A Montana General Partnership (Intervenor)), 112 IBLA 266 (Jan. 4, 1990)

Where language in a cooperative agreement between Colorado and OSM governing surface mining regulation on Federal lands clearly indicates that OSM may take Federal enforcement action pursuant to the Federal lands program, 30 U.S.C. § 1273 (1988), an appeal of an ALJ's denial of an application for temporary relief based upon arguments that state enforcement procedures and the state's interpretation of whether appellant is in substantial compliance should prevail will be dismissed for failure to show "substantial likelihood that the findings and decision of the ALJ in the matters to which the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

FEDERAL LANDS--Continued

Cooperative Agreements--Continued

application relates will be favorable to the applicant." 43 CFR 4.1263(b); 30 U.S.C. § 1275(c) (1988).

Kerr Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 131 IBLA 27 (Sept. 28, 1994)

FEDERAL PROGRAM

Permits

An Office of Surface Mining Reclamation and Enforcement decision to disapprove an application for a significant revision of a permit in a Federal-program state is properly reviewed in accordance with the regulations at 43 CFR 4.1370-.1379, rather than regulations at 43 CFR 4.1280. Expedited review in accordance with proposed regulations at 54 FR 9852-55 (Mar. 8, 1989), is required by order of the Director of the Office of Hearings and Appeals.

Pacific Coast Coal Co., Inc., 113 IBLA 384 (Mar. 28, 1990)

OSM may approve the creation of a permanent impoundment of water on a mine site when the operator demonstrates that the impoundment complies with sec. 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(28) (1988), and the implementing regulations. The spoil which otherwise would have been returned to the mined-out area, as well as the areas upon which the spoil is placed, must further comply with the AOC requirements of sec. 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), and 30 CFR 816.102. OSM properly denies a permit revision application in which the proposal to create a permanent water impoundment involves retaining the spoil piles as permanent topographical features which do not conform to the AOC of the area prior to the surface mining and reclamation operations.

Pacific Coast Coal Co., Inc., 118 IBLA 83 (Feb. 28, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

HEARINGS

Generally

A petition for permission to appeal an interlocutory ruling by an Administrative Law Judge that a party is not precluded from introducing evidence on the issue of whether his mining operation caused damage off the permit is properly denied when the governing law has changed and a significant time has elapsed between the finding in a state proceeding that the operation did cause such damage and the issuance of a Federal notice of violation.

Muskingum Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Delbert Lacy (Intervenor), 113 IBLA 352 (Mar. 22, 1990)

An Office of Surface Mining Reclamation and Enforcement decision to disapprove an application for a significant revision of a permit in a Federal-program state is properly reviewed in accordance with the regulations at 43 CFR 4.1370-.1379, rather than regulations at 43 CFR 4.1280. Expedited review in accordance with proposed regulations at 54 FR 9852-55 (Mar. 8, 1989), is required by order of the Director of the Office of Hearings and Appeals.

Pacific Coast Coal Co., Inc., 113 IBLA 384 (Mar. 28, 1990)

The procedural rule found at 43 CFR 4.1166(c) does not require a litigant to plead all affirmative defenses when responding to a preceding pleading.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

Procedure

If a party has moved for certification of a ruling by an Administrative Law Judge that does not finally dispose of a case in accordance with 43 CFR 4.1124, the party may petition the Board for permission to appeal from the interlocutory ruling by the Administrative Law Judge in accordance with 43 CFR 4.1272. The Board may

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

HEARINGS--Continued

Procedure--Continued

grant the petition if the correctness of the ruling sought to be reviewed involves a controlling issue of law the resolution of which will materially advance final disposition of the case.

Muskingum Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Delbert Lacy (Intervenor), 113 IBLA 352 (Mar. 22, 1990)

When an applicant for review of NOVs and a CO fails to appear at a scheduled review hearing, and does not justify such failure, the ALJ properly decides the case based upon the record completed at the hearing, despite the absence of evidence in support of the applicant's case.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 119 IBLA 111 (Apr. 18, 1991)

HYDROLOGIC SYSTEM PROTECTION

Generally

Where OSMRE presents uncontroverted evidence showing the essential facts establishing that the operator failed to maintain sedimentation pond inlets and to stabilize rills and gullies at a mine site as required by the Oklahoma Permanent Regulatory Program regulations 816.49(e) and 816.106, and the operator admits the existence of the deteriorating conditions, but seeks to excuse its failure to comply based on its use of the best technology currently available in the face of severe weather conditions which assertedly prevented compliance, a NOV issued by OSMRE citing a violation of the Oklahoma regulations will be upheld. The regulations at 30 CFR 722.17 require that a NOV may not be vacated because of an operator's inability to comply.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

HYDROLOGIC SYSTEM PROTECTION--Continued

Generally--Continued

Although backfilling and grading, the remedial action required to abate a violation of 30 CFR 717.14, may also be helpful in remedying a violation of 30 CFR 717.17 (concerning protection of the hydrologic system from mine runoff) by helping to control water flow from a minesite, an NOV citing violations of both 30 CFR 717.14 and 717.17 is not duplicative where the record establishes that there were violations of both regulations.

J&M Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 122 IBLA 90 (Jan. 14, 1992)

Under 43 CFR 4.1366(a), when a permit applicant seeks review of a permit condition imposed by OSM, OSM has the burden of going forward to establish a prima facie case as to the failure of the permit applicant to comply with applicable requirements of the Act or regulations or the appropriateness of the permit condition, and the applicant shall have the ultimate burden of persuasion as to its entitlement to the permit or the inappropriateness of the permit condition. To establish a prima facie case, OSM must introduce evidence that will justify but not compel a finding that the condition is an appropriate response to a failure of the permit application to satisfy a specified statutory or regulatory standard or is otherwise appropriate.

When the evidence demonstrates that OSM's principal reason for imposing a permit condition requiring the permittee to dewater impoundments was its concern for protecting the water rights claims of downstream users, even though such claims are currently being adjudicated in state court, OSM has failed to establish a prima facie case that the permit condition is appropriate, and the ALJ properly declares the condition invalid.

When OSM fails to establish a prima facie case that it acted pursuant to provisions of SMCRA and implementing regulations in imposing a condition requiring the permittee to dewater impoundments, it is proper for the ALJ to rule that the permit condition is inappropriate.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 123 IBLA 195 (June 5, 1992)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

HYDROLOGIC SYSTEM PROTECTION--Continued

Generally--Continued

Under 30 CFR 816.42(h), any person who conducts surface mining activities is required to replace the water supply of an owner of interest in real property who obtains all or part of his or her supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source, where the water supply has been adversely impacted by contamination, diminution, or interruption proximately resulting from the surface mining activities. The replacement requirement is controlled by the owner's pre-existing uses of the water supply.

When OSM issues a 10-day notice to a state regulatory authority pursuant to sec. 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1988), in response to a citizen's complaint alleging that the quality of a well water supply has not been replaced to that existing before commencement of nearby surface coal mining activities, this Board will affirm OSM's decision declining to take Federal enforcement action where the record shows that the water supply is potable and has been restored to comparable premining quality. In such a situation, the water supply has been replaced within the meaning of 30 CFR 816.42(h).

Martha & Roy A. McBride, 129 IBLA 112 (Apr. 11, 1994)

To sustain a NOV alleging material damage to the hydrologic balance caused by the mining operations resulting in discharge of water from an underground coal mining operation violating State and Federal water quality laws and effluent limitations, OSM must establish that there was material damage to the hydrologic balance and that the damage was caused by the acts of the operator cited in the NOV.

Roblee Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 130 IBLA 268 (Aug. 18, 1994)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

IMPOUNDMENTS

Generally

OSM may approve the creation of a permanent impoundment of water on a mine site when the operator demonstrates that the impoundment complies with sec. 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(28) (1988), and the implementing regulations. The spoil which otherwise would have been returned to the mined-out area, as well as the areas upon which the spoil is placed, must further comply with the AOC requirements of sec. 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), and 30 CFR 816.102. OSM properly denies a permit revision application in which the proposal to create a permanent water impoundment involves retaining the spoil piles as permanent topographical features which do not conform to the AOC of the area prior to the surface mining and reclamation operations.

Pacific Coast Coal Co., Inc., 118 IBLA 83 (Feb. 28, 1991) 98 I.D. 38

Under 43 CFR 4.1366(a), when a permit applicant seeks review of a permit condition imposed by OSM, OSM has the burden of going forward to establish a prima facie case as to the failure of the permit applicant to comply with applicable requirements of the Act or regulations or the appropriateness of the permit condition, and the applicant shall have the ultimate burden of persuasion as to its entitlement to the permit or the inappropriateness of the permit condition. To establish a prima facie case, OSM must introduce evidence that will justify but not compel a finding that the condition is an appropriate response to a failure of the permit application to satisfy a specified statutory or regulatory standard or is otherwise appropriate.

When the evidence demonstrates that OSM's principal reason for imposing a permit condition requiring the permittee to dewater impoundments was its concern for protecting the water rights claims of downstream users, even though such claims are currently being adjudicated in state court, OSM has failed to establish a prima facie case that the permit condition is appropriate, and the ALJ properly declares the condition invalid.

When OSM fails to establish a prima facie case that it acted pursuant to provisions of SMCRA and implementing regulations in imposing a condition requiring the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

IMPOUNDMENTS--Continued

Generally--Continued

permittee to dewater impoundments, it is proper for the ALJ to rule that the permit condition is inappropriate.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 123 IBLA 195 (June 5, 1992)

INDIAN LANDS

Generally

"Federal lands." "Indian lands." The term "Indian lands," as defined by sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1291(9) (1982)), includes non-Federal lands satisfying the statutory criteria that they either be situated within the exterior boundaries of a Federal Indian Reservation or held in trust for or supervised by an Indian tribe. By the same token, lands owned by the United States are "Indian lands" under SMCRA only if they meet these statutory criteria.

"Indian lands" are specifically excepted from the definition of "Federal lands." Therefore, under SMCRA, the categories of "Indian lands" and "Federal lands" are mutually exclusive. Thus, a holding that lands are not "Indian lands" because neither the surface nor the mineral estate are "Federal lands" is properly reversed.

Lands located outside a Federal Indian reservation, the surface estate of which is owned by an Indian tribe and the mineral estate of which is privately owned, are "Indian lands" within the meaning of sec. 701(9) of SMCRA (30 U.S.C. § 1291(9)), and thus are subject to OSMRE's jurisdiction.

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

INDIAN LANDS--Continued

Generally--Continued

that statute, if that question was not addressed by the Judge.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

When OSM inspects a surface coal mining operation in response to an inspection request, it is required by 30 CFR 842.12(d)(1) to send to the person requesting the inspection within 10 days thereafter a description of the enforcement action taken or an explanation why no enforcement action was taken. An explanation that no enforcement action was taken because more time was needed to review the matter will be affirmed if the explanation is reasonable and does not result in undue delay.

Citizens Coal Council, Water Information Network, The Dineh-Hopi Alliance, 129 IBLA 148 (Apr. 19, 1994)

INSPECTIONS

Generally

Under 30 CFR 842.11(b)(1) (1986), an immediate Federal inspection is required where the authorized representative has reason to believe on the basis of information available to him or her (other than information resulting from a previous Federal inspection) that there exists any condition or practice which creates an imminent danger to the health or safety of the public, and the person supplying the information supplies adequate proof that an imminent danger to the public health and safety exists and that the State regulatory authority has failed to take appropriate action.

Under 30 CFR 842.11(b)(1)(C) (1986), the person supplying information to OSMRE must prove adequate proof that an imminent danger to the public health and safety exists and that the State regulatory authority

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

INSPECTIONS--Continued

Generally--Continued

has failed to take appropriate action. What constitutes adequate proof must be determined on a case-by-case basis.

M & J Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 8 (June 4, 1990)

In response to a citizen's complaint charging that an area disturbed by surface coal mining operations has not been restored to its approximate original contour, OSM properly declines to undertake a further inspection of the minesite and enforcement action where it determines that the land has been so restored, and where the appellant presents no evidence to the contrary.

Peter J. Rosati, 119 IBLA 219 (May 14, 1991)

Where reclamation costs exceed the amounts forfeited under a bond, the Board will not affirm an OSM decision that a state agency has taken appropriate action under 30 U.S.C. § 1271(a)(1) (1988), simply because a bond was ordered forfeited.

Robert L. Clewell et al., 123 IBLA 253 (June 18, 1992)
99 I.D. 100

10-day Notice to State

The Secretary of the Interior through OSMRE properly has jurisdiction to issue cessation orders in states with approved programs where OSMRE acts as a result of an oversight inspection pursuant to sec. 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2) after OSMRE issues a 10-day notice and the state fails to take appropriate action.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

INSPECTIONS--Continued

10-day Notice to State--Continued

Where OSMRE determines that any condition or practice exists which creates an imminent danger to the health or safety of the public, it is required to immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). Where a 10-day notice has been issued to the State and OSMRE determines during the 10-day period that an imminent danger situation exists, OSMRE is not required to wait until the 10-day period elapses before issuing a cessation order.

M & J Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 8 (June 4, 1990)

Where an Office of Surface Mining Reclamation and Enforcement finding that a state regulatory authority took appropriate action in response to a 10-day notice is contradicted by the record developed by the agency, the decision to deny Federal enforcement action is reversed and inspection ordered.

W. E. Carter et al., 116 IBLA 262 (Oct. 18, 1990)

OSM is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency refuses to take action because it does not consider the activity to be surface mining or a related activity, and thus finds a permit is not required, but the interpretation of the statute advanced by the state is contrary to both the intent of the Act and a reasonable interpretation of state law, it is proper for OSM to order a Federal inspection. If, after Federal inspection, OSM determines that the activity is in violation of any requirement of the Act, OSM may issue a notice of violation to the operator or cessation order, fixing a reasonable time for abatement.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

INSPECTIONS--Continued

10-day Notice to State--Continued

Regulation 30 CFR 843.17 provides that no notice of violation may be vacated for the agency's failure to give the notice to the state regulatory authority required by 30 CFR 842.11(b)(1)(ii)(B).

Harlan Cumberland Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 123 IBLA 129 (May 21, 1992)

Under 30 CFR 842.11(b)(2), OSM has reason to believe that a violation, condition, or practice exists if the facts alleged by an informant would, if true, constitute a condition, practice, or violation of SMCRA, Departmental regulations at 30 CFR ch. VII, the applicable state program, or any condition of a permit or exploration approval. Once a citizen's complaint gives OSM reason to believe that a violation of the Act has occurred, OSM is required by 30 U.S.C. § 1271(a)(1) (1988), to notify the state regulatory authority thereof.

Under 30 CFR 842.11(b)(1)(iii)(A), OSM is required to immediately notify the state regulatory authority in writing when in response to a 10-day notice the state regulatory authority fails to take appropriate action to cause a violation to be corrected or to show good cause for such failure. If the state regulatory authority disagrees with the authorized representative's written determination, it may file a request in writing for informal review of that determination by the Deputy Director within 5 days from receipt of OSM's written determination. While a final determination as to whether a state agency has failed to take appropriate action or shown good cause may be delayed until the review process is exhausted, nothing in the language of the regulation authorizes OSM to withhold its initial determination.

The 10-day notification period in 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(iii)(A) establishes the response time for state regulatory authorities. The allowance of additional time beyond

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

INSPECTIONS--Continued

10-day Notice to State--Continued

the 10-day period for the state agency to take appropriate action or show good cause would not only violate the regulation but the plain language of the statute as well.

If outstanding violations remain on a minesite, the operator is bankrupt, and forfeited reclamation bonds are insufficient to abate the violations, a state will not ordinarily be considered to have taken appropriate action or shown good cause for failure to do so under 30 U.S.C. § 1271(a)(1) (1988), unless it is diligently pursuing or has exhausted all appropriate enforcement provisions of the state program and is taking action to ensure that the operator and its owners and principals will be precluded from receiving future permits while violations continue at the site.

Under 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(i) and (ii)(C), OSM is required to conduct an immediate inspection when the person informing OSM provides adequate proof that imminent danger of significant environmental harm exists and that the state has failed to take appropriate action. If OSM receives adequate proof, an immediate inspection is mandatory; the statute gives OSM no discretion to defer an inspection when an imminent danger is involved.

Where a particular violation constitutes a significant, imminent environmental harm by definition, a signed statement setting forth the violation may constitute adequate proof of the existence of such a harm under 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(i) and (ii)(C). A signed statement showing that the state had improperly licensed the operation as exempt from SMCRA reclamation requirements is adequate proof that the state had failed to take appropriate action as of the date the inspection request was filed.

Robert L. Clewell et al., 123 IBLA 253 (June 18, 1992)
99 I.D. 100

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

INSPECTIONS--Continued

10-day Notice to State--Continued

OSM properly issued a NOV to a surface coal mine operator in a state where the principal authority to regulate such mining was exercised by state authorities when a Federal inspection established a continuing violation of SMCRA and applicable state law and state authorities refused to take corrective action after notice was given to them of the violation of the state program.

Consolidation Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 127 IBLA 192 (Sept. 14, 1993)

When, despite an applicable interim program regulatory requirement that all highwalls be completely eliminated, a state erroneously determined that a surface coal mine operator who failed to totally eliminate a disturbed pre-existing highwall listed as a violation in a 10-day notice issued by OSM had, nonetheless, satisfactorily reclaimed the highwall because insufficient available spoil existed to completely eliminate it, the state's response to the 10-day notice based on such an erroneous reclamation determination did not constitute appropriate action designed to secure abatement of the violation, and OSM properly issued an NOV requiring complete elimination of the disturbed highwall.

Delmar Adkins v. Office of Surface Mining Reclamation & Enforcement, 128 IBLA 1 (Nov. 2, 1993)

An OSM decision on informal review upholding a determination that the State regulatory authority had shown good cause for not taking enforcement action in response to a 10-day notice of a citizen's complaint charging damage to improvements from subsidence caused by an underground coal mining operation will be affirmed on appeal where the complainant fails to show the State regulatory authority's action was arbitrary, capricious, or an abuse of discretion.

Ronald Maynard, 130 IBLA 260 (Aug. 17, 1994)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

INSPECTIONS--Continued

10-day Notice to State--Continued

In the 1988 final rulemaking revising the 10-day notice procedure, the Department clearly rejected the contention that when a violation exists, the only appropriate action by the state regulatory authority in response to such a notice is enforcement action. The Department recognized that other action, which would cause the violation to be corrected and was authorized by the state program, could be utilized by the state regulatory authority, unless it were arbitrary, capricious, or an abuse of discretion.

Pacificorp, dba Pacificorp Electric Operations, Utah Power & Light Co., & Energy West Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 131 IBLA 17 (Sept. 26, 1994)

NOTICES OF VIOLATION

Generally

In a proceeding concerning an application for review of a notice of violation, the burden of going forward to establish a prima facie case rests with OSMRE. Although the ultimate burden of persuasion rests with the applicant for review, the notice of violation will be affirmed only where OSMRE meets its burden of establishing a prima facie case. OSMRE makes a prima facie case when it presents sufficient evidence to establish essential facts from which it may be determined that a violation of pertinent requirements has occurred.

Where OSMRE presents uncontroverted evidence showing the essential facts establishing that the operator failed to maintain sedimentation pond inlets and to stabilize rills and gullies at a mine site as required by the Oklahoma Permanent Regulatory Program regulations 816.49(e) and 816.106, and the operator admits the existence of the deteriorating conditions, but seeks to excuse its failure to comply based on its use of the best technology currently available in the face of severe weather conditions which assertedly

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

prevented compliance, a NOV issued by OSMRE citing a violation of the Oklahoma regulations will be upheld. The regulations at 30 CFR 722.17 require that a NOV may not be vacated because of an operator's inability to comply.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

The record on appeal establishes that the mineral and surface owner was cited and served with notices of violation. Therefore, subsequent cessation orders issued for failure to abate the NOVs were not invalid for failure to cite and serve the underlying NOVs on said mineral and surface owner.

A surface coal mining operation which commences prior to the formulation of a state permanent program must comply with the Federal interim regulatory program after the state permanent program is effective if the mine operator has not sought and received a permit to operate under the applicable state permanent program. 30 CFR 710.11(a)(3)(iii).

A litigant's failure to timely seek review of a notice of violation does not bar it from challenging OSMRE's jurisdictional authority to issue the underlying notice of violation in an application for review of a cessation order subsequently issued for failure to abate the violations set out in the NOV.

Stipulations in a proceeding in which a second party did not appear should not serve as the basis for concluding there was privity between the second party and a party to the previous action (a prerequisite for applying collateral estoppel) because the second party was not a party to the proceeding in which the stipulations were entered.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

When, on the basis of a Federal inspection, the permittee is found to be in violation of any requirement of SMCRA, and the violation does not create an imminent danger to the health and safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the inspector shall issue a notice to the permittee or its agent fixing a reasonable time for abatement. If, when the period for abatement expires, the violation remains unabated, cessation of surface coal mining and reclamation operations shall be ordered.

Unless and until the permittee gives proper notice of a change or designation of a party or parties authorized to receive a notice of violation or cessation order, delivery of a notice of violation or cessation order to one of the parties named as owner or agent of the applicant in the application for a surface mining permit will constitute service of the notice of violation or cessation order.

Roy E. Mehaffey v. Office of Surface Mining Reclamation & Enforcement, 117 IBLA 350 (Jan. 31, 1991)

In a proceeding concerning a petition for review of a proposed civil penalty, the issue of the validity of the underlying notice of violation may be raised. In such proceeding, the burden of going forward to establish a prima facie case that the violation occurred as alleged rests with OSM. The ultimate burden of persuasion to show that no violation occurred rests with the petitioner for review.

In civil penalty proceedings, OSM bears the ultimate burden of persuasion regarding the amount of the civil penalty. OSM must establish the basis for determination of the appropriate civil penalty charged an operator for allowing gullies to develop in an access road, including the basis for its implicit conclusion that existence of gullies is likely to endanger either use of the roadway or the surrounding land. Where the sum of the evidence reveals only that the gullies temporarily affected access along a small portion of the access road, and where there is no evidence that the gullies threatened adjacent land, OSM's conclusion and

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

its accompanying assignment of 11 points for the seriousness of the violation are properly set aside.

The Board of Land Appeals may direct OSM to waive a civil penalty where the total of penalty points properly assessed was 30 or less and no cessation order was issued. The Board will so direct where only a single, isolated violation is involved; where there is an absence of proof of any substantial harm from the violation, either on- or off-site; and where the record shows that the operator abated the violation as soon as practical.

Intersouth Mineral Co., Inc. v. Office of Surface Mining Reclamation & Enforcement (Appellant), 118 IBLA 14 (Feb. 14, 1991)

The effects flowing from issuance of a permanent program permit operate prospectively from the date the permit is secured or issued and do not operate to deny OSM the authority to enforce a notice of violation issued during the interim program for a violation arising during the interim program.

An applicant seeking to take advantage of the valid existing rights exception to the application of 30 U.S.C. § 1272(e)(4) and (5) (1988), bears the burden of proving the existence of the rights giving rise to such entitlement.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, June S. Stout (Intervenor), 118 IBLA 129 (Mar. 6, 1991) 98 I.D. 70

Where the facts demonstrate that one person retained control over an operation, he is properly cited for failure to reclaim the site. Even assuming arguendo that he and another person shared control of the operation for a portion of the time the site was being mined, he is still properly cited, as, in such circumstances,

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

both parties are jointly and severally liable for compliance with any applicable performance standards.

W. D. Martin (dba Martin Coal) v. Office of Surface Mining Reclamation & Enforcement, 120 IBLA 279 (Aug. 30, 1991)

Where OSM has determined that two minesites are related and that their combined acreages exceed 2 acres, so that the operations are not exempt from regulation under SMCRA, and where OSM has issued two NOVs at different times citing the operator of the two minesites for identical violations at both sites, the second NOV will be vacated and treated as an amendment to the first for the purposes of calculating the civil penalty due for the violations.

J&M Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 122 IBLA 90 (Jan. 14, 1992)

The Act makes no distinction between pre-existing and newly created areas of a mine. The determining factor is whether the area is used in conjunction with a present mining operation. Where a mining operator has been issued an NOV for failure to restore a load-out area to approximate original contour in violation of 30 CFR 717.14, and where the record establishes that the operator created the load-out area at the base of a pre-existing highwall and the newly created load-out area to approximate original contour will be affirmed on appeal.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

When, despite an applicable interim program regulatory requirement that all highwalls be completely eliminated, a state erroneously determined that a surface coal mine operator who failed to totally eliminate a disturbed pre-existing highwall listed as a violation in a 10-day notice issued by OSM had, nonetheless, satisfactorily reclaimed the highwall because insufficient available spoil existed to completely eliminate it, the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

state's response to the 10-day notice based on such an erroneous reclamation determination did not constitute appropriate action designed to secure abatement of the violation, and OSM properly issued an NOV requiring complete elimination of the disturbed highwall.

Issuance of a NOV will be affirmed only where OSM makes a prima facie case by presenting evidence sufficient to establish facts essential to justify a finding that there were violations of SMCRA as alleged in the NOV.

Delmar Adkins v. Office of Surface Mining Reclamation & Enforcement, 128 IBLA 1 (Nov. 2, 1993)

In an appeal from a decision that a prima facie case was not established, OSM has the burden of showing that the ALJ erred.

In a hearing held in response to an application for review of a NOV, OSM has the burden of presenting a prima facie case that the NOV is valid by submitting sufficient evidence to establish the essential facts of the violation. If OSM establishes a prima facie case, the evidence will sustain the violation if it is not rebutted.

When OSM presents a prima facie case, the mining operator need only present sufficient evidence to overcome OSM's case by proving, by the preponderance of the evidence, either that the violation cited in the NOV did not occur, or that the violation was not caused by its operations.

Roblee Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 130 IBLA 268 (Aug. 18, 1994)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

The failure of a state regulatory authority to issue a NOV in response to a 10-day notice alleging a violation relating to transfer of a permit will not be considered arbitrary, capricious, or an abuse of discretion when the state regulatory authority informs OSM that permit transfer application, filed prior to the issuance of the 10-day notice, was being timely processed by the state regulatory authority.

Pacificorp, dba Pacificorp Electric Operations, Utah Power & Light Co., & Energy West Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 131 IBLA 17 (Sept. 26, 1994)

Permittees

If a question arises concerning who is responsible for compliance at a surface coal mining operation, it is proper for the OSM inspector issuing a NOV to cite all parties who may be responsible. When a cited party challenges such a notice on the basis that it is not a responsible party, OSM bears the burden of going forward to establish a prima facie case that such party is responsible. The challenging party, however, bears the burden of persuasion by a preponderance of the evidence that it is not responsible for the cited violations.

W. P. Corp. v. Office of Surface Mining Reclamation & Enforcement, 119 IBLA 130 (Apr. 22, 1991)

Under sec. 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1988), a permittee of a minesite was properly cited for a violation of the Act notwithstanding the fact that the surface mining or related activity was performed by a third party.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991) 98 I.D. 231

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

NOTICES OF VIOLATION--Continued

Permittees--Continued

The permittee of a surface mining operation is ordinarily responsible for violations of SMCRA and the regulations committed by the operator on the permitted site. The issuance of a CO to the holder of a 2-acre permit for failure to obtain a permit under the Act and reclaim the highwall as required under the Act which is predicated on the mining of physically related sites under common control totalling in excess of 2 acres within 12 months will be reversed where the record establishes that the permittee of the 2-acre site had no ownership or control of operations on the physically related sites.

Mary Herald v. Office of Surface Mining Reclamation & Enforcement, 123 IBLA 334 (July 14, 1992)

If a question arises concerning who is responsible for compliance with the Act and regulations at the site of a surface coal mining operation, it is proper for an OSM inspector issuing a NOV or a CO to name all parties who may be responsible. If a party challenges the notice or order on the basis that it is not a responsible party, OSM bears the burden of going forward to establish that the challenging party is responsible. The challenging party then bears the ultimate burden of persuasion by a preponderance of the evidence that it is not responsible for the cited violation.

Barwick Coal Co., Inc., 127 IBLA 86 (July 23, 1993)

Remedial Actions

Regulation 30 CFR 817.121(c)(1), requiring an operator to correct any material damage resulting from subsidence caused to surface lands, and regulation 405 KAR 18:210 § 3(2)(a), modelled thereon, are supported by sec. 516(b)(1) of SMCRA, 30 U.S.C. § 1266(b)(1) (1988), which requires that each permit require the operator to adopt measures consistent with

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

NOTICES OF VIOLATION--Continued

Remedial Actions--Continued

known technology in order to, inter alia, prevent subsidence causing material damage to the extent technologically and economically feasible and to maintain the value and reasonably foreseeable use of surface lands.

Harlan Cumberland Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 123 IBLA 129 (May 21, 1992)

PERFORMANCE BOND OR DEPOSIT

Generally

A performance bond issued in 1981, during the interim program when a bond was required by the State but was not required by SMCRA, and evidently used again as the bond required by the State's surface mining act and by SMCRA for granting of permanent program permit, is a statutory bond pursuant to SMCRA. Such a bond remains enforceable by OSM despite repeal of the State's surface mining act.

Exchange Mutual Insurance Co., 119 IBLA 296 (June 11, 1991)

A performance bond, issued in 1981 during the interim program, when a bond was required by the State but was not required by SMCRA, and utilized again as the bond required by the State's surface mining act and by SMCRA for the grant of a permanent program permit, is a statutory bond pursuant to SMCRA. Such a bond remains enforceable by OSM despite repeal of the State's surface mining act.

Exchange Mutual Insurance Co. (On Reconsideration), Exchange Mutual Insurance Co., 124 IBLA 72 (Sept. 2, 1992)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PERFORMANCE BOND OR DEPOSIT--Continued

Generally--Continued

Departmental regulation 30 CFR 800.21 does not allow hypothecation of real property not owned by a permittee to insure mine reclamation.

Pacific Coast Coal Co., Inc., 124 IBLA 370 (Dec. 9, 1992)

Forfeiture

Where reclamation costs exceed the amounts forfeited under a bond, the Board will not affirm an OSM decision that a state agency has taken appropriate action under 30 U.S.C. § 1271(a)(1) (1988), simply because a bond was ordered forfeited.

Robert L. Clewell et al., 123 IBLA 253 (June 18, 1992)
99 I.D. 100

Release

Where OSM determines the percentage of vegetative ground cover within an area covered by a surface mining permit being reclaimed for use as pasture to be less than 90 percent, in violation of 30 CFR 942.816(f)(1), and where the permittee fails to challenge this determination or the methodology used to make it, OSM's decision disapproving the permittee's application for a Phase II bond release will be affirmed.

Newtex Management Corp., 117 IBLA 380 (Feb. 13, 1991)

PERMITS

Generally

A surface coal mining operation which commences prior to the formulation of a state permanent program must comply with the Federal interim regulatory program after the state permanent program is effective if the mine operator has not sought and received a permit to

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PERMITS--Continued

Generally--Continued

operate under the applicable state permanent program. 30 CFR 710.11(a)(3)(iii).

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

The effects flowing from issuance of a permanent program permit operate prospectively from the date the permit is secured or issued and do not operate to deny OSM the authority to enforce a notice of violation issued during the interim program for a violation arising during the interim program.

An applicant seeking to take advantage of the valid existing rights exception to the application of 30 U.S.C. § 1272(e)(4) and (5) (1988), bears the burden of proving the existence of the rights giving rise to such entitlement.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, June S. Stout (Intervenor), 118 IBLA 129 (Mar. 6, 1991) 98 I.D. 70

"Permit." A permit is a written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable without such authority. Under SMCRA, the issuance of a surface mining permit by a regulatory authority empowers the permittee to surface mine a designated area under the conditions specified in the permit, without which permit such mining would not be allowable.

Under the Surface Mining Control and Reclamation Act of 1977, a permit applicant is required to file legal documentation of a right to mine an area under consideration, and maps which accurately depict the area within which the applicant possesses the legal right to mine. 30 U.S.C. § 1257(b)(9) (1988). These requirements come within sec. 521(a)(1) of the Act (30 U.S.C. § 1271(a)(1) (1988)), providing that, "[w]henever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PERMITS--Continued

Generally--Continued

any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority," and the state authority shall take "appropriate action."

If a citizen alleges and provides evidence that a state program has granted a permit to enter and mine where the permittee has not obtained a legal right to enter and mine, a state is required by sec. 521(a)(1) 30 U.S.C. § 1271(a)(1) (1988)) and sec. 507(b)(9) 30 U.S.C. § 1257(b)(9) (1988)) of the Surface Mining Control and Reclamation Act of 1977 to take any "appropriate action" short of adjudication of property title disputes.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991) 98 I.D. 231

Under 43 CFR 4.1366(a), when a permit applicant seeks review of a permit condition imposed by OSM, OSM has the burden of going forward to establish a prima facie case as to the failure of the permit applicant to comply with applicable requirements of the Act or regulations or the appropriateness of the permit condition, and the applicant shall have the ultimate burden of persuasion as to its entitlement to the permit or the inappropriateness of the permit condition. To establish a prima facie case, OSM must introduce evidence that will justify but not compel a finding that the condition is an appropriate response to a failure of the permit application to satisfy a specified statutory or regulatory standard or is otherwise appropriate.

When the evidence demonstrates that OSM's principal reason for imposing a permit condition requiring the permittee to dewater impoundments was its concern for protecting the water rights claims of downstream users, even though such claims are currently being adjudicated in state court, OSM has failed to establish a prima facie case that the permit condition is appropriate, and the ALJ properly declares the condition invalid.

When OSM fails to establish a prima facie case that it acted pursuant to provisions of SMCRA and implementing regulations in imposing a condition requiring the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PERMITS--Continued

Generally--Continued

permittee to dewater impoundments, it is proper for the ALJ to rule that the permit condition is inappropriate.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 123 IBLA 195 (June 5, 1992)

A settlement agreement is properly approved if the settlement is fair, adequate, reasonable, and appropriate under the particular facts. The Board will affirm an ALJ's approval of a settlement unless the objecting party demonstrates that the Judge made a harmful error of law or a meaningful error in judgment. In evaluating the appropriateness of a settlement agreement, deference should be paid to the judgment of the Government agency which has proposed and submitted the compromise.

OSM has the authority, pursuant to SMCRA's prohibition against mining within 100 feet of a cemetery, 30 U.S.C. § 1272(e)(5) (1988), to require a permit applicant to submit additional information concerning the probability of locating undiscovered prehistoric burials in the permit area and to propose means to avoid disturbing such sites. However, if that information is necessary to support the written finding required by 30 U.S.C. § 1260(b)(4) (1988), that no mining will occur in an area designated unsuitable for surface mining, such data must be obtained before permit approval. OSM's attempt to base the required finding upon information to be received after permit issuance by the imposition of special conditions to the permit violates 30 U.S.C. § 1260(b)(1) and (4) (1988).

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, The Hopi Tribe, Maxine Kescoli, & The Navajo Nation (Intervenors), 125 IBLA 107 (Jan. 14, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PERMITS--Continued

Generally--Continued

When as a result of a citizen's complaint the state regulatory authority is notified by OSM in a TDN that there is a dispute regarding whether a state permittee has a legal right to mine private land subject to permit but the state refuses within 10 days of receipt thereof to suspend mining under the permit pending resolution of that dispute, OSM should direct suspension of mining.

Marion A. Taylor, 125 IBLA 271 (Feb. 19, 1993)

When OSM inspects a surface coal mining operation in response to an inspection request, it is required by 30 CFR 842.12(d)(1) to send to the person requesting the inspection within 10 days thereafter a description of the enforcement action taken or an explanation why no enforcement action was taken. An explanation that no enforcement action was taken because more time was needed to review the matter will be affirmed if the explanation is reasonable and does not result in undue delay.

Citizens Coal Council, Water Information Network, The Dineh-Hopi Alliance, 129 IBLA 148 (Apr. 19, 1994)

Approval

OSMRE properly applies state program requirements in determining whether or not to approve a permit application in a state with a cooperative agreement, and where, at the time of permit approval, the applicant complies with those requirements for the disclosures of entities and their compliance histories and OSMRE makes the necessary findings based thereon, an application for a permit is properly approved.

Northern Plains Resource Council et al. v. Office of Surface Mining Reclamation & Enforcement, Montco (A Montana General Partnership (Intervenor)), 112 IBLA 266 (Jan. 4, 1990)

PERMITS--Continued

Approval--Continued

Under 43 CFR 4.1366(a), when a permit applicant seeks review of a permit condition imposed by OSM, OSM has the burden of going forward to establish a prima facie case as to the failure of the permit applicant to comply with applicable requirements of the Act or regulations or the appropriateness of the permit condition, and the applicant shall have the ultimate burden of persuasion as to its entitlement to the permit or the inappropriateness of the permit condition. To establish a prima facie case, OSM must introduce evidence that will justify but not compel a finding that the condition is an appropriate response to a failure of the permit application to satisfy a specified statutory or regulatory standard or is otherwise appropriate.

When the evidence demonstrates that OSM's principal reason for imposing a permit condition requiring the permittee to dewater impoundments was its concern for protecting the water rights claims of downstream users, even though such claims are currently being adjudicated in state court, OSM has failed to establish a prima facie case that the permit condition is appropriate, and the ALJ properly declares the condition invalid.

When OSM fails to establish a prima facie case that it acted pursuant to provisions of SMCRA and implementing regulations in imposing a condition requiring the permittee to dewater impoundments, it is proper for the ALJ to rule that the permit condition is inappropriate.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 123 IBLA 195 (June 5, 1992)

A settlement agreement is properly approved if the settlement is fair, adequate, reasonable, and appropriate under the particular facts. The Board will affirm an ALJ's approval of a settlement unless the objecting party demonstrates that the Judge made a harmful error of law or a meaningful error in judgment. In evaluating the appropriateness of a settlement agreement, deference should be paid to the judgment of the Government agency which has proposed and submitted the compromise.

OSM has the authority, pursuant to SMCRA's prohibition against mining within 100 feet of a cemetery,

PERMITS--Continued

Approval--Continued

30 U.S.C. § 1272(e)(5) (1988), to require a permit applicant to submit additional information concerning the probability of locating undiscovered prehistoric burials in the permit area and to propose means to avoid disturbing such sites. However, if that information is necessary to support the written finding required by 30 U.S.C. § 1260(b)(4) (1988), that no mining will occur in an area designated unsuitable for surface mining, such data must be obtained before permit approval. OSM's attempt to base the required finding upon information to be received after permit issuance by the imposition of special conditions to the permit violates 30 U.S.C. § 1260(b)(1) and (4) (1988).

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, The Hopi Tribe, Maxine Kescoli, & The Navajo Nation (Intervenors), 125 IBLA 107 (Jan. 14, 1993)

Ownership or Control

Where the facts demonstrate that one person retained control over an operation, he is properly cited for failure to reclaim the site. Even assuming arguendo that he and another person shared control of the operation for a portion of the time the site was being mined, he is still properly cited, as, in such circumstances, both parties are jointly and severally liable for compliance with any applicable performance standards.

W. D. Martin (dba Martin Coal) v. Office of Surface Mining Reclamation & Enforcement, 120 IBLA 279 (Aug. 30, 1991)

Revisions

An Office of Surface Mining Reclamation and Enforcement decision to disapprove an application for a significant revision of a permit in a Federal-program state is properly reviewed in accordance with the regulations at 43 CFR 4.1370-.1379, rather than regulations at 43 CFR 4.1280. Expedited review in accordance with proposed regulations at 54 FR 9852-55 (Mar. 8, 1989),

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PERMITS--Continued

Revisions--Continued

is required by order of the Director of the Office of Hearings and Appeals.

Pacific Coast Coal Co., Inc., 113 IBLA 384 (Mar. 28, 1990)

OSM may approve the creation of a permanent impoundment of water on a mine site when the operator demonstrates that the impoundment complies with sec. 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(28) (1988), and the implementing regulations. The spoil which otherwise would have been returned to the mined-out area, as well as the areas upon which the spoil is placed, must further comply with the AOC requirements of sec. 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), and 30 CFR 816.102. OSM properly denies a permit revision application in which the proposal to create a permanent water impoundment involves retaining the spoil piles as permanent topographical features which do not conform to the AOC of the area prior to the surface mining and reclamation operations.

Pacific Coast Coal Co., Inc., 118 IBLA 83 (Feb. 28, 1991) 98 I.D. 38

Transfer, Assignment, or Sale of Rights

The failure of a state regulatory authority to issue a NOV in response to a 10-day notice alleging a violation relating to transfer of a permit will not be considered arbitrary, capricious, or an abuse of discretion when the state regulatory authority informs OSM that permit transfer application, filed prior to the issuance of the 10-day notice, was being timely processed by the state regulatory authority.

Pacificorp, dba Pacificorp Electric Operations, Utah Power & Light Co., & Energy West Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 131 IBLA 17 (Sept. 26, 1994)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

POSTMINING LAND USE

Generally

OSM may approve the creation of a permanent impoundment of water on a mine site when the operator demonstrates that the impoundment complies with sec. 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(28) (1988), and the implementing regulations. The spoil which otherwise would have been returned to the mined-out area, as well as the areas upon which the spoil is placed, must further comply with the AOC requirements of sec. 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), and 30 CFR 816.102. OSM properly denies a permit revision application in which the proposal to create a permanent water impoundment involves retaining the spoil piles as permanent topographical features which do not conform to the AOC of the area prior to the surface mining and reclamation operations.

Pacific Coast Coal Co., Inc., 118 IBLA 83 (Feb. 28, 1991) 98 I.D. 38

PREVIOUSLY MINED LANDS

Generally

The Act makes no distinction between pre-existing and newly created areas of a mine. The determining factor is whether the area is used in conjunction with a present mining operation. Where a mining operator has been issued an NOV for failure to restore a load-out area to approximate original contour in violation of 30 CFR 717.14, and where the record establishes that the operator created the load-out area at the base of a pre-existing highwall and the newly created load-out area to approximate original contour will be affirmed on appeal.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

PREVIOUSLY MINED LANDS--Continued

Generally--Continued

Where a permittee operating pursuant to a state 2-acre permit receives authorization from a state inspector to reclaim an adjacent previously mined area, those two sites cannot be considered related under 30 CFR 700.11(b)(2), where there is no evidence that they were mined within 12 months of one another or that they were under common ownership and control.

Where a permittee operating pursuant to a state 2-acre permit receives authorization from a state inspector to reclaim an adjacent previously mined area, that previously mined area will not be considered part of the "affected area," as defined in 30 CFR 701.5, where the reclamation undertaken thereon was not necessary or incidental to the permittee's surface coal mining operation.

Ron Deaton/Barwick Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 320 (June 16, 1993)

PROHIBITION OF MINING OPERATIONS

Generally

"Occupied dwelling." The definition of "occupied dwelling" set forth at 30 CFR 761.5 does not require that the dwelling be used solely for human habitation. So long as the "building is currently being used on a regular or temporary basis for human habitation," the structure falls within the scope of the regulatory definition. A building is properly determined to be an "occupied dwelling" notwithstanding the fact that an occupant also operates a full-time antique business in the building.

The effects flowing from issuance of a permanent program permit operate prospectively from the date the permit is secured or issued and do not operate to deny OSM the authority to enforce a notice of violation issued during the interim program for a violation arising during the interim program.

An applicant seeking to take advantage of the valid existing rights exception to the application of 30 U.S.C. § 1272(e)(4) and (5) (1988), bears the burden

PROHIBITION OF MINING OPERATIONS--Continued

Generally--Continued

of proving the existence of the rights giving rise to such entitlement.

"Surface coal mining operation." Notwithstanding a State regulatory authority's determination that a portal building and adjacent parking lot did not fall within the State definition of a surface coal mining operation, the building and parking lot will be considered a surface coal mining operation subject to the prohibitions in sec. 522(e) of SMCRA, 30 U.S.C. § 1272(e) (1988), when the evidence establishes that these surface facilities exist to support and are "incident to" underground mining.

Under sec. 522(e)(4) and (e)(5) of SMCRA, 30 U.S.C. § 1272(e)(4) and (e)(5) (1988), no surface impacts incident to underground mining may be created within 100 feet of a road and 300 feet of an occupied dwelling unless the mine operator had a valid existing right on Aug. 3, 1977. To have valid existing rights on Aug. 3, 1977, under the regulatory scheme currently applicable to adjudications arising under the interim program, the operator conducting underground mining must have held property rights which were created by a legally binding document authorizing the operator to create those surface impacts incident to an underground mining operation being contemplated, and must have made a good faith effort to obtain all permits required to conduct such operations prior to Aug. 3, 1977, or show that the coal is both needed for and adjacent to an ongoing surface coal mining operation.

When approval of an erosion and sedimentation control plan was the only "permit" a coal company was required to obtain before creating the surface impacts located within the 100- and 300-foot buffer zones, and it is shown that application was made prior to Aug. 3, 1977, and the plan was approved Aug. 12, 1977, a good faith effort to obtain all permits required to conduct surface impacts incident to mining within the 100- and 300-foot buffer zones has been demonstrated for purposes of establishing valid existing rights on Aug. 3, 1977.

A coal mine operator failed to show that a valid existing right to create surface impacts on the lands in question existed on Aug. 3, 1977. The right to mine coal had been severed from the surface right prior to

PROHIBITION OF MINING OPERATIONS--Continued

Generally--Continued

Aug. 3, 1977, and the operator failed to demonstrate that: (1) a merger of title prior to that date; (2) all of the coal to be mined in conjunction with the surface impacts was within the lands held by the grantor at the time of severance; (3) the conveyance document at the time of severance included the right to create the surface impacts for the purpose of extracting coal from lands other than that conveyed by the grantor; (4) the existence of a lease or other express agreement granting such right; or (5) the existence of any other contractual relationship between the coal owner and the surface owner binding the surface owner to dedicate the land to the coal mining operation.

A disparity in the consideration term of a surface lease executed after Aug. 3, 1977, and a letter preceding Aug. 3, 1977, precluded a finding under Pennsylvania law that a legally enforceable lease was in existence on Aug. 3, 1977, affording the valid existing rights claimant the right to create the surface impacts within the 100- and 300-foot buffer zones.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, June S. Stout (Intervenor), 118 IBLA 129 (Mar. 6, 1991) 98 I.D. 70

PUBLIC HEALTH AND SAFETY

Imminent Danger

Where OSMRE determines that any condition or practice exists which creates an imminent danger to the health or safety of the public, it is required to immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). Where a 10-day notice has been issued to the State and OSMRE determines during the 10-day period that an imminent danger situation exists, OSMRE is not required to wait until the 10-day period elapses before issuing a cessation order.

Under 30 CFR 842.11(b)(1) (1986), an immediate Federal inspection is required where the authorized representative has reason to believe on the basis of information available to him or her (other than

PUBLIC HEALTH AND SAFETY--Continued

Imminent Danger--Continued

information resulting from a previous Federal inspection) that there exists any condition or practice which creates an imminent danger to the health or safety of the public, and the person supplying the information supplies adequate proof that an imminent danger to the public health and safety exists and that the State regulatory authority has failed to take appropriate action.

Under 30 CFR 842.11(b)(1)(C) (1986), the person supplying information to OSMRE must prove adequate proof that an imminent danger to the public health and safety exists and that the State regulatory authority has failed to take appropriate action. What constitutes adequate proof must be determined on a case-by-case basis.

OSMRE establishes a prima facie case in support of the issuance of a cessation order by showing that the mining operations of the person cited in the order caused subsidence which resulted in damage to residences and which condition created an imminent danger to the public health and safety.

M & J Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 8 (June 4, 1990)

Under 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(i) and (ii)(C), OSM is required to conduct an immediate inspection when the person informing OSM provides adequate proof that imminent danger of significant environmental harm exists and that the state has failed to take appropriate action. If OSM receives adequate proof, an immediate inspection is mandatory; the statute gives OSM no discretion to defer an inspection when an imminent danger is involved.

Where a particular violation constitutes a significant, imminent environmental harm by definition, a signed statement setting forth the violation may constitute adequate proof of the existence of such a harm under 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(i) and (ii)(C). A signed statement showing that the state had improperly licensed the operation

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PUBLIC HEALTH AND SAFETY--Continued

Imminent Danger--Continued

as exempt from SMCRA reclamation requirements is adequate proof that the state had failed to take appropriate action as of the date the inspection request was filed.

Robert L. Clewell et al., 123 IBLA 253 (June 18, 1992)
99 I.D. 100

RECLAMATION FEES

Generally

An appeal taken pursuant to 43 CFR 4.1280 from a decision requiring payment of additional reclamation fees will be dismissed where the decision did not specifically grant a right of appeal to the Board.

Terry Eagle Coal Co., 129 IBLA 367 (June 7, 1994)

REVEGETATION

Generally

Where OSM determines the percentage of vegetative ground cover within an area covered by a surface mining permit being reclaimed for use as pasture to be less than 90 percent, in violation of 30 CFR 942.816(f)(1), and where the permittee fails to challenge this determination or the methodology used to make it, OSM's decision disapproving the permittee's application for a Phase II bond release will be affirmed.

Newtex Management Corp., 117 IBLA 380 (Feb. 13, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

SPOIL AND MINE WASTES

Generally

"Excess spoil." Spoil needed for returning disturbed land to its approximate original contour is not "excess spoil."

OSM may approve the creation of a permanent impoundment of water on a mine site when the operator demonstrates that the impoundment complies with sec. 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(28) (1988), and the implementing regulations. The spoil which otherwise would have been returned to the mined-out area, as well as the areas upon which the spoil is placed, must further comply with the AOC requirements of sec. 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), and 30 CFR 816.102. OSM properly denies a permit revision application in which the proposal to create a permanent water impoundment involves retaining the spoil piles as permanent topographical features which do not conform to the AOC of the area prior to the surface mining and reclamation operations.

Pacific Coast Coal Co., Inc., 118 IBLA 83 (Feb. 28, 1991)
98 I.D. 38

STATE PROGRAM

Generally

The Secretary of the Interior through OSMRE properly has jurisdiction to issue cessation orders in states with approved programs where OSMRE acts as a result of an oversight inspection pursuant to sec. 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2) after OSMRE issues a 10-day notice and the state fails to take appropriate action.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE PROGRAM--Continued

Generally--Continued

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so.

Annaco, Inc. v. Office of Surface Mining Reclamation & Enforcement, 119 IBLA 158 (Apr. 30, 1991)

R.C.T. Engineering, Inc. v. Office of Surface Mining Reclamation & Enforcement, 121 IBLA 142 (Oct. 28, 1991)

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so. Where OSM determines during an inspection that the operator is mining without a valid surface coal mining permit, 30 CFR 843.11(a)(2) requires that OSM issue a CO because mining without such a permit itself constitutes a practice which causes or can reasonably be expected to cause significant, imminent environmental harm.

Ron Deaton/Barwick Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 320 (June 16, 1993)

State primacy does not deprive OSM of enforcement jurisdiction because 30 U.S.C. § 1254(b) (1988), provides a separate and distinct basis for Federal inspection and enforcement authority against individual mining operations during state primacy in addition to that authority which OSM may exercise after asserting Federal primacy under sec. 1271(b).

OSM is required to consider citizens' complaints involving alleged violations arising from permitting improper recognition of valid existing rights or operations existing on Aug. 3, 1977. The exhaustion of state administrative remedies is not a prerequisite for the filing of a citizen complaint, and a citizen's failure

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE PROGRAM--Continued

Generally--Continued

to do so is not a valid reason for OSM to disregard a complaint.

Lois J. Armstrong, Elizabeth Hillmann, 130 IBLA 228 (Aug. 5, 1994)

10-day Notice to State

Where an Office of Surface Mining Reclamation and Enforcement finding that a state regulatory authority took appropriate action in response to a 10-day notice is contradicted by the record developed by the agency, the decision to deny Federal enforcement action is reversed and inspection ordered.

W. E. Carter et al., 116 IBLA 262 (Oct. 18, 1990)

If a citizen files a complaint with OSM alleging that a permittee has no right to enter and mine upon his land and that state program action has not been appropriate, pursuant to sec. 521(a)(1) of SMCRA, OSM has authority to issue a 10-day notice to the state, and to review resulting state program action to determine whether the state has taken "appropriate action to cause said violation to be corrected or has shown good cause for such failure" under 30 U.S.C. § 1271(a)(1) (1988).

Under SMCRA, a permit applicant is required to file legal documentation of a right to mine an area under consideration, and maps which accurately depict the area within which the applicant possesses the legal right to mine. 30 U.S.C. § 1257(b)(9) (1988). These requirements come within sec. 521(a)(1) of the Act (30 U.S.C. § 1271(a)(1) (1988)), providing that, "[w]henever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority," and the state authority shall take "appropriate action."

If a citizen alleges and provides evidence that a state program has granted a permit to enter and mine

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

where the permittee has not obtained a legal right to enter and mine, a state is required by sec. 521(a)(1) (30 U.S.C. § 1271(a)(1) (1988)) and sec. 507(b)(9) (30 U.S.C. § 1257(b)(9) (1988)) of SMCRA to take any "appropriate action" short of adjudication of property title disputes.

Where a landowner provides evidence that an initial decision that an operator has a right to enter and mine an area that has been permitted may be in error, state authorities must assure that the operator has the right to enter and mine before the area is mined, and state action which fails to do so will be deemed inappropriate action pursuant to sec. 521(a)(1) of the Act. 30 U.S.C. § 1257(b)(9) (1988); 30 U.S.C. § 1271(a)(1) (1988). So long as the operator retains full authority to mine the disputed area under a validly issued permit, the intent and purpose of the Act as stated in sec. 102(b) (30 U.S.C. § 1202(b) (1988)) to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations" is jeopardized.

OSM is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency refuses to take action because it does not consider the activity to be surface mining or a related activity, and thus finds a permit is not required, but the interpretation of the statute advanced by the state is contrary to both the intent of the Act and a reasonable interpretation of state law, it is proper for OSM to order a Federal inspection. If, after Federal inspection, OSM determines that the activity is in violation of any requirement of the Act, OSM may issue a notice of violation to the operator or cessation order, fixing a reasonable time for abatement.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991) 98 I.D. 231

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

Regulation 30 CFR 843.17 provides that no notice of violation may be vacated for the agency's failure to give the notice to the state regulatory authority required by 30 CFR 842.11(b)(1)(ii)(B).

Harlan Cumberland Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 123 IBLA 129 (May 21, 1992)

When as a result of a citizen's complaint the state regulatory authority is notified by OSM in a TDN that there is a dispute regarding whether a state permittee has a legal right to mine private land subject to permit but the state refuses within 10 days of receipt thereof to suspend mining under the permit pending resolution of that dispute, OSM should direct suspension of mining.

Marion A. Taylor, 125 IBLA 271 (Feb. 19, 1993)

When OSM issues a 10-day notice to a state regulatory authority pursuant to sec. 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1988), in response to a citizen's complaint alleging that the quality of a well water supply has not been replaced to that existing before commencement of nearby surface coal mining activities, this Board will affirm OSM's decision declining to take Federal enforcement action where the record shows that the water supply is potable and has been restored to comparable premining quality. In such a situation, the water supply has been replaced within the meaning of 30 CFR 816.42(h).

Martha & Roy A. McBride, 129 IBLA 112 (Apr. 11, 1994)

When, after OSM provided notice of a failure to reclaim highwalls contrary to State law, the State failed to take appropriate action to abate the cited violation, OSM was required to take enforcement action

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

although the State exercised primary enforcement authority under SMCRA.

Fremont Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 130 IBLA 41 (July 12, 1994)

An OSM decision on informal review upholding a determination that the State regulatory authority had shown good cause for not taking enforcement action in response to a 10-day notice of a citizen's complaint charging damage to improvements from subsidence caused by an underground coal mining operation will be affirmed on appeal where the complainant fails to show the State regulatory authority's action was arbitrary, capricious, or an abuse of discretion.

Ronald Maynard, 130 IBLA 260 (Aug. 17, 1994)

In the 1988 final rulemaking revising the 10-day notice procedure, the Department clearly rejected the contention that when a violation exists, the only appropriate action by the state regulatory authority in response to such a notice is enforcement action. The Department recognized that other action, which would cause the violation to be corrected and was authorized by the state program, could be utilized by the state regulatory authority, unless it were arbitrary, capricious, or an abuse of discretion.

The failure of a state regulatory authority to issue a NOV in response to a 10-day notice alleging a violation relating to transfer of a permit will not be considered arbitrary, capricious, or an abuse of discretion when the state regulatory authority informs OSM that permit transfer application, filed prior to the issuance of the 10-day notice, was being timely processed by the state regulatory authority.

Pacificorp, dba Pacificorp Electric Operations, Utah Power & Light Co., & Energy West Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 131 IBLA 17 (Sept. 26, 1994)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE REGULATION

Generally

The doctrines of collateral estoppel and equitable estoppel will not preclude OSMRE from issuing its own cessation order in situations where a similar notice of violation and cessation order was issued and litigated by the state regulatory authority since the statutory scheme of SMCRA evidences a countervailing statutory policy against application of those doctrines in such a situation.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so.

The doctrines of collateral estoppel and res judicata will not preclude OSM from taking enforcement action in a primacy state where similar state regulatory authority enforcement actions have been resolved through settlement, since the statutory scheme of SMCRA evidences a countervailing statutory policy against the application of those doctrines in such situations. Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not be applicable when the violations are not fully litigated before the state agency, but are resolved through a settlement agreement, and there is no privity between OSM and the state.

Annaco, Inc. v. Office of Surface Mining Reclamation & Enforcement, 119 IBLA 158 (Apr. 30, 1991)

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so.

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own cessation order in situations where a similar cessation

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE REGULATION--Continued

Generally--Continued

order was issued and litigated by a state regulatory authority because the statutory scheme of SMCRA evidences a countervailing statutory policy against application of those doctrines in such a situation.

R.C.T. Engineering, Inc. v. Office of Surface Mining Reclamation & Enforcement, 121 IBLA 142 (Oct. 28, 1991)

Since the initial definition of "affected area" promulgated in Mar. 1979, the intent of the Federal law has been to include surface areas above underground workings as "affected areas" within the meaning of the Act. The Virginia program was approved on Dec. 15, 1981, on the condition that it define "affected area" to include that land overlying underground mine workings. States are not permitted to modify their programs without the Secretary's approval. 30 CFR 732.17(g). Where a mining operation under the jurisdiction of Virginia reclamation authorities included a surface disturbance of 1.65 acres and an underground "shadow" disturbance of 19.2 acres, the area affected is greater than 2 acres; the operator therefore is required to reclaim the area in accordance with applicable program standards for minesites in excess of 2 acres.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own CO in situations where the violation which is the basis of the CO was cited and litigated by a state regulatory authority because the statutory scheme of sec. 521(a)(2) of SMCRA mandates issuance of a CO in such a situation where the Federal oversight inspection discloses an unabated violation which is causing or can be expected to cause imminent environmental harm.

The doctrines of res judicata or collateral estoppel do not ordinarily preclude review of a CO issued by OSM for operations conducted without a valid permit where the state regulatory agency agreed to a settlement of the same violation which did not require performance of the reclamation mandated by law. OSM is

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE REGULATION--Continued

Generally--Continued

neither a party to the case nor in privity with the state regulatory agency where the latter adopts a position inconsistent with that required by OSM.

Triple R Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 310 (June 16, 1993)

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so. Where OSM determines during an inspection that the operator is mining without a valid surface coal mining permit, 30 CFR 843.11(a)(2) requires that OSM issue a CO because mining without such a permit itself constitutes a practice which causes or can reasonably be expected to cause significant, imminent environmental harm.

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own CO in a situation where a similar order for the same violation was issued and litigated by a state regulatory authority because the statutory scheme of SMCRA evidences a countervailing statutory policy against application of those doctrines in such a situation.

Ron Deaton/Barwick Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 320 (June 16, 1993)

State primacy does not deprive OSM of enforcement jurisdiction because 30 U.S.C. § 1254(b) (1988), provides a separate and distinct basis for Federal inspection and enforcement authority against individual mining operations during state primacy in addition to that authority which OSM may exercise after asserting Federal primacy under sec. 1271(b).

OSM is required to consider citizens' complaints involving alleged violations arising from permitting improper recognition of valid existing rights or operations existing on Aug. 3, 1977. The exhaustion of state administrative remedies is not a prerequisite for the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE REGULATION--Continued

Generally--Continued

filing of a citizen complaint, and a citizen's failure to do so is not a valid reason for OSM to disregard a complaint.

Lois J. Armstrong, Elizabeth Hillmann, 130 IBLA 228 (Aug. 5, 1994)

SUBSIDENCE

Generally

An OSM decision on informal review upholding a determination that the State regulatory authority had shown good cause for not taking enforcement action in response to a 10-day notice of a citizen's complaint charging damage to improvements from subsidence caused by an underground coal mining operation will be affirmed on appeal where the complainant fails to show the State regulatory authority's action was arbitrary, capricious, or an abuse of discretion.

Ronald Maynard, 130 IBLA 260 (Aug. 17, 1994)

TEMPORARY RELIEF

Applications

While the term "substantial likelihood of success," required to be shown by an applicant for temporary relief from a citation under sec. 525(c) of SMCRA, is not defined in the statute or regulations, the relief is basically in the nature of a stay or injunction. Hence, if the balance of hardship from not granting temporary relief tips decidedly in favor of the applicant, it is not necessary that the applicant's right to prevail on the merits of the controversy be free from all doubt where the applicant "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation."

Powderhorn Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 129 IBLA 22 (Mar. 18, 1994)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

TEMPORARY RELIEF--Continued

Applications--Continued

Where language in a cooperative agreement between Colorado and OSM governing surface mining regulation on Federal lands clearly indicates that OSM may take Federal enforcement action pursuant to the Federal lands program, 30 U.S.C. § 1273 (1988), an appeal of an ALJ's denial of an application for temporary relief based upon arguments that state enforcement procedures and the state's interpretation of whether appellant is in substantial compliance should prevail will be dismissed for failure to show "substantial likelihood that the findings and decision of the ALJ in the matters to which the application relates will be favorable to the applicant." 43 CFR 4.1263(b); 30 U.S.C. § 1275(c) (1988).

Kerr Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 131 IBLA 27 (Sept. 28, 1994)

A coal mine owner was entitled to temporary relief from a CO prohibiting continued disposal of mined material on unpermitted land pending issuance of an agency decision on substantial legal and factual questions concerning such disposal methods which had not been shown to be potentially harmful.

Heatherly Mining Inc. v. Office of Surface Mining Reclamation & Enforcement, 131 IBLA 117 (Oct. 21, 1994)

Evidence

While the term "substantial likelihood of success," required to be shown by an applicant for temporary relief from a citation under sec. 525(c) of SMCRA, is not defined in the statute or regulations, the relief is basically in the nature of a stay or injunction. Hence, if the balance of hardship from not granting temporary relief tips decidedly in favor of the applicant, it is not necessary that the applicant's right to prevail on the merits of the controversy be free from all doubt where the applicant "has raised questions going to the merits so serious, substantial, difficult and doubtful,

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

TEMPORARY RELIEF--Continued

Evidence--Continued

as to make them a fair ground for litigation and thus for more deliberative investigation."

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Where language in a cooperative agreement between Colorado and OSM governing surface mining regulation on Federal lands clearly indicates that OSM may take Federal enforcement action pursuant to the Federal lands program, 30 U.S.C. § 1273 (1988), an appeal of an ALJ's denial of an application for temporary relief based upon arguments that state enforcement procedures and the state's interpretation of whether appellant is in substantial compliance should prevail will be dismissed for failure to show "substantial likelihood that the findings and decision of the ALJ in the matters to which the application relates will be favorable to the applicant." 43 CFR 4.1263(b); 30 U.S.C. § 1275(c) (1988).

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Heatherly Mining Inc. v. Office of Surface Mining Reclamation & Enforcement, 131 IBLA 117 (Oct. 21, 1994)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

VALID EXISTING RIGHTS

Generally

An applicant for valid existing rights bears the burden of proving entitlement.

A decision rejecting an application for valid existing rights to mine coal on lands not subject to surface coal mining after Aug. 3, 1977, pursuant to sec. 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(e)(3) (1988), will be affirmed where the applicant fails to show, and the record fails to demonstrate, that the necessary permits to mine the coal were applied for as of the Aug. 3, 1977, enactment of the Act.

Eastern Minerals Internat'l, Inc., 117 IBLA 221 (Dec. 21, 1990)

Under sec. 522(e)(4) and (e)(5) of SMCRA, 30 U.S.C. § 1272(e)(4) and (e)(5) (1988), no surface impacts incident to underground mining may be created within 100 feet of a road and 300 feet of an occupied dwelling unless the mine operator had a valid existing right on Aug. 3, 1977. To have valid existing rights on Aug. 3, 1977, under the regulatory scheme currently applicable to adjudications arising under the interim program, the operator conducting underground mining must have held property rights which were created by a legally binding document authorizing the operator to create those surface impacts incident to an underground mining operation being contemplated, and must have made a good faith effort to obtain all permits required to conduct such operations prior to Aug. 3, 1977, or show that the coal is both needed for and adjacent to an ongoing surface coal mining operation.

When approval of an erosion and sedimentation control plan was the only "permit" a coal company was required to obtain before creating the surface impacts located within the 100- and 300-foot buffer zones, and it is shown that application was made prior to Aug. 3, 1977, and the plan was approved Aug. 12, 1977, a good faith effort to obtain all permits required to conduct surface impacts incident to mining within the 100- and

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

VALID EXISTING RIGHTS--Continued

Generally--Continued

300-foot buffer zones has been demonstrated for purposes of establishing valid existing rights on Aug. 3, 1977.

A coal mine operator failed to show that a valid existing right to create surface impacts on the lands in question existed on Aug. 3, 1977. The right to mine coal had been severed from the surface right prior to Aug. 3, 1977, and the operator failed to demonstrate that: (1) a merger of title prior to that date; (2) all of the coal to be mined in conjunction with the surface impacts was within the lands held by the grantor at the time of severance; (3) the conveyance document at the time of severance included the right to create the surface impacts for the purpose of extracting coal from lands other than that conveyed by the grantor; (4) the existence of a lease or other express agreement granting such right; or (5) the existence of any other contractual relationship between the coal owner and the surface owner binding the surface owner to dedicate the land to the coal mining operation.

A disparity in the consideration term of a surface lease executed after Aug. 3, 1977, and a letter preceding Aug. 3, 1977, precluded a finding under Pennsylvania law that a legally enforceable lease was in existence on Aug. 3, 1977, affording the valid existing rights claimant the right to create the surface impacts within the 100- and 300-foot buffer zones.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, June S. Stout (Intervenor), 118 IBLA 129 (Mar. 6, 1991) 98 I.D. 70

Where OSM has issued a 10-day notice to a state agency pursuant to 30 U.S.C. § 1271(a)(1) (1988), concerning an offsite processing facility operating within buffer zones prohibited under 30 U.S.C. § 1272(e) (1988), and the state agency declines to take action on the ground that the operation was in existence on Aug. 3, 1977, and that it had valid existing rights, the state's response will be found to be arbitrary and

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

VALID EXISTING RIGHTS--Continued

Generally--Continued

capricious when at least one essential factor for a valid existing rights determination is unaddressed.

Lois J. Armstrong, Elizabeth Hillmann, 130 IBLA 228 (Aug. 5, 1994)

VARIANCES

Generally

A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

An operation is exempt from SMCRA if extraction of coal is incidental to extraction of other materials and constitutes less than 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use and sale. If an operation is not exempt, mining without a valid permit would constitute a violation.

Robert L. Clewell et al., 123 IBLA 253 (June 18, 1992) 99 I.D. 100

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS

Generally

Where OSMRE presents uncontroverted evidence showing the essential facts establishing that the operator failed to maintain sedimentation pond inlets and to stabilize rills and gullies at a mine site as required by the Oklahoma Permanent Regulatory Program regulations 816.49(e) and 816.106, and the operator admits the existence of the deteriorating conditions, but seeks to excuse its failure to comply based on its use of the best technology currently available in the

face of severe weather conditions which assertedly prevented compliance, a NOV issued by OSMRE citing a violation of the Oklahoma regulations will be upheld. The regulations at 30 CFR 722.17 require that a NOV may not be vacated because of an operator's inability to comply.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

Under 43 CFR 4.1366(a), when a permit applicant seeks review of a permit condition imposed by OSM, OSM has the burden of going forward to establish a prima facie case as to the failure of the permit applicant to comply with applicable requirements of the Act or regulations or the appropriateness of the permit condition, and the applicant shall have the ultimate burden of persuasion as to its entitlement to the permit or the inappropriateness of the permit condition. To establish a prima facie case, OSM must introduce evidence that will justify but not compel a finding that the condition is an appropriate response to a failure of the permit application to satisfy a specified statutory or regulatory standard or is otherwise appropriate.

When the evidence demonstrates that OSM's principal reason for imposing a permit condition requiring the permittee to dewater impoundments was its concern for protecting the water rights claims of downstream users, even though such claims are currently being adjudicated in state court, OSM has failed to establish a prima facie case that the permit condition is appropriate, and the ALJ properly declares the condition invalid.

When OSM fails to establish a prima facie case that it acted pursuant to provisions of SMCRA and implementing regulations in imposing a condition requiring the permittee to dewater impoundments, it is proper for the ALJ to rule that the permit condition is inappropriate.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 123 IBLA 195 (June 5, 1992)

Under 30 CFR 816.42(h), any person who conducts surface mining activities is required to replace the water supply of an owner of interest in real property who obtains all or part of his or her supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source, where the water supply has been adversely impacted by contamination, diminution, or interruption proximately resulting from the surface mining activities. The replacement requirement is controlled by the owner's pre-existing uses of the water supply.

When OSM issues a 10-day notice to a state regulatory authority pursuant to sec. 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1988), in response to a citizen's complaint alleging that the quality of a well water supply has not been replaced to that existing before commencement of nearby surface coal mining activities, this Board will affirm OSM's decision declining to take Federal enforcement action where the record shows that the water supply is potable and has been restored to comparable premining quality. In such a situation, the water supply has been replaced within the meaning of 30 CFR 816.42(h).

Martha & Roy A. McBride, 129 IBLA 112 (Apr. 11, 1994)

To sustain a NOV alleging material damage to the hydrologic balance caused by the mining operations resulting in discharge of water from an underground coal mining operation violating State and Federal water quality laws and effluent limitations, OSM must establish that there was material damage to the hydrologic balance and that the damage was caused by the acts of the operator cited in the NOV.

Roblee Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 130 IBLA 268 (Aug. 18, 1994)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

WORDS AND PHRASES

"Occupied dwelling." The definition of "occupied dwelling" set forth at 30 CFR 761.5 does not require that the dwelling be used solely for human habitation. So long as the "building is currently being used on a regular or temporary basis for human habitation," the structure falls within the scope of the regulatory definition. A building is properly determined to be an "occupied dwelling" notwithstanding the fact that an occupant also operates a full-time antique business in the building.

"Surface coal mining operation." Notwithstanding a State regulatory authority's determination that a portal building and adjacent parking lot did not fall within the State definition of a surface coal mining operation, the building and parking lot will be considered a surface coal mining operation subject to the prohibitions in sec. 522(e) of SMCRA, 30 U.S.C. § 1272(e) (1988), when the evidence establishes that these surface facilities exist to support and are "incident to" underground mining.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, June S. Stout (Intervenor), 118 IBLA 129 (Mar. 6, 1991) 98 I.D. 70

"Permit." A permit is a written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable without such authority. Under SMCRA, the issuance of a surface mining permit by a regulatory authority empowers the permittee to surface mine a designated area under the conditions specified in the permit, without which permit such mining would not be allowable.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991) 98 I.D. 231

"Surface coal mining operations." This term is defined in sec. 701(28)(a) of SMCRA, 30 U.S.C. § 1291(28)(a). The most sound parsing of that paragraph is that it includes only surface coal mine and surface activities connected with those surface operations and surface impacts that are incident to an underground mine that are subject to sec. 516. Under this construction, subsidence is not included within the term "surface coal

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

WORDS AND PHRASES--Continued

mining operations," because subsidence is not an activity conducted on the surface of lands. However, subsidence is still specifically regulated under sec. 516 of SMCRA.

Applicability of Sec. 522(e) of the Surface Mining Control & Reclamation Act to Subsidence, M-36971 (July 10, 1991) 100 I.D. 85

SURFACE RESOURCES ACT
(See also Hearings, Mining Claims)

OCCUPANCY

Sec. 4(a) of the Surface Resources Act, 30 U.S.C. § 612(a) (1988), bars use of an unpatented mining claim for any purpose other than prospecting, mining, or processing operations and uses "reasonably incident thereto." Residential occupancy may be reasonably incident to mining during the conduct of operations where required to provide feasible access to remote claims and/or to provide security for equipment and material at times when operations are ongoing. These needs are obviated, however, and residential occupancy may not be reasonably incident where the claimant owns fee lands contiguous with the claim which both provide and control vehicular access to the claim and from which claimant operates a tourist shop.

Storage on an unpatented mining claim of numerous inoperable (junk) automobiles and trucks is not reasonably incidental to mining even though some cannibalized parts from those vehicles may potentially have utility. Similarly, storage on the claim of more dump trucks than the record establishes can reasonably be used in claimant's mining operation is not reasonably incidental to mining.

Occupancy of an unpatented mining claim is properly regulated to bar any unnecessary and undue degradation of the public lands as set forth in sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988). The accumulation of an excessive quantity of parts and materials stored in a disorganized manner on the surface of an unpatented mining claim causing a surface disturbance greater than

SURFACE RESOURCES ACT--Continued

OCCUPANCY--Continued

would normally result when mining is performed by a prudent operator in usual, customary, and proficient operations of similar character gives rise to unnecessary and undue degradation of the public lands.

The conduct of operations on an unpatented mining claim under an approved plan of operations may be conditioned upon provision of a bond adequate to cover the costs of reasonable stabilization and reclamation of disturbed areas. However, the basis for establishing the amount of the bond must be clear from the record.

United States v. Lee Jesse Peterson, 125 IBLA 72 (Jan. 6, 1993)

SURVEYS OF PUBLIC LANDS
(See also Boundaries, Public Lands)

GENERALLY

When locations and lines established by an official Government survey are identified, they are conclusive, and the corner of a Government subdivision is where the United States surveyors in fact established it, whether such location is right or wrong. Where, as a result of two independent surveys, a hiatus was created between the south line of one township and the north line of the adjoining township, such hiatus was not included in patents to lands in either township but remains public land subject to survey.

Joie Osgood, 117 IBLA 204 (Dec. 21, 1990)

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and

SURVEYS OF PUBLIC LANDS--Continued

GENERALLY--Continued

the actual water line is deemed to be the omitted land and the property of the United States.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

Under the EAJA, 5 U.S.C. § 504 (1988), and 43 CFR 4.603, an adversary adjudication is one required by statute to be determined on the record after an opportunity for an agency hearing in accordance with 5 U.S.C. § 554 (1988). Where the Board of Land Appeals orders a hearing in an omitted lands survey case, in accordance with 43 CFR 4.415, such a proceeding is not an adversary adjudication within the meaning of the EAJA and 43 CFR 4.603.

Herbert J. Hansen, 119 IBLA 29 (Mar. 21, 1991)

In apportioning accreted lands between two adjoining riparian sections, BLM properly uses the perpendicular survey method where it is not feasible to use the proportionate shoreline survey method because no zero accretion point or end point of a perpendicular line drawn to the new bank of the river created by accretion may be used to allocate proportionate parts of that bank to the sections.

In utilizing the perpendicular survey method to apportion accreted lands between two adjoining riparian sections, BLM must select a perpendicular line drawn to the new bank of the river created by accretion which equitably apportions that bank between the sections, consistent, whenever practicable, with awarding to each section the land in front of it.

First American Title Insurance Co. v. Bureau of Land Management, Fort Mojave Indian Tribe (Intervenor), 9 OHA 17 (Mar. 26, 1991) 98 I.D. 164

SURVEYS OF PUBLIC LANDS--Continued

GENERALLY--Continued

A supplemental plat of survey, approved in 1968, may not be challenged years later by a protest filed under 43 CFR 4.450-2 because that section of the regulations identifies a protest as any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau. The previous approval and filing of a plat of survey is not an action proposed to be taken.

MM Holdings, Inc., 121 IBLA 26 (Oct. 7, 1991)

When BLM changes the location of a Native allotment claim from its originally intended location during the course of the survey of the claim boundaries to compensate for the loss of a portion of the original claim by erosion, and confirms the legislative approval of the claim in its new location, the Board will set aside the BLM decision and remand the case for resurvey and reconfirmation of the legislative approval of the claim in its original location.

Hermann T. Kroener, 124 IBLA 57 (Aug. 27, 1992)

An allegation that a dependent resurvey is void because it impairs bona fide rights is without merit where the record shows that the dependent resurvey is an accurate retracement and reestablishment of the lines of the original survey. Where rights to land are based on patents grounded on the original survey, the dependent resurvey will not affect the location of any boundary lines as it is, by definition, a restoration of the original conditions of the official survey.

John W. & Ovada Yeargan, 126 IBLA 361 (June 29, 1993)

When surveying the boundaries of an Indian reservation created in 1891 on an island off the coast of Alaska, it was not proper to include an island in the reservation that clearly was not included as the reservation was defined by the President in 1916.

State of Alaska, Forest Service, U.S. Dept. of Agriculture, 127 IBLA 1 (July 12, 1993)

SURVEYS OF PUBLIC LANDS--Continued

GENERALLY--Continued

Surveys by FS do not constitute official surveys of the public lands of the United States, as the authority to conduct such surveys and resurveys is vested solely in the Secretary of the Interior, who in turn has delegated this authority to BLM.

Where location of a corner cannot be determined from evidence of original accessories, proportionate measurement is a suitable means to determine the corner. Ordinarily, such determination will be set aside only if an appellant establishes by a preponderance of the evidence that BLM used an improper proportioning methodology or that the corner exists.

Volney Bursell, 130 IBLA 55 (July 19, 1994)

AUTHORITY TO MAKE

A decision rejecting a protest of a BLM survey of lands which have been conveyed to a Native corporation will be reversed. Authority to survey the public lands is generally restricted to lands where the U.S. holds legal title.

Bay View, Inc., 126 IBLA 281 (June 7, 1993)

DEPENDENT RESURVEYS

Statements offered to show that a missing quarter section corner was not lost but obliterated lacked probative value where the witnesses had no knowledge of the original corner monument or its accessory.

Where original topographic calls are ambiguous, location of an original corner may not be made in reliance on topography alone.

Where location of a corner cannot be determined from evidence of original monument or accessory and original topographic calls are ambiguous, proportionate measurement is proper to determine corner location.

Boise Cascade Corp., Dewey L. Annon, Margaret L. Annon, 115 IBLA 327 (Aug. 7, 1990)

One challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

Where there was no evidence that an old fence was built to a corner established by the original survey, and there was no proof that the old fence started or ended at established corners of the original survey, it was properly determined that the fence did not perpetuate an original corner location.

Where location of a corner cannot be determined from evidence of original accessories, and original topographic calls are ambiguous, proportionate measurement is a suitable means to determine the corner.

James O. Steambarge, 116 IBLA 185 (Oct. 4, 1990)

BLM properly dismissed a protest of a dependent resurvey of the southern boundary of a Spanish land grant that was unsupported by evidence tending to show that the Department failed to properly perpetuate the location of the southeastern and southwestern corners of the grant, as determined by a survey approved in 1894 by the U.S. Court of Private Land Claims.

Ojo Caliente Craftsmen, Inc., 126 IBLA 290 (June 8, 1993)

The purpose of a dependent resurvey is to trace and reestablish the lines of the original survey in their true and original positions of the original corners. Where a party challenging the filing of a plat for a dependent resurvey fails to meet his burden of establishing by a preponderance of the evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey, the decision dismissing a protest of the dependent resurvey will be affirmed.

An allegation that a dependent resurvey is void because it impairs bona fide rights is without merit where the record shows that the dependent resurvey is an accurate retracement and reestablishment of the lines of the original survey. Where rights to land are based on patents grounded on the original survey, the dependent

resurvey will not affect the location of any boundary lines as it is, by definition, a restoration of the original conditions of the official survey.

John W. & Ovada Yeargan, 126 IBLA 361 (June 29, 1993)

An appeal from a decision of BLM denying a protest against a BLM dependent resurvey of corners along a section line by the owners of private land that is tied to one of those corners is properly dismissed for lack of standing where the appellants' land is entirely surrounded by private land and the resurvey only determined the boundaries of distant public land, as they are not adversely affected by BLM's affirmance of the resurvey.

Ron & Margery A. Martin, 130 IBLA 238 (Aug. 5, 1994)

A patentee takes title to land described in his patent, as surveyed on the ground at the time of patent. A successor-in-interest to a portion of land conveyed will not be permitted to overturn the dependent resurvey of the boundaries of the patent on the basis that the description in the patent encompassed other or different land than the land intended to be patented.

In the absence of evidence of an original corner of the public land survey, the location of the lost corner is properly determined by means of proportionate measurement in a dependent resurvey. A BLM decision denying a protest of the resurvey on the basis of a local corner asserted to be a perpetuation of the lost corner will be affirmed where the preponderance of the evidence including distances and directions to natural and artificial landmarks indicate that the local corner is not a reliable perpetuation of the survey corner.

Lorna L. Boykin, Reynold L. Allgood, 130 IBLA 301 (Aug. 31, 1994)

SURVEYS OF PUBLIC LANDS--Continued

DEPENDENT RESURVEYS--Continued

An appeal from a decision of BLM denying a protest against a BLM dependent resurvey of a boundary between two townships by the owners of private land that borders that boundary is properly dismissed for lack of standing where the appellants' land is entirely surrounded by private land and the resurvey only determined the boundaries of distant public land, as they are not adversely affected by BLM's affirmance of the resurvey.

James C. Boussios, Sonia Boussios, 130 IBLA 342 (Sept. 13, 1994)

An official dependent resurvey by BLM of an 1891 survey that found one of the original quarter corners was not shown to be in error by reference to a conflicting quarter corner monument erected in the course of an unofficial survey run by surveyors for the FS.

Dan Ogle et al., 131 IBLA 129 (Oct. 25, 1994)

The Board will dismiss an appeal from a BLM decision dismissing a protest of the section line adopted in dependent resurveys where the appellant fails to demonstrate that he has been adversely affected by such dismissal since he has no legally cognizable interest which will be affected by BLM's placement of the line.

Robert M. Sayre, 131 IBLA 337 (Dec. 27, 1994)

OMITTED LANDS

An unsurveyed island, whether located in navigable or non-navigable waters, remains public domain, does not pass with the bed under the water to a state upon statehood or convey with a grant of riparian land, and may be surveyed and disposed of by the United States.

A railroad patent to the State of Michigan describing "all of section one" does not convey an unsurveyed island within the meander lines of a lake, whether navigable or non-navigable, located within

SURVEYS OF PUBLIC LANDS--Continued

OMITTED LANDS--Continued

sec. 1, and the United States may properly survey such island.

Northern Michigan Exploration Co., 114 IBLA 177 (Apr. 23, 1990) 97 I.D. 171

An island, whether located in navigable or non-navigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

Mr. & Mrs. Thomas J. Dekker, 114 IBLA 302 (May 10, 1990)

The general rule regarding lands patented according to an official plat of survey showing a meander line along a lake or other body of water is that the actual shoreline rather than the meander line is the boundary, the meander line being intended to ascertain the approximate acreage in the fractional subdivision. An exception to this rule arises where the lands are omitted from the official plat of survey because of gross error or fraud in establishing the meander line.

Where BLM attempts to establish that lands were omitted from an officially filed original survey as a result of gross error or fraud, it may prove by clear and convincing evidence that the original survey was grossly in error. However, it need only demonstrate by a preponderance of the evidence that the omitted land was land in place at the time of the original survey and was similar to the surveyed land at that time.

Analysis of whether a particular omitted lands case falls within the general rule or the gross error exception requires the application of various judicially evolved factors to the specific facts of the case. The three specific factors pertinent to this analysis include: (1) the size of the parcel involved, including the size of the parcel as shown by the original survey, the relative size of the new area disclosed by the more recent survey, and the magnitude of the original surveyor's error as measured by the amount of unsurveyed land in the surrounding area as a whole, with the greatest weight being given to the relative

SURVEYS OF PUBLIC LANDS--Continued

OMITTED LANDS--Continued

size of the omitted tract; (2) the intent of the surveyor; and (3) the nature and value of the land at the time of the survey.

Lawyers Title Insurance Corp. v. Bureau of Land Management, 117 IBLA 63 (Dec. 3, 1990)

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and the actual water line is deemed to be the omitted land and the property of the United States.

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document purporting on its fact to convey the claimed land to the applicant or the applicant's predecessors. If the land sought is omitted land lying adjacent to a lake, and the document relied upon described the land in accordance with a Government survey showing the land as lakeshore property, such a document purports on its fact to convey the claimed land.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

The Secretary of the Interior is authorized and obligated to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States. An island, whether located in navigable or nonnavigable waters, that is omitted from a public land survey remains public land and may be surveyed and disposed of by the United States.

In determining whether a land mass was an island omitted from an original public land survey, the inquiry focuses on the existance and condition of the land at

SURVEYS OF PUBLIC LANDS--Continued

OMITTED LANDS--Continued

the time of the original survey. Evidence concerning its condition at later times is relevant only to the extent it reflects on the status of the land at the critical time.

Exxon Corp., et al. v. Bureau of Land Management, 118 IBLA 38 (Feb. 21, 1991)

TAYLOR GRAZING ACT
(See also Grazing Leases, Grazing Permits & Licenses)

A decision by BLM to grant a sheep grazing application subject to restrictions in order to facilitate multiple-use management objectives by keeping a portion of an allotment off limits to domestic sheep so that it might be available for the introduction of bighorn sheep, will not be disturbed absent substantial evidence showing that the decision is improper.

Joe Saval Co. v. Bureau of Land Management, State of Nevada, Department of Wildlife (Intervenor), 119 IBLA 202 (May 7, 1991)

Unless there is specific direction to the contrary, lands acquired by the United States under the Taylor Grazing Act are not open for location of mining claims under 30 U.S.C. § 22 (1988).

Phillip A. Davis, 131 IBLA 14 (Sept. 22, 1994)

TIDELANDS

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in

TIDELANDS--Continued

lands presently and actually occupied by the United States under claim of right."

The Supreme Court has articulated a two-pronged test to determine whether a Federal reservation of public land defeats a state's equal footing entitlement: (1) that Congress clearly intended to include land beneath navigable waters (or tideland) within the reservation and (2) affirmatively intended to defeat future state title to such land.

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

TIMBER SALES AND DISPOSALS

BLM may properly proceed with a proposed timber sale where the environmental assessment adequately considered all relevant matters of environmental concern, including the impact of clearcutting and road-building on moose and elk populations, the hydrologic and vegetative character of the sale area and water quality in local streams, and where the finding that the sale would not significantly affect the human environment was supported by the record and was reasonable.

G. Jon & Katherine M. Roush, 112 IBLA 293 (Jan 9, 1990)

An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. However, the Board does not automatically dismiss every case where the action sought to be prevented by the filing of an appeal has taken place; we have recognized that dismissal of a particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal of the appeal would tend to preclude the issue from ever being reviewed. Even assuming an issue involving a timber

TIMBER SALES AND DISPOSALS--Continued

sale could be recurring, where it is not evasive of review, a motion to dismiss for mootness may be granted.

In re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51 (Apr. 6, 1990)

A protest of a BLM timber sale received more than 15 days after publication of the notice of sale or the notice of decision is not timely filed and is properly denied per the terms of 43 CFR 5003.3(c).

In re Fire Fly Timber Sale, 114 IBLA 94 (Apr. 12, 1990)

A BLM decision denying a protest of a proposed timber sale will not be distrubed on appeal where appellant fails to establish that BLM did not adequately consider matters of environmental concern, such as the threat of soil erosion posed by road building and the cumulative impacts of continued timber harvesting, and appellant has failed to meet its burden of showing error in the BLM decision.

Oregon Natural Resources Council, 115 IBLA 179 (July 3, 1990)

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of clear reasons for modification or reversal. When an appellant has challenged a timber sale located in an area of critical environmental concern on the basis that the sale is allegedly inconsistent with the applicable management plan, but such inconsistency has not been established, the timber sale shall be allowed to occur.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere

differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

A decision to proceed with a timber sale will not be reversed due to an alleged failure to consider cumulative impacts in the sale EA where the EA is tiered to a programmatic EIS which adequately considered the cumulative impacts.

In re Grassy Overlook Timber Sale, 115 IBLA 359 (Aug. 14, 1990)

The Secretary is vested with discretionary authority to dispose of timber upon revested Oregon and California Railroad and Reconveyed Coos Bay Wagon road grant lands. Recognizing that, having been granted this broad discretionary authority, the Secretary is afforded a great deal of latitude, this Board will normally affirm a Departmental exercise of this authority, unless the appellant or record demonstrates an abuse of discretion or that the action taken was prohibited by law. When a high bidder in a timber sale does not return the contract and other documents, or file a written request for doing so, it is proper for BLM to terminate all rights and privileges in and to the timber described in the proposed timber sales contract and reject a subsequent request for an extension of time to submit the required documents.

C & B Logging, 116 IBLA 81 (Sept. 10, 1990)

Provision of the Department of the Interior and Related Agencies Appropriations Act, 1989, 102 Stat. 1774 (Sept. 27, 1988), restricting "judicial review" to "particular activities" does not affect the authority of the Board of Land Appeals to consider timber sale appeals.

An appeal from a decision denying a protest against a timber sale will not be dismissed as moot even though the protested action has occurred, where issues raised by the appeal are capable of repetition and where failure to decide the appeal would cause substantial issues to evade review.

The Copco timber sale is reviewable as a specific action proposed to implement part of the Jackson-Klamath Sustained Yield Units Ten Year Management Plan.

A decision to proceed with a timber sale will not be disturbed on appeal where it has not been established that there was a failure to consider relevant matters of environmental concern, such as impacts on soils, water quality, and wildlife, or that the decision was unsupported by the record or contrary to law or fact.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)

BLM properly denies a protest to a proposed timber sale where it has, in the course of its entire presale environmental review, fully considered all of the probable environmental impacts, both site-specific and cumulative, of the sale and concluded that no significant environmental impact will result which has not already been considered in an applicable environmental impact statement, and the appellant has failed to demonstrate otherwise.

Where, following a BLM decision denying a protest to a proposed timber sale and an appeal thereof, the U.S. Fish and Wildlife Service lists the northern spotted owl as a threatened species and BLM suspends the sale contracts pending the outcome of consultations with the U.S. Fish and Wildlife Service, the Board will set aside the BLM decision and remand the case to BLM for further review of the effect of the listing.

A series of approved timber sales will not be considered to constitute a taking of a migratory bird prohibited by sec. 2 of the Act of July 3, 1918, as amended, 16 U.S.C. § 703 (1988), where there is no evidence that the cutting of old-growth timber so degrades the environment as to lead to the death of any migratory bird.

Allowing the harvesting of timber on O&C lands does not violate the broad principle of multiple-use management governing BLM's actions under the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. §§ 1701-1784 (1988), where such land is, instead, to be managed for permanent forest production

pursuant to the Act of Aug. 28, 1937, as amended, 43 U.S.C. §§ 1181a-1181f (1988).

Oregon Natural Resources Council, 116 IBLA 355 (Nov. 5, 1990)

A re-offering of a timber sale is a discretionary action and is a decision subject to protest pursuant to 43 CFR 5003.3. However, the doctrine of administrative finality precludes review of issues which could have been reviewed at the time of the first offering but were not, and of issues on which a final decision was made at the time of the first offering.

Oregon Natural Resources Council, 120 IBLA 261 (Aug. 21, 1991)

The sale of timber by BLM does not involve a "taking" of migratory birds under the Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988). This Act was not intended to include habitat modification or degradation among its prohibitions.

The O&C Act makes clear that the primary use of O&C lands is for timber production to be managed in conformity with the principle of sustained yield. BLM did not err in construing the O&C Act as establishing timber production as the dominant use, notwithstanding the provisions of FLPMA calling for multiple use.

Where appellants protest a timber sale because of BLM's failure to address in an EA the impacts of the sale on the marbled murrelet, a robin-sized bird proposed for listing as threatened, the decision may be affirmed where the record on appeal fails to discluse any impact to the murrelet from the salvage sale of dead and blown-down timber.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

It is proper for BLM to deny a protest to a proposed timber sale when it has fully considered all of the probably site-specific and cumulative environmental impacts of the sale (including the impact on the Northern spotted owl, a Federally listed threatened species) and concluded that there will be no significant environmental impact not previously considered in an applicable EIS, and the appellant has failed to demonstrate otherwise.

It is proper for BLM to deny a protest to a proposed timber sale based on a contention that the sale was devised in accordance with an overall BLM strategy for the interim protection of the Northern spotted owl (a Federally listed threatened species) generally called the Jamison Strategy, if BLM has fully complied with sec. 7(a)(2) of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536(a)(2) (1988), and there is no evidence that if an alternative strategy had been adopted the effect of the sale upon the owl would be any different.

In re Cedar Pot Thinning Sale et al., 122 IBLA 53 (Jan. 9, 1992)

It is proper for BLM to deny a protest to a proposed timber sale contending that BLM failed to consider the impact of permitted overstory removal, salvage operations, and road building on the Pacific yew and that the proposed timber sale does not conform with appliable State office policy regarding management of the yew when BLM specifically reserved the yew from cutting in the sale contract, and the protestant submits no evidence that the sale may adversely affect the yew or that BLM is not abiding by its stated policy.

In re Grizzly Knob Timber Sale, 122 IBLA 155 (Feb. 4, 1992)

When all other challenges to a proposed timber sale have been resolved by Federal court action and the record, as supplemented on appeal, establishes that BLM fulfilled all of its reponsibilities to conserve the Northern spotted owl (designated as threatened during the pendency of the appeal) imposed by the Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531-1543

(1988), the Board will affirm BLM's decision to proceed with the sale.

Headwaters, Inc., 122 IBLA 362 (Mar. 20, 1992)

One appealing the denial of a protest to a timber sale and the attendant EA must affirmatively demonstrate why the decision was in error. Mere disagreement with the timber sale without substantial evidence showing the sale violates or is inconsistent with management policies is insufficient to show error. Likewise, it is the timber sale implementing the timber management plan which is the specific action that may be reviewed for compliance with the pertinent statutes and regulations, and challenges to the general management policies and recommendations found in the timber management plan are beyond the Board's review.

In re Bare Nelson Timber Sale, 126 IBLA 93 (Apr. 21, 1993)

The provisions of 43 CFR 4.21(a), 58 FR 4942-43 (Jan. 19, 1993), govern the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." The regulations governing the administration of forest management decisions, including timber sale decisions, 43 CFR Part 5000, contain a "pertinent regulation" that meets the exception of 43 CFR 4.21(a). Under 43 CFR 5003.1, "[t]he filing of a notice of appeal under part 4 of this title shall not automatically suspend the effect of a decision governing or relating to forest management as described under subparts 5003.2 and 5003.3," and upon denial of a protest, the authorized officer may proceed with implementation of the decision. 43 CFR 5003.3(f).

A decision by BLM denying a protest of a timber sale may be affirmed where the SOR filed in support of an appeal merely repeats, with little change, arguments raised in the protest and fails to present any new issues or point out any error in the decision appealed from, and the BLM decision is comprehensive and fully addresses each of the arguments contained in the protest.

In Re Eastside Salvage Timber Sale, 128 IBLA 114 (Dec. 20, 1993)

A protest of a timber sale that was not received by BLM within 15 days following advertisement of the sale against which it was directed was properly rejected because it was untimely filed.

Idaho Conservation League, 131 IBLA 11 (Sept. 22, 1994)

A decision denying a protest of a timber sale which is not timely filed is properly affirmed under the relevant regulations. When modification of a timber sale is announced after awarding the initial sale contract, a protest of the sale amendment may be timely filed.

Under the doctrine of administrative finality, when a party has had an opportunity to obtain administrative review of a timber sale and the EA on which it is based and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in a later case except upon a showing of compelling legal reasons such as a violation of basic rights of the parties or the need to prevent an injustice. In the case of a modification or addition to a timber sale, reconsideration of the sale is ordinarily barred except to the extent of environmentally significant modifications or changed circumstances occurring between the time of the two sales.

Oregon Natural Resources Council, 131 IBLA 180 (Nov. 3, 1994)

An EA of a timber sale which is limited to site-specific considerations and tiered to a previously approved management plan and FEIS may be reviewed for compliance with applicable statutes, regulations, and policies. However, challenges to the general management policies found in the previously approve RMP are beyond the Board's review.

It is proper for BLM to deny a protest of a proposed timber sale if, in the course of its environmental review, it has fully considered the probable site-specific and cumulative environmental impacts and a reasonable range of alternatives, and has concluded that there will be no significant environmental impact not previously addressed in an applicable EIS.

In re Suce Creek Timber Sale, 131 IBLA 206 (Nov. 9, 1994)

TOWNSITES

The regulation at 43 CFR 2565.7, governing conveyance of residual townsite lots which are unoccupied at the time of subdivisional survey, provides for conveyance to the municipality upon proof of incorporation. Application of this regulation to preclude conveyance to an unincorporated Native village has been held inconsistent with the Native Townsite Act and, hence, the regulation is not properly applied to the Native townsites to bar conveyance to the Native village.

Native Village of Circle, 114 IBLA 377 (May 24, 1990)

Because the Alaska Townsite Trustee has no authority to withdraw land from settlement under the townsite laws in favor of a joint venture composed of two Native village corporations, such an attempted withdrawal does not preclude the timely initiation and occupancy of townsite claims by other individuals.

Where a townsite claimant stakes a claim and moves a house onto the claim and occupies it prior to revocation of the townsite laws by the Federal Land Policy and Management Act of 1976, and the record shows the claimant's expressed intent to occupy the entire claim, he has established an entitlement to that claim.

Marlin L. Virg-in, City of St. Mary's, 117 IBLA 285 (Jan. 16, 1991)

Mining claims located on land described by a townsite patent are properly declared null and void where the claimants, after being offered the opportunity to present evidence to show that their mining claims embrace lands within mining claims that were valid on the date of the townsite patent, fail to present proof that there was a valid discovery of a valuable mineral deposit on any such claims on the date of the townsite patent.

Norman R. Blake, Mildred L. Blake, 119 IBLA 141 (Apr. 25, 1991)

TOWNSITES--Continued

Where a decision of the Alaska Townsite Trustee, approving one of two conflicting applications for the same townsite lot, is based on a state divorce decree, rather than on the statutes and regulations governing townsites in Alaska, that decision will be vacated and remanded for a determination of who occupied the lot or was entitled to occupancy thereof on the date of approval of the final subdivisional survey.

Joe L. Herbert, 128 IBLA 13 (Nov. 3, 1993)

TRESPASS

GENERALLY

Under 30 U.S.C. § 42 (1982), the proprietor of a mining claim may appropriate nonmineral ground as a millsite for mining, milling, or other operations in connection with such claim. Occupancy of a millsite claim for purposes not related to mining operations constitutes a trespass.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

BLM may properly require the removal of structures unintentionally erected in trespass upon public land.

Sharon R. Dayton, 117 IBLA 162 (Dec. 13, 1990)

A decision determining back rental for a period of unauthorized use of a site used as an oil well servicing facility will be set aside and remanded where the record fails to establish how BLM arrived at the determination of past annual fair market rental value.

Sierra Production Service, 118 IBLA 259 (Mar. 11, 1991)

TRESPASS--Continued

GENERALLY--Continued

Where the record does not show that a trespasser lacked good faith, or acted unreasonably or irresponsibly, but demonstrates instead that he removed materials from a gravel pit on the basis of erroneous advice from a BLM official, a BLM assessment of trespass damages based on willfulness will be set aside and remanded for recalculation on the basis of innocent trespass.

Western States Contracting, Inc., 119 IBLA 355 (June 18, 1991)

A BLM decision notifying the occupant of public land of the initiation of trespass proceedings and requiring the removal of unauthorized property, based on the fact that the holder of a life estate occupancy lease for the land in question had relinquished the lease, will be set aside where the record shows that the land was the subject of a mining claim properly recorded with BLM in 1982 and questions exist regarding present ownership of the claim and whether occupancy of the claim is reasonably incident to mining.

Mr. & Mrs. Michael Bosch, 119 IBLA 370 (June 26, 1991)

Any use or occupancy of the public lands such as for radio broadcasting which requires a right-of-way or temporary use permit, which use has not been authorized, is prohibited and shall constitute a trespass for which the trespasser is liable for administrative costs, damages, and penalties under the regulations at 43 CFR 2801.3.

An assessment of damages for a willful trespass is properly affirmed where appellant's conduct constituted a voluntary or conscious trespass in that the evidence shows appellant knew of the lack of authority to use the public lands for communication site purposes.

High Desert Communications, Inc., 123 IBLA 20 (Apr. 24, 1992)

TRESPASS--Continued

GENERALLY--Continued

A for-profit corporation which does not qualify for the free use of mineral materials under the provisions of the Materials Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1988), and its implementing regulations, 43 CFR Part 3600, is properly cited for trespass for the unauthorized removal of mineral materials when it removes aggregate from a BLM pit without prior payment in violation of the terms of its material sales contract and 43 CFR 3610.1-3, even though it asserts that it was told by BLM personnel that it would not have to pay royalty for the material since the material was to be used on a BLM road-surfacing project. Reliance on such representations, although insufficient to grant appellant rights not authorized by law, may, however, demonstrate that the trespass was innocent, not willful, and an assessment of triple damages for such trespass will be set aside and the case remanded for reevaluation of the appropriate measure of damages.

So. Way Co., dba Southway Construction Co., Inc., 123 IBLA 122 (May 21, 1992)

A mining claimant who constructs a road and clears land in a WSA in connection with a post-FLPMA mining claim violates 43 CFR 3802.1-1 by failing to file a plan of operations and receive approval prior to beginning work. Such unauthorized actions constitute a trespass under 43 CFR 2801.3.

A mining claimant who constructs a road across public lands in connection with a mining claim without filing a notice of such action with BLM violates 43 CFR 3809.1-3(a). Such construction is unauthorized and constitutes a trespass under 43 CFR 2801.3.

A mining claimant who violates 43 CFR 3802.1 by constructing a road in a WSA in conjunction with a mining claim without filing and receiving approval of a plan of operations or who violates 43 CFR 3809.1-3(a) by contructing an access road across public lands to a mining claim without filing a notice of such action with BLM is liable for the costs of rehabilitating and stabilizing such lands and for costs incurred by the United States in the investigation and termination of such trespass.

Karry K. Klump, 123 IBLA 377 (July 23, 1992)

TRESPASS--Continued

GENERALLY--Continued

Where the record raises a question of fact regarding whether an individual, charged by BLM under 43 CFR 2920.1-2(a) with the costs of removing structures allegedly placed in trespass on public lands, was responsible for their construction or use, the case will be referred for a hearing on that question.

John H. Peterson, 125 IBLA 267 (Feb. 17, 1993)

A statute establishing time limitations for the commencement of judicial actions for damages on behalf of the U.S. does not limit administrative proceedings within the DOI.

A trespasser is properly considered willful where the trespasser ignores its mineral materials sales contract's authorized quantity and expiration date and removes mineral material in excess of the stated contract amount over a 5-year period after the contract expires.

Bolling Construction Co. & Bob Bolling, 125 IBLA 303 (Mar. 16, 1993)

The regulations at 43 CFR 3603.1 and 43 CFR 9239.0-7 prohibit the removal of mineral material except when authorized by a sale or permit issued under the Materials Act and Departmental regulations. A finding that no trespass occurred because BLM authorized the removal of gravel by means other than issuance of a permit or sales contract will be reversed.

When BLM has indicated to a trespasser that gravel extraction operations may continue, there is no basis for concluding that the continued operations were unreasonable or lacked good faith. Absent evidence showing knowledge that the violation is occurring or a reckless disregard for whether a violation is occurring, there is no justification for imposing what are essentially punitive damages for willful trespass. In such a case the Board will find, in the interest of fundamental fairness, that BLM is precluded from charging that the operator, who remained in trespass with permission to

TRESPASS--Continued

GENERALLY--Continued

continue operations, but absent formal authorization, was in willful trespass.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

Where it is clear that lands on which a dam, pond, and field are situated are Federal lands and that no right-of-way or temporary use permit was issued either to place the dam or pond on those lands or to cultivate them, a trespass exists.

Enclosing public lands by fencing them is itself an act of trespass. It is axiomatic that no legal entitlement is created by illegally enclosing lands. Thus, the fact that Federal lands on which the improvements were made may have been fenced as though they belonged to a person is not significant in determining whether there was a trespass.

Where unrebutted evidence shows that BLM never advised a trespasser (in writing or orally) that a pending land exchange application would resolve all outstanding trespasses, and where it was clear both from a notice of realty action published in the Federal Register and from the issuance of patent that lands where an agricultural trespass was ongoing were not in fact covered by the exchange, BLM is not estopped from prosecuting either that agricultural trespass or the subsequent construction in trespass of a dam and pond on the same public lands. The trespasser, as the exchange applicant, properly bore the burden of bringing the question of the ownership of the lands covered by the agricultural trespass into the exchange negotiations.

BLM may properly require the removal of improvements constructed in trespass on public lands, even where placed without knowledge of the trespass, as part of its authority to require a trespasser either to rehabilitate lands harmed by the trespass or to pay the costs incurred by the United States in doing so.

Double J Land & Cattle Co., Peter A. Jaffe, 126 IBLA 101 (Apr. 21, 1993)

TRESPASS--Continued

GENERALLY--Continued

When a mineral materials purchase and sales contract expire, subsequent removal of mineral material is an act of trespass.

CM Concepts of Nevada, 126 IBLA 134 (May 4, 1993)

Use of a road on Oregon and California lands for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

When the record does not support the calculation of fees for the unauthorized use of a road and of penalties under 43 CFR 2801.3(b)(2) and (c), the calculation of liability will be set aside and remanded.

Larry D. Olson, 126 IBLA 229 (May 24, 1993)

The unauthorized removal of material (topsoil) from public lands under the jurisdiction of the DOI is an act of trespass.

BLM's determination of the volume of material removed in trespass is properly affirmed where it is amply supported by the record, where BLM has supported its conclusions with a thorough exposition of its methodology, and where the appellant fails to establish error in the methodology BLM used to collect data and its interpretation of that data to determine the amount of material removed from the site. Appellant's anecdotal evidence concerning observations of conditions at the site is insufficient to overcome BLM's documented survey of those conditions.

Anyone properly determined by BLM to be in trespass is liable to the U.S. under 43 CFR 2801.3(b), among other things, for either rehabilitating the lands harmed by the trespass or for the costs incurred by the U.S. in so doing.

Absent controlling State law, damages for an unintentional trespass involving removal of topsoil are the market value of the severed material less the expenses of severing it. Where the record does not contain a clear application of that rule, in that BLM did not take into account the expenses of severing the topsoil, BLM's

TRESPASS--Continued

GENERALLY--Continued

decision is properly set aside and the case remanded to do so.

Pine Grove Farms, 126 IBLA 269 (June 3, 1993)

BLM may properly require the removal of structures unintentionally erected in trespass on public land. A party erecting a cabin in trespass on the public lands is liable for the administrative expenses incurred in dealing with the trespass as well as the fair market value rental of the land for the period of trespass.

James W. Bowling, 129 IBLA 52 (Mar. 25, 1994)

Where there is no substantial dispute that a purchaser of materials under a materials sale contract removed more bank material than the amount authorized by contract after the expiration date of that contract, an act of trespass has occurred and the unauthorized user is liable for damages to the United States. Where the purchaser has not effectively challenged BLM's computation of the volume removed in excess of the authorized amount, BLM's decision is properly affirmed. In the absence of controlling State law, the appropriate measure of damages is the in-place value of the material, as previously determined following hearing, in the absence of additional evidence showing that relevant circumstances have changed since the hearing date.

An area-wide appraisal assigning a value to representative sand and gravel deposits located in a BLM resource area is a master appraisal. In appraisal cases where BLM attempts to implement the comparable use method of valuation by using a master appraisal, the Board seeks to determine whether the material subject to appraisal actually conforms to the representative material. It is improper for BLM to apply a master appraisal without making a thorough comparison of various factors considered in appraising the representative material, and a BLM decision using a master appraisal to establish value of materials is insufficient where the master appraisal acknowledges that there are significant potential differences in sand and gravel found in the resource area, the record fails to demonstrate any relationship between the materials being appraised and the master appraisal, and there is no indication that the specific materials at issue matched

TRESPASS--Continued

GENERALLY--Continued

the comparable factors identified in BLM's appraisal of the representative material.

An assessment of damages for intentional trespass against the purchaser of sand and gravel under a materials sale contract because he processed and removed materials after expiration of the contract is properly reversed where the terms of the contract provide that title to the materials pass to the purchaser when he has paid for the materials and they are extracted, and those terms suggest that "removal" of materials after expiration of the contract is not trespass; where the contract does not expressly provide for reversion of title to the materials to the United States; and where the purchaser has in fact tendered payment and extracted the material.

Extraction of sand and gravel bank material beyond amounts authorized by sales contract and after expiration thereof is intentional trespass where BLM repeatedly expressly warned that removal of material would constitute trespass. However, where the record is unclear as to how much material was removed, the decision setting damages is properly set aside and remanded for clarification.

Richard C. Nielson (dba Nielson Sand and Rock), 129 IBLA 316 (May 27, 1994)

A written statement admitting that construction work had been performed on a road across Federal land providing access to mining claims was not the prior notice to BLM required by 43 CFR 3809.1-3(a), but instead supported issuance of a notice of noncompliance pursuant to 43 CFR 3809.3-2(a).

Reimbursement of administrative costs incurred by BLM to investigate and reclaim a mining access road, water pipeline, and reservoir constructed without authorization on public land was properly required under right-of-way regulation 43 CFR 2801.3.

Wayne D. Klump, 130 IBLA 98 (Aug. 2, 1994)

TRESPASS--Continued

GENERALLY--Continued

Removal of mineral material without a sales contract or permit issued under the Materials Act and Departmental regulations is an act of trespass. When trespass damages are based on the "value in place" that would have been paid had the mineral material been removed under contract, the assessment of trespass damages is in accord with rulings governing damages for unintentional trespass.

Wesley Corp., 130 IBLA 311 (Sept. 2, 1994)

MEASURE OF DAMAGES

Pursuant to 43 CFR 2920.1-2(a)(1) anyone determined to be in trespass on public lands shall be liable for the administrative costs incurred by the United States as a consequence of the trespass. When the record on appeal does not support all of the administrative costs assessed by BLM, the assessment will be reduced to reflect only those costs supported by the record.

Sharon R. Dayton, 117 IBLA 162 (Dec. 13, 1990)

The proper measure of damages for intentional conversion of decorative building stone taken from Federal lands in the State of Colorado is the value of the stone without deduction for extraction costs. The measure of damages to be used is derived from state law, in the absence of Federal law authorizing imposition of a different rule.

Consistent with Colorado law, damages for intentional trespass involving stone on Federal lands require payment of full value of the stone taken without deduction for labor or expense in removing and marketing the stone.

John Aloe & Liberty Masonry, Inc., 117 IBLA 298 (Jan. 17, 1991)

TRESPASS--Continued

MEASURE OF DAMAGES--Continued

If payment is required for use of the public lands, either with or without prior approval of the Department, a fair market rental value determination must be made pursuant to 43 CFR 2920.

Fair market rental value may be assessed from a flat rate fee schedule established by BLM appraisal staff.

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)

The provisions of 43 CFR 2920.1-2 concerning trespass do not apply to violations of 43 CFR 8372.0-7(a) governing special recreation permits. Rather, the appropriate penalties are provided by 43 CFR 8372.0-7(b).

Summit Quest, Inc., 120 IBLA 374 (Sept. 19, 1991)

Any use or occupancy of the public lands such as for radio broadcasting which requires a right-of-way or temporary use permit, which use has not been authorized, is prohibited and shall constitute a trespass for which the trespasser is liable for administrative costs, damages, and penalties under the regulations at 43 CFR 2801.3.

An assessment of damages for a willful trespass is properly affirmed where appellant's conduct constituted a voluntary or conscious trespass in that the evidence shows appellant knew of the lack of authority to use the public lands for communication site purposes.

High Desert Communications, Inc., 123 IBLA 20 (Apr. 24, 1992)

When the vegetative material severed from the land in trespass is so far from the area permitted under a

TRESPASS--Continued

MEASURE OF DAMAGES--Continued

vegetative material sale contract that the act is reasonably deemed to be a conscious performance of a prohibited act or indifference to or reckless disregard of the law, BLM may assess damages for a willful trespass, pursuant to 43 CFR 9239.1-3(a).

Under 43 CFR 9239.1-3, when applicable State laws do not impose a higher penalty, the trespasser may be assessed three times the value of the timber or other vegetative materials severed or removed. By this imposition of treble damages the trespasser is required to: (1) reimburse the United States for the value of the lost timber or vegetative resource, and (2) pay the penalty assessed under 43 CFR 9239.1-3 in an additional amount equal to two times that value. The value to be used for this determination is the value of the timber or vegetative material at the time of the trespass, i.e., when severed or removed from the public lands.

J. W. Weaver, 124 IBLA 29 (Aug. 21, 1992)

When the record supports a finding that the purchaser under a mineral materials sale contract committed a willful trespass by removing sand and gravel in excess of the volume limitation in the contract, a BLM levy of trespass damages determined in accordance with applicable state law will be affirmed.

Frehner Construction Co., Inc., 124 IBLA 310 (Nov. 4, 1992)

A trespasser is properly considered willful where the trespasser ignores its mineral materials sales contract's authorized quantity and expiration date and removes mineral material in excess of the stated contract amount over a 5-year period after the contract expires.

Bolling Construction Co. & Bob Bolling, 125 IBLA 303 (Mar. 16, 1993)

TRESPASS--Continued

MEASURE OF DAMAGES--Continued

Absent clearly controlling state law, damages for unintentional gravel trespass may be based on either the value of the gravel in place or market value at the site of the processed gravel, less the expenses of severing and processing it, whichever is greater.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

Anyone properly determined by BLM to be in trespass is liable to the United States for (1) reimbursement of all costs incurred by the United States in the investigation and termination of a trespass; (2) the rental value of the lands for the time of the trespass; and (3) either rehabilitating the lands harmed by the trespass or for the costs incurred by the United States in so doing. Where a trespasser does not take issue with the details of BLM's assessment of liability, and that assessment is in accordance with those principles, the assessment is properly affirmed.

BLM may properly require the removal of improvements constructed in trespass on public lands, even where placed without knowledge of the trespass, as part of its authority to require a trespasser either to rehabilitate lands harmed by the trespass or to pay the costs incurred by the United States in doing so.

Double J Land & Cattle Co., Peter A. Jaffe, 126 IBLA 101 (Apr. 21, 1993)

Evidence of knowledge that a violation is occurring or a reckless disregard for whether a violation is occurring is essential to a finding of willful trespass. Standing alone, knowledge that specific behavior is regulated will not support a finding that the violation was willfully committed or a finding that it was committed with reckless disregard. The test is the trespasser's actual intention at the time of the violation.

The rule of damages applied for mineral materials trespass is the measure of damages prescribed by the laws of the state in which the trespass is committed.

TRESPASS--Continued

MEASURE OF DAMAGES--Continued

Both statutes and state court decisions prescribing mineral trespass damages are applicable.

CM Concepts of Nevada, 126 IBLA 134 (May 4, 1993)

When the record does not support the calculation of fees for the unauthorized use of a road and of penalties under 43 CFR 2801.3(b)(2) and (c), the calculation of liability will be set aside and remanded.

Larry D. Olson, 126 IBLA 229 (May 24, 1993)

Anyone properly determined by BLM to be in trespass is liable to the U.S. under 43 CFR 2801.3(b), among other things, for either rehabilitating the lands harmed by the trespass or for the costs incurred by the U.S. in so doing.

Absent controlling State law, damages for an unintentional trespass involving removal of topsoil are the market value of the severed material less the expenses of severing it. Where the record does not contain a clear application of that rule, in that BLM did not take into account the expenses of severing the topsoil, BLM's decision is properly set aside and the case remanded to do so.

Pine Grove Farms, 126 IBLA 269 (June 3, 1993)

A determination to assess damages for removal of sand and gravel from Federal lands made by a contractor who lacked a contract of sale with BLM for the materials taken was properly assessed as a willful trespass. An unrelated transaction involving an earlier expired materials contract with BLM did not establish that the trespass was innocent so as to justify assessment at a lesser rate.

Hess Construction Co., 126 IBLA 353 (June 29, 1993)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987) (See also Appeals)

ADMINISTRATIVE REVIEW AND APPEALS

The price for which tenant-owned real property improvements may be acquired is not reviewable under appeals procedures applicable to relocation assistance benefits claims.

Uniform Relocation Assistance Appeal of Humboldt Fish & Game Club, & Each Member Thereof, 9 OHA 161 (May 15, 1992)

UNIFORM REAL PROPERTY ACQUISITION POLICY

Generally

Attorney fees incurred by the owners of real property because of a condemnation proceeding brought by the United States to acquire that property are not reimbursable litigation expenses under the Act and the Department's implementing regulation where the real property concerned was transferred to the United States under an agreed-upon settlement of the condemnation proceedings.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Drew H. Arndt, 9 OHA 15 (Mar. 21, 1991)

Expenses Incidental to Transfer of Title to the United States

A claim for reimbursement of real property transfer taxes paid in connection with conveyance of title to real property acquired by the U.S., filed after the time allowed for filing by Departmental regulation, is properly denied as untimely.

Uniform Relocation Assistance Appeal of Mrs. Gretchen Bain (Trustee), 10 OHA 98 (July 22, 1993)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM REAL PROPERTY ACQUISITION POLICY--Continued

Expenses Incidental to Transfer of Title to the United States--Continued

Real estate taxes assessed against a 10-year term reserved use estate in a portion of the acquired lands are not reimbursable as expenses incidental to the transfer of title to the United States under sec. 303 of the Uniform Act, as amended, and Departmental regulations in 49 CFR 24.106.

Uniform Relocation Assistance Appeal of Mr. Richard A. Heath, 10 OHA 188 (Mar. 10, 1994)

UNIFORM RELOCATION ASSISTANCE

Generally

Where appellants fail to establish entitlement to reimbursement for actual reasonable moving and related expenses under sec. 202(a)(1) of the Act in an amount greater than that allowed in the decision appealed from, the decision will be affirmed.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Leslie Sisco, Sr., 8 OHA 134 (Jan. 12, 1990)

Where claimants commenced occupancy of an office-residence structure on acquired lands after the property had been acquired by the United States and subsequently moved therefrom upon termination of their occupancy by the Park Service, claimants did not move as a result of the acquisition of the property by the United States and, consequently, they do not qualify as displaced persons and are not eligible for benefits under the Act and the Department's implementing regulations.

Uniform Relocation Assistance Appeal of Mr. & Mrs. John Watt, 9 OHA 181 (Aug. 28, 1992)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Generally--Continued

A relocation assistance benefits claim which is filed within the 6-month limitations period provided in a court order is timely filed.

Relocation assistance benefits claims filed several years after the claimant's displacement from the Government-acquired property concerned are properly denied as untimely under Departmental regulation 49 CFR 24.207(d).

A relocation assistance benefits claim for moving and related expenses incurred as a result of displacement from Government-acquired property will remain denied, on the basis of collateral estoppel, where the claimant has received a court judgment in full settlement for such moving and related expenses.

Uniform Relocation Assistance Appeals of Terra Vista Estates Inc., 10 OHA 1 (Apr. 27, 1993)

A relocation assistance benefits claim which is filed within the 6-month limitations period provided in a court order is timely filed.

A relocation assistance benefits claim for moving and related expenses incurred as a result of displacement from Government-acquired property will remain denied, on the basis of collateral estoppel, where the claimant has received a court judgment in full settlement for such moving and related expenses.

Uniform Relocation Assistance Appeals of The DeFranco Co., Inc., 10 OHA 20 (May 18, 1993)

Where claimants commenced occupancy of Government-acquired property after the property was acquired by the U.S. and subsequently moved therefrom upon expiration of a reserved residential right of use and occupancy of the property, the claimants did not move as a result of the acquisition of the property by the U.S. and consequently they do not qualify as displaced persons and are not eligible for moving benefits under sec. 202 of the

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Generally--Continued

Uniform Act and the Department's implementing regulations.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Edward L. Rant, 10 OHA 36 (June 28, 1993)

Moving and Related Expenses

Generally

Costs for business insurance on the displacement property and for rental of premises to which the business was relocated are not compensable as moving expenses under the Uniform Act, as amended, and the Department's regulations. Such expenses, being related to the business use of the properties concerned, are properly borne by the owners of the business as business-related expenses.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Joseph F. Wallace, 8 OHA 222 (Sept. 14, 1990)

Where claimants have not established on appeal that they are entitled under the law and the Department's regulations to a greater payment for moving and related expenses than that allowed by the Bureau in the decision appealed from, the Bureau decision will be affirmed.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Ralph L. Chase, 8 OHA 237 (Nov. 26, 1990)

Where appellants have not established on appeal that they are entitled under the law and the Department's regulations to a greater payment for moving and related expenses than that determined to be allowable in the decision appealed from, the determination will be affirmed.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Lightle Samsel, 9 OHA 8 (Feb. 28, 1991)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving and Related Expenses--Continued

Generally--Continued

Where appellant has not established entitlement under the law and the Department's regulations to a greater payment for moving and related expenses than that allowed by the Park Service in the decisions appealed from, the Park Service decisions will be affirmed.

Uniform Relocation Assistance Appeals of Thomas B. Wilson (President), Yachts America, Inc., 9 OHA 59 (May 3, 1991)

Where appellant has not shown error in the determination of the Fish and Wildlife Service upon appellant's claim for moving and related expenses and the administrative record supports the determination made, the Fish and Wildlife Service determination will be affirmed.

Uniform Relocation Assistance Appeal of Humboldt Fish & Game Club, & Each Member Thereof, 9 OHA 161 (May 15, 1992)

Payments in Lieu of Moving and Related Expenses

Fixed Payment(s)

Taking of Business Operation

Where appellants fail to establish entitlement to a fixed payment for displacement from a business in an amount greater than that allowed in the decision appealed from, and the record evidence supports the determination made, the decision appealed from will be affirmed.

Uniform Relocation Assistance Appeal of Joel A. & Susan B. Lord, 9 OHA 170 (June 9, 1992)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Replacement Housing Payment for Homeowners

Generally

Replacement housing differential payment benefits are properly disallowed where claimants, who were displaced from a mobile home on a rented homesite, relocated to a conventional dwelling with homesite which property cost more than that required for purchase of a mobile home replacement residence comparable to claimants' displacement residence, including the difference in rental costs for a comparable replacement homesite for a period of 4 years and 48 times the monthly rental for the Government-acquired site on which claimants' displacement mobile home was situate.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Leslie Sisco, Sr., 8 OHA 134 (Jan. 12, 1990)

Where appellants have not established on appeal that they are entitled under the law and the Department's regulations to a greater payment for replacement housing differential costs than that determined to be allowable in the decision appealed from, the determination will be affirmed.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Lightle Samsel, 9 OHA 8 (Feb. 28, 1991)

A claim for housing price differential payment benefits is properly denied where a comparable housing survey of the area within reasonably close proximity to the Government-acquired property shows that the claimants could have purchased comparable replacement property at a price less than was paid for the acquired property.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Gerald C. Caugh, 9 OHA 99 (Oct. 31, 1991)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Replacement Housing Payment for Homeowners--Continued

Last Resort

When the record shows appellants have been paid the difference between the reasonable cost of a comparable replacement dwelling and the acquisition cost of the Government-acquired dwelling, appellants' claim for a supplemental payment over and above the amount they have received is properly denied.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Robert L. Skinner, 10 OHA 110 (Aug. 31, 1993)

Replacement Housing Payment for Tenants and Certain Others

A claimant for rental replacement housing payment benefits under § 204 of the Uniform Act, as amended, must show by sufficient evidence that the displacement residence was occupied by her as her permanent or customary and usual residence for not less than 90 days immediately prior to the initiation of negotiations for acquisition of the property by the United States.

Where claimant fails to submit sufficient evidence to establish her entitlement to rental replacement housing payment benefits under § 204 of the Uniform Act, as amended, and the decision appealed from is supported by the administrative record, disallowance of the claim will be affirmed.

Uniform Relocation Assistance Appeal of Mrs. Irene H. Span, 8 OHA 216 (Aug. 27, 1990)

WATER AND WATER RIGHTS

GENERALLY

A BLM decision to issue a right-of-way grant for an irrigation ditch and associated structures will be affirmed on appeal when based on a reasoned analysis of all relevant factors, including the threat to the human environment from potential breaches of the ditch and to the rights of downstream water users from the diversion

WATER AND WATER RIGHTS--Continued

GENERALLY--Continued

of water, and provided the decision was made with due regard for the public interest and sufficient reasons for disturbing the decision have not been shown.

Daryl Richardson et al., 125 IBLA 132 (Jan. 15, 1993)

RECLAMATION PROJECTS

Filings by the United States

When it becomes necessary to protect the water supply of a Federal reclamation project, the United States is obligated and entitled to make filings in general stream adjudications on behalf of project water rights to which the United States holds legal title.

The United States is not obligated to make water rights filings or present evidence of beneficial use on behalf of individual water users. In addition, when the United States files in general stream adjudications in states that do not distinguish between storage rights and rights to receive water, it has no evidentiary burden to carry for the individual water users. However, by making the filings of Reclamation project water rights held in its name, the United States protects its interest in the project water rights, and the project water rights users are afforded the opportunity to protect their water rights, based on their ability to establish beneficial use of water.

Filings of Claims for Water Rights in General Stream Adjudications, M-36966 (July 6, 1989) 97 I.D. 21

STATE LAWS

Neither the decrees governing the water rights involved, nor provisions of state law provide an inherent bar to the acquisition by the Secretary of water rights for use at Stillwater for wildlife purposes; however, the State Engineer may find factual reasons for disapproving an individual change of use or change of place of use application.

Authority to Provide Water to Stillwater Wildlife Management Area, M-36967 (July 10, 1989) 97 I.D. 32

WATER POLLUTION CONTROL
(See also Environmental Quality, Hearings)

GENERALLY

In determining whether a saltwater disposal well is leaking, the Bureau of Indian Affairs may consider as probative evidence the results of an Environmental Protection Agency mechanical integrity test of the well which is conducted pursuant to that agency's Underground Injection Control program under the Safe Drinking Water Act, 41 U.S.C. § 300h (1982).

Linda Mashunkashey Kays v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 431 (Sept. 17, 1990)

WILD AND SCENIC RIVERS ACT

In denying a right-of-way authorizing motorized access to private property across lands included in a wild and scenic river area, BLM acted contrary to sec. 12(b) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1283(b) (1982), and the implementing regulations at 43 CFR 8351.2-1, since the record established that appellants and their predecessors have historically used motorized vehicles in reaching their property.

Alvin R. Platz et al., 114 IBLA 8 (Mar. 30, 1990)
97 I.D. 125

"Providing an unauthorized trip." Where the holder of a special recreation permit for commercial use of a wild and scenic river, during the 1987 period of regulated use of the river, put boats into the water on the day of a scheduled river trip, but did not load passengers and begin the scheduled trip downriver until 2 days later, the trip was unauthorized as that term is used by an operating plan governing such excursions.

The holder of a special recreation permit for commercial use on a wild and scenic river may be required to forfeit two scheduled trips where it is established the permittee provided an unauthorized trip by starting a trip on an unscheduled date without reporting his

WILD AND SCENIC RIVERS ACT--Continued

departure as required by an operating plan made part of his permit.

Galand Haas, 114 IBLA 198 (Apr. 24, 1990)

Under 43 CFR 3809.1-4(b)(2), an approved plan of operations is required prior to commencing any operation except casual use in areas designated as a potential addition or an actual component of the national wild and scenic rivers system.

The general requirement of 16 U.S.C. § 1274(b) (1988), that the boundaries of each component of the national wild and scenic rivers systems designated by 16 U.S.C. § 1274(a) (1988), shall include an average of not more than 320 acres per mile on both sides of the river does not apply to river areas that Congress has specifically defined by reference to a map.

Because Departmental regulation 43 CFR 3809.1-4(b)(2) requires approval of a plan of operations prior to commencing any operation except casual use in areas designated as a potential addition to the national wild and scenic rivers system as well as actual components thereof, any operation within the boundaries on a map identified as a river area under 16 U.S.C. § 1274(b) (1988), have been completed, even though the map includes land in addition to the area indicated when the river was listed as a potential addition under 16 U.S.C. § 1276 (1988).

Joe Trow, 123 IBLA 96 (May 12, 1992)

Where BLM's decision not to transfer commercial use privileges to noncommercial use on the wild section of the Rogue River is supported by the record, sound management policies, and applicable precedent, it will not be disturbed on appeal.

Nat'l Organization for River Sports, 124 IBLA 38 (Aug. 26, 1992)

WILD AND SCENIC RIVERS ACT--Continued

BLM properly required the operator of a placer mining claim to conform suction dredging operations in a river designated for potential addition to the national wild and scenic rivers system and related occupancy to a modified plan of operations because such operations do not constitute casual use under 43 CFR 3809.0-5 (1991).

Pierre J. Ott, 125 IBLA 250 (Feb. 11, 1993)

A determination by BLM that approval of an APD to drill a natural gas well will not eliminate a river from eligibility for potential inclusion within the National Wild and Scenic River System, pursuant to sec. 5(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1276(d) (1988), is supported by the record where there is no evidence in the record that drilling the well in question would adversely affect all the river's outstandingly remarkable values so as to render it ineligible for consideration.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

A BLM decision to implement a wild and scenic river management plan including a FONSI decision will be affirmed on appeal if the decision is based on a consideration of all relevant factors, including an evaluation of the impacts on fisheries resources, is supported by the record, and accords with statutory directives, absent a showing of clear reasons for modification or reversal.

A party challenging a FONSI finding must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Steamboaters, Oregon Rivers Council & Oregon Trout, Inc., Douglas County (Intervenor), 131 IBLA 223 (Nov. 17, 1994)

WILD FREE-ROAMING HORSES AND BURROS ACT

A document that is styled as a "protest" is nevertheless a notice of appeal where the person filing it has been a party in a dispute and challenges BLM's decision to repossess a wild horse.

A Private Maintenance and Care Agreement for a wild horse is properly cancelled and the horse is properly repossessed by the Federal Government where there is sufficient evidence of improper care of the adopted horse to establish that the adopter violated the terms of the agreement by "inhumanely treating" the horse, in that it was allowed to suffer stress and injury owing to action or failure to act that was not compatible with animal husbandry practices accepted in the veterinary community.

Where the record establishes that a wild free-roaming horse that has been placed for adoption was found in a deteriorated condition, the burden of proving that the horse was in satisfactory condition rests with the adopter. This burden is not met by uncorroborated assertions and statements of neighbors as to the general well-being of the horse.

Under 43 CFR 4760.1(d), BLM may, in its discretion, give a would-be adopter of a wild horse a reasonable amount of time to complete required corrective actions in lieu of immediate repossession of the horse and cancellation of the Private Maintenance and Care Agreement, or may elect to repossess the horse immediately. Where the record establishes that the horse was suffering from inhumane treatment on the date of repossession, it was properly repossessed and the agreement properly cancelled.

Under paragraph 9 of BLM's Private Maintenance and Care Agreement for the adoption of wild horses, made generally applicable by 43 CFR 4760.1(a), any foal born after the adoption of a wild horse is the property of the adopter. However, the adoption of a wild horse is not final until certificate of title is issued, so that any foal born to a horse prior to issuance of certificate of title for that horse is not the property of the adopter and, where the horse has been subjected to inhumane treatment, possession of the foal is properly taken by BLM.

Authority for fining criminal violators of the regulations governing adoption of wild horses is distinct from the administrative remedies found therein. The fact that BLM did not present evidence at a criminal proceeding does not affect the validity

of its evidence in the administrative proceeding, and the acquittal of a person on the criminal charge does not preclude the Department from invoking administrative remedies, including repossession of the horse and cancellation of the Private Maintenance and Care Agreement.

Thana Conk, 114 IBLA 263 (May 9, 1990)

BLM may properly cancel a Private Maintenance and Care Agreement for an adopted wild horse when there is sufficient evidence of improper care of the horse to establish that the adopter violated the terms of the Agreement.

Kathleen Chapman, 115 IBLA 59 (June 12, 1990)

The Board will set aside a BLM decision to remove wild horses from a herd management area where removal is not properly predicated on an appropriate determination that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1982).

Animal Protection Institute of America, 116 IBLA 239 (Oct. 16, 1990)

The Board will affirm a BLM decision to remove wild horses from a herd management area where removal is predicated on an anlysis of grazing utilization, trend in range condition, actual use, and other factors, which demonstrate that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1988).

Animal Protection Institute of America, 117 IBLA 4 (Nov. 20, 1990)

Under 43 CFR 4750.5(b), BLM is required to transfer title to a wild horse when, after 12 months, the adopter has complied with the terms and conditions of the private maintenance and care agreement and the authorized officer determines, based on a field inspection, or the adopter provides a certification of a qualified official, that the animal has received proper care and humane treatment. However, when, prior to transfer of title, the adopter sells the animal in violation of the terms and conditions of the agreement, BLM may properly cancel the agreement.

G. W. Elliott, 117 IBLA 134 (Dec. 4, 1990)

Where evidence of record tends to show the condition of adopted horses and/or burros is such as to threaten their continued survival, the burden is upon the adopter challenging cancellation of the adoption agreement and repossession of the animals to show that the condition was not due to any conduct or neglect on his part. A hearing may be ordered where the record presents issues of material fact.

George Gilchrist et al., 117 IBLA 142 (Dec. 11, 1990)

A BLM decision to gather wild free-roaming horses from within and outside a wild horse herd management area will be affirmed on appeal when: (1) a conclusion that the dormant season utilization levels have exceeded the utilization levels called for in an approved resource management plan is supported by field-monitoring data; (2) the actual size of the wild horse herd exceeds an appropriate management level identified in approved land-use plans; and (3) it is necessary to remove the "excess" horses to restore and maintain a thriving natural ecological balance to the range and protect it from deterioration associated with overpopulation.

Animal Protection Institute of America, 117 IBLA 208 (Dec. 21, 1990)

WILD FREE-ROAMING HORSES AND BURROS ACT--Continued

The Board will affirm a BLM decision to remove wild horses from a herd management area where removal is predicated on an analysis of grazing utilization, trend in range condition, actual use, and other factors, which demonstrate that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1988).

Departmental regulation 43 CFR 4710.4 requires wild horse management to be undertaken with the objective of limiting the animals' distribution to herd areas, which are defined as "the geographic area identified as having been used by a herd as its habitat in 1971." 43 CFR 4700.0-5(d).

The decision to remove wild horses from an area of the public lands is properly remanded where the record fails to establish that the horses are excess, i.e., that removal of the horses is necessary to establish a thriving natural ecological balance and multiple-use relationship in that area.

Animal Protection Institute of America, 118 IBLA 20 (Feb. 15, 1991)

When an appellant merely urges some other course of action which may be theoretically as correct as that chosen by BLM, this Board will not overturn a BLM decision to gather excess wild horses. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. In cases involving an expert's interpretation of data, it is not enough that the party objecting to the determination demonstrates that another course of action or interpretation is available or that the proposed course of action is also supported by the evidence. The appellant must demonstrate by the preponderance of the evidence that the BLM expert erred when collecting the underlying data, when interpreting that data, or in reaching the conclusion.

Animal Protection Institute of America et al., 118 IBLA 63 (Feb. 22, 1991)

WILD FREE-ROAMING HORSES AND BURROS ACT--Continued

Where BLM issues a single multiple-use decision regarding both adjustment of livestock grazing privileges, which has been appealed to an ALJ pursuant to 43 CFR 4.470, and wild horse removal, which has been appealed to the Board under 43 CFR 4770.3, the wild horse appeal may properly be referred to the ALJ to the extent it involves factual issues for hearing and consideration together with the grazing appeal.

Animal Protection Institute of America, Roy Shurtz, 118 IBLA 345 (Mar. 13, 1991)

When BLM determines in its land-use planning process to remove wild horses from a grazing allotment and, following notice to interested parties, implements that plan, a challenge to a subsequent BLM decision allocating grazing use in the allotment, by a party who received notice of the removal, on the basis that wild horses were improperly removed and should be relocated into the allotment, is untimely.

Animal Protection Institute of America, 120 IBLA 342 (Sept. 12, 1991)

BLM may properly cancel private maintenance and care agreements for wild horses and repossess the horses when there is sufficient evidence of improper care of the adopted animals to establish that the adopter violated the terms of the agreement.

Vickie L. Fontenot, Allen J. Fontenot, Jr., 120 IBLA 47 (Oct. 22, 1991)

The Board will affirm a decision establishing the appropriate management level suitable for a herd management area where the decision is predicated on an analysis of monitoring data such as grazing utilization, trend in range condition, actual use, and other factors, which demonstrate that maintenance of the herd at the prescribed levels of horse population will restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1988). When an appellant merely urges some other course of action which may be theoretically as correct as that chosen by BLM, this Board will not substitute its judgment for that of

the Department's experts, but will rely on their reasoned analysis. In cases involving the interpretation of data, the appellant must demonstrate by the preponderance of the evidence that the BLM expert erred when collecting the underlying data, when interpreting the data, or in reaching the conclusion.

Animal Protection Institute of America et al., 122 IBLA 290 (Mar. 5, 1992)

The decision to remove wild horses from an area of the public lands is properly reversed where the record fails to establish that the horses are excess; that is to say, that removal of the horses is necessary to establish a thriving natural ecological balance.

Animal Protection Institute of America, 124 IBLA 231 (Oct. 28, 1992)

BLM may properly cancel private maintenance and care agreements for wild horses and repossess the horses when there is sufficient evidence of improper care of the adopted animals to establish that the adopter violated the terms of the agreement.

Freddie R. Mason, 126 IBLA 28 (Apr. 13, 1993)

The Wild Free-Roaming Horses and Burros Act authorizes the Secretary to make excess wild horses available for private maintenance and care by qualified individuals. An applicant must have no prior conviction for inhumane treatment of animals or for violation of the Act or its implementing regulations.

A BLM decision rejecting an application to adopt a wild horse on the ground that an applicant has violated a regulation implementing the Wild Free-Roaming Horses and Burros Act will be set aside if the applicant has not been convicted of the violation as provided in 43 CFR 4750.3-2(a)(2), and a substantial issue exists as to the applicant's responsibility for the violation. The regulation contemplates that issues of culpability

will be resolved in a proceeding that would lead to a conviction rather than an appeal to this Board.

A person who has expressed an intent to commercially exploit an animal after receiving title is not a qualified applicant. When determining whether an applicant is qualified it is proper for BLM to ascertain an applicant's long-term intent in order to assure that the horse's humane treatment and care will continue after title transfers.

Marvin Cook, 126 IBLA 158 (May 10, 1993)

BLM properly cancelled a private maintenance and care agreement for a wild or free-roaming burro upon receiving proof that the animal subject to the agreement was in a deteriorated condition. Evidence offered by the burro's custodian to establish that a genetic defect was the cause of the burro's observed hoof condition was not adequate to overcome contrary medical evidence based on an actual examination of the adopted burro where the evidence of genetic defect offered by the adopter related to other animals not covered by the maintenance agreement.

John P. Wiley, 126 IBLA 261 (June 2, 1993)

BLM properly canceled a private maintenance and care agreement for three wild horses and took possession of a remaining wild free-roaming horse where the record established that the adopter violated the terms of his agreement by selling the other two horses before title to them was issued by BLM.

Darby L. Ryland, 126 IBLA 371 (June 30, 1993)

The provisions of 43 CFR 4.21(a), 58 FR 4939, 4942-43 (Jan. 19, 1993), govern the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." Because 43 CFR 4770.3(c) authorizes BLM to place into full force and effect a decision to remove wild horses from public or private land regardless of an appeal, the effect of such removal decisions pending appeal are controlled by that regulation, not 43 CFR 4.21(a), and BLM's failure to place

such a decision into full force and effect effectively stays the removal decision pending appeal.

Michael Blake et al., 127 IBLA 109 (Aug. 12, 1993)

The effectiveness of a BLM decision to round up and remove wild horses during the pendency of an appeal to the Board of Land Appeals is controlled by 43 CFR 4770.3(c), not by 43 CFR 4.21(a) (58 FR 4942-43 (Jan. 19, 1993)). Where BLM fails to place its roundup decision into full force and effect on a specified date, pursuant to 43 CFR 4770.3(c), and a notice of appeal of that decision is timely filed, it is error for BLM to proceed with the roundup, as the effect of BLM's decision is stayed during the appeal period and pending the Board's ruling on the appeal.

An appeal from a BLM decision to round up horses is not moot, even though the horses have been removed, as remedies are available (even apart from returning the same horses to the range) if BLM's decision is found to be in error. BLM may be directed to allow the population of wild horses to return to its former numbers or to repopulate the range with other animals taken from its holding areas. Further, the appeal is not moot, as it is capable of repetition, in that the population of wild horses may return in time to former numbers through propagation of the remaining horses.

Animal Protection Institute of America, 128 IBLA 90 (Dec. 10, 1993)

A decision to make proportionate reductions in livestock and wild horse use that was based on monitoring, research, and analysis of usage of the public lands and was shown to have been made in consideration of the condition of the affected range in terms of available forage was properly affirmed.

Animal Protection Institute of America, 128 IBLA 150 (Jan. 13, 1994)

A decision to gather wild horses from a herd management area in order to avert deterioration of the range and to pursue a thriving natural ecological balance in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1988), is properly affirmed where the record demonstrates that the decision is based upon a reasonable analysis of data collected on an ongoing basis.

Audubon Society of Portland et al., 128 IBLA 370 (Mar. 11, 1994)

The Private Maintenance and Care Agreement and 43 CFR 4750.4-1(e) require financially responsible adopters to assure the proper care and treatment of horses covered by the Agreement. When the person providing care for an animal being adopted for the adopting party informs BLM that the person adopting the animal has not paid care and maintenance bills, and that the person providing care will no longer care for the animal, BLM is justified in cancelling the Agreement and repossessing the animal.

Mark L. Williams, 130 IBLA 45 (July 12, 1994)

A BLM decision cancelling private maintenance and care agreements and repossessing a wild burro and a wild horse is properly affirmed where the evidence establishes that the adopter violated the adoption agreement and the applicable regulation requiring adopter to notify BLM within 7 days of discovery of an animal's escape; that a subsequent adoption was obtained without notice to BLM of the impoundment by animal control authorities of the escaped animal; and the record indicates that the animals were maintained under conditions which threatened their welfare.

Larry Pulley, 131 IBLA 7 (Sept. 22, 1994)

A BLM decision notifying the adopter that his wild horses had been repossessed and cancelling his private maintenance and care agreement will be reversed where the record on appeal contains insufficient evidence of

WILD FREE-ROAMING HORSES AND BURROS ACT--Continued

improper care or abandonment of the adopted animals or any other failure to comply with the terms of the agreement sufficient to justify such action.

It is error for BLM to repossess a wild horse and allow it to be readopted prior to notice to the original adopter of the repossession of the horse and cancellation of the private maintenance and care agreement. Such action by BLM defeats the ability of the adopter to reclaim the repossessed animal through the administrative review process.

Noel Benoist, 131 IBLA 138 (Oct. 31, 1994)

BLM's decision to gather wild horses will be affirmed where it is based upon appropriate management levels for herd management areas based on analysis of grazing utilization, trend in range condition, actual use, and observational data demonstrating that maintenance of the herd at the prescribed levels of horse population will restore and maintain the range in a thriving natural ecological balance and prevent deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act.

Animal Protection Institute of America, 131 IBLA 175 (Nov. 2, 1994)

WILDERNESS ACT

While Congress has prohibited the Secretary from issuing mineral leases for lands within a wilderness study area under 30 U.S.C. § 226-3(a) (Supp. V 1987), Congress also provided that nothing in this section shall affect any authority of the Secretary to issue permits for exploration by means not requiring construction of roads or improvement of existing roads if such activity is conducted in a manner compatible with the preservation of the wilderness environment. 30 U.S.C. § 226-3(b) (Supp. V 1987).

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

WILDERNESS ACT--Continued

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)

A request for extension of a right-of-way for a culinary water well and related facilities within a wilderness study area is properly denied where the holder does not overcome BLM's determination that the extension will violate BLM's mandatory nonimpairment criteria.

The City of St. George, 116 IBLA 230 (Oct. 16, 1990)

Approval of a mining plan of operations providing for surface occupancy of mining claims by the claimant was inconsistent with a decision requiring that he remove structures and personal property from the claims by June 1989. To support a finding that surface occupancy of the claims exceeded the manner and degree of use to which the claims were put prior to Oct. 21, 1976, within the meaning of 43 U.S.C. § 1782(c) (1988), the record must indicate whether there was surface occupancy of the claims on or before that date.

Edmund Key, 117 IBLA 274 (Jan. 16, 1991)

In order to demonstrate error in a BLM decision to eliminate an inventory unit from further consideration as a wilderness study area pursuant to secs. 201 and 603 of FLPMA, 43 U.S.C. §§ 1711 and 1782 (1988), an appellant must point out not only that BLM failed to follow proper procedures but also that the record does not support BLM's substantive conclusions and that a different determination might result from reassessment.

In assessing the presence or absence of wilderness characteristics in an inventory unit, BLM necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal and

such judgments may not be overcome simply by expressions of disagreement.

Neither NEPA, 42 U.S.C. § 4332 (1988), nor the Endangered Species Act, 16 U.S.C. § 1536 (1988), contains directives which BLM must observe in evaluating the wilderness characteristics of an area. That evaluation is conducted pursuant to relevant provisions of FLPMA and the Wilderness Act.

The Wilderness Society et al., 119 IBLA 168 (May 1, 1991)

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

A protest against sale of oil and gas leases that contends the sale should not proceed because the land to be leased has wilderness characteristics is properly dismissed because the final administrative determination that the land was not wilderness in character was made in 1985 when BLM and the Board decided not to include the land at issue in a WSA.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 17 (Jan. 2, 1992)

Failure to appeal a decision designating an area as a WSA renders it final and precludes a party from later challenging it on appeal of a subsequent BLM decision approving a road restoration project within the WSA.

A BLM decision approving a road restoration project in a WSA will be sustained on appeal notwithstanding the fact that it may not be possible to restore all roads

within the WSA to a substantially unnoticeable condition, as to hold otherwise would defeat legislative intent demonstrated in FLPMA and the Wilderness Act.

San Juan County Commission, 123 IBLA 68 (May 11, 1992)

It is within BLM's authority to require an owner of a tract of private land within a designated widerness area to obtain a lease of lands used for vehicular access to the inholding pursuant to sec. 302(b) of FLPMA, 43 U.S.C. § 732(b) (1988).

If the appraisal setting fair market rental value fails to consider the effect of restrictive clauses limiting the use and enjoyment of the leased land on the fair market rental value, the appraisal will be set aside and the case file will be remanded to consider rental reductions reflecting those restrictions.

Mathilda B. Williams, Jack F. Brown, 124 IBLA 7 (Aug. 13, 1992)

A determination by an authorized officer that dredging operations capable of moving over 2,400 yards of earth annually within the meaning of 43 CFR 3809.0-5 from the Merced River did not constitute "casual use" was not overcome by an allegation that less than 5 acres of land would be disturbed by such activity.

A reclamation bond was properly required for operations conducted within a wild and scenic river study area pursuant to a plan of operations. 43 CFR 3809.1-9(b).

Lloyd L. Jones, 125 IBLA 94 (Jan. 8, 1993)

A BLM decision notifying a claimant that continued occupancy of mining claims is unauthorized, requiring reclamation of the site, and demanding the removal of a mobile home, generators, and other personal property from mining claims because the property is located within a WSA is properly affirmed where the IMP provides that any temporary impacts must be removed and reclaimed

WILDERNESS ACT--Continued

by June 30, 1989, the date the Secretary was scheduled to send his recommendation on that WSA to the President.

Virgil Schuette, 131 IBLA 332 (Dec. 22, 1994)

WILDLIFE REFUGES AND PROJECTS
(See also Exchanges of Land, Migratory Bird Conservation Act)

GENERALLY

The Secretary may withdraw wildlife refuge lands regardless of the date on which the lands were placed in the National Wildlife Refuge. However, sec. 1410 does not authorize the Secretary to withdraw park or refuge lands located outside the boundaries of the original ANCSA withdrawals.

Authority of the Secretary to Withdraw Land Within National Parks & Wildlife Refuges for Selection by Underselected Alaska Native Village Corporations, M-36972 (Oct. 16, 1991) 100 I.D. 163

ADMINISTRATION

A Cooperative Wildlife Habitat-Farming Development Agreement negotiated under the Sikes Act, as amended by the Act of Oct. 18, 1974, 16 U.S.C. § 670g (1988), was properly cancelled when the state agency responsible for monitoring the agreement reported and inspection revealed that there had been a failure to seed, irrigate, and maintain the lands as agreed. An unsupported allegation that facts supporting the decision were not correct was insufficient to overcome the presumption that conditions reported by the public officials were as stated in the record.

George W. Anthony, 119 IBLA 332 (June 18, 1991)

WILDLIFE REFUGES AND PROJECTS--Continued

LEASES AND PERMITS

Noncompetitive oil and gas lease offers filed prior to Nov. 14, 1983, for any lands which are part of a unit of the National Wildlife Refuge System outside of Alaska may not be adjudicated pending promulgation of regulations explicitly authorizing the leasing of such lands, a hearing on such regulatory revisions, and preparation of an environmental impact statement as required by the terms of P.L. 98-151, § 137, 97 Stat. 964, 981 (1983). Such offers are properly suspended pending compliance with the statutory requirements.

Lowell J. Simons, 114 IBLA 284 (May 9, 1990)

WITHDRAWALS AND RESERVATIONS

GENERALLY

To establish that a location of a mining claim made after withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of this claim subject to the withdrawal; that the person making the amended location had an unbroken chain of title with the original locators; and that the location predating the withdrawal was properly made.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Duane L. & Wyoma I. Pearson et al., 113 IBLA 393 (Mar. 28, 1990)

WITHDRAWALS AND RESERVATIONS--Continued

GENERALLY--Continued

Congress has limited the exercise of the authority to make, modify, extend, or revoke withdrawals to the Secretary and individuals in the Office of the Secretary, appointed by the President by and with the advice and consent of the Senate, to whom he has delegated his authority. Unless the order making a withdrawal specifies when it terminates, lands remain withdrawn until the Secretary or his properly authorized delegate issues a formal order published in the Federal Register. A resource management plan is properly distinguished from an order revoking a withdrawal.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)

A mining claim located on land withdrawn under a first-form reclamation withdrawal pursuant to the Act of June 17, 1902, is null and void ab initio. A first-form reclamation withdrawal effective before Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the 1902 Act. The Mining Claims Rights Restoration Act of 1955 does not confer a right to enter and locate mining claims on lands withdrawn under a first-form reclamation withdrawal.

Glenn Freeman, Judith L. D. Freeman, 116 IBLA 105 (Sept. 17, 1990)

An unapproved prospecting permit application to prospect for quartz in the Ouachita National Forest in Arkansas is properly rejected where, by virtue of sec. 323 of P.L. 100-446, 102 Stat. 1774, 1827 (Sept. 27, 1988), all quartz deposits on acquired lands within the operation of Reorganization Plan No. 3 of 1946 in the forest were removed from and were made subject to disposition as common varieties under the Materials Act of 1947 (61 Stat. 681).

Lee Roy Newsom et al., 117 IBLA 386 (Feb. 13, 1991)

WITHDRAWALS AND RESERVATIONS--Continued

GENERALLY--Continued

A placer mining claim was properly declared null and void because it was located on land withdrawn from mining when the claimants failed to show that they had an unbroken chain of title to locators of a claim located prior to withdrawal.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

AUTHORITY TO MAKE

Where a statute withdrawing public lands expressly provides that the withdrawal and segregation of the public lands shall terminate on a date certain and, further, that the withdrawal may not be extended or renewed except by Act of Congress, a mining claim located on the lands after expiration of the withdrawal is not properly invalidated on the ground that the land was not opened by a public land order issued by the Secretary.

Richard Bargen, 117 IBLA 239 (Jan. 3, 1991)

Because the Alaska Townsite Trustee has no authority to withdraw land from settlement under the townsite laws in favor of a joint venture composed of two Native village corporations, such an attempted withdrawal does not preclude the timely initiation and occupancy of townsite claims by other individuals.

Marlin L. Virg-in, City of St. Mary's, 117 IBLA 285 (Jan. 16, 1991)

A PLO, issued in 1963 pursuant to the authority of the Act of June 25, 1910, ch. 421, 36 Stat. 847 (1910), did not withdraw the land described therein from location for gold because sec. 2 of that Act provided that lands withdrawn under its authority were to remain open under the mining laws for metalliferous minerals.

James Aubert et al., 130 IBLA 50 (July 13, 1994)

EFFECT OF

Where BLM declares a mining claim null and void ab initio to the extent that it overlaps a prior powersite withdrawal and BLM has not considered the effect of 30 U.S.C. § 621 (1982), on the powersite withdrawal, the Board will set aside BLM's decision and remand the case for further action.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)

The Board will affirm BLM's rejection of State selection applications filed for land which, at the time of selection, was withdrawn by a public land order from State selection pursuant to sec. 17(d)(1) of the Alaska Native Claims Settlement Act, where the question of the validity of the order was determined as a result of the dismissal with prejudice of a prior judicial proceeding in which the order was expressly challenged, and as a result of an agreement between the appellant and the United States not to challenge the order in the future.

State of Alaska, 113 IBLA 86 (Feb. 13, 1990)

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a withdrawal or segregation of lands pursuant to a first-form reclamation withdrawal, thereby reinstating the terms of the withdrawal, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

EFFECT OF--Continued

A mining claim located on lands previously statutorily withdrawn by the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (1988), is null and void ab initio.

David R. Clark, 119 IBLA 367 (June 21, 1991)

A BLM decision declaring lode mining claims null and void ab initio because they were located on land withdrawn by the President on Oct. 12, 1910, pursuant to sec. 1 of the Act of June 25, 1910, ch. 421, 36 Stat. 847, will be reversed if it cannot be shown that the claims were located solely for nonmetalliferous minerals.

A BLM decision declaring lode mining claims null and void ab initio because they were located on land subject to a Nov. 23, 1910, GLO coal-land classification order will be set aside if BLM has not afforded the claimant an opportunity to dispute the coal-land classification.

Jonathan Z. Herod et al., 121 IBLA 339 (Dec. 13, 1991)

The fact that land is withdrawn and may be unavailable for conveyance to a Native group is unrelated to the factual determination of the group's locality.

Minchumina Homeowners Ass'n et al., State of Alaska (Intervenor) v. Minchumina Natives, Inc. & The Bureau of Indian Affairs, 122 IBLA 375 (Apr. 2, 1992)

In order to defeat a future state's title to submerged lands, the two-pronged test articulated in Utah Div. of State Lands v. U.S., 482 U.S. 193 (1987), must be successfully applied. That test requires that: 1) Congress clearly intended to include land under navigable waters within the reservation and 2) affirmatively intended to defeat future state title to such land. This test does apply to the P.L.O 82 withdrawal.

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

That the text and purpose of P.L.O. 82, by its broad and all-inclusive language, clearly intended to include lands underlying navigable waters.

Where the Executive intended through P.L.O. 1621 to defeat Alaska's future title to submerged lands within the boundaries of the National Petroleum Reserve Numbered 4, and the proposed boundaries of the Arctic National Wildlife Refuge, and that Congress affirmed this executive intent in sec. 6(e) of the Alaska Statehood Act.

Where sec. 11(b) of the Alaska Statehood Act is an express retention of lands for military purposes within the meaning of sec. 5(a) of the Submerged Lands Act.

This supplemental decision modifies the findings in M-36911 and harmonizes them with the Supreme Court decision in Utah Div. of State Lands v. U.S., 482 U.S. 193 (1987).

Ownership of Submerged Lands in Northern Alaska in Light of Utah Div. of State Lands v. U.S., M-36911 (Supp. I) (Apr. 20, 1992) 100 I.D. 103

A mining claim located upon lands withdrawn from mineral entry is properly declared null and void.

Where lands are withdrawn from location under the mining law, "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described by the withdrawal, including the lands covered by unpatented mining claims. The withdrawal is not effective against the claimant's possessory right, but, if the withdrawal is still in existence at the time the claims are abandoned, the withdrawal becomes effective, eo instanti, as to the land covered by such claims, and future mining claim locations are precluded.

Cotter Corp., 127 IBLA 18 (July 13, 1993)

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

Mining claims located on lands closed to mineral entry are null and void ab initio. Because such claims create no property rights, no rights were infringed when BLM found three claims located on lands closed to mineral entry to be null and void.

Barbara J. Cole, 127 IBLA 120 (Aug. 18, 1993)

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

The Supreme Court has articulated a two-pronged test to determine whether a Federal reservation of public land defeats a state's equal footing entitlement: (1) that Congress clearly intended to include land beneath navigable waters (or tideland) within the reservation and (2) affirmatively intended to defeat future state title to such land.

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

Sec. 1410 of ANILCA authorizes the Secretary to withdraw lands within units of national parks and wildlife refuges to satisfy village corporation ANCSA entitlements if the land had been withdrawn during the original ANCSA selection period for selection by specific village corporation. Because lands within national parks in existence on Dec. 18, 1971 (the date

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

of ANCSA's enactment) were excluded from the original withdrawals, such park lands may not be withdrawn now. The Secretary may withdraw park lands added to the National Park system after ANCSA's enactment.

The Secretary may withdraw wildlife refuge lands regardless of the date on which the lands were placed in the National Wildlife Refuge. However, sec. 1410 does not authorize the Secretary to withdraw park or refuge lands located outside the boundaries of the original ANCSA withdrawals.

Authority of the Secretary to Withdraw Land Within National Parks & Wildlife Refuges for Selection by Underselected Alaska Native Village Corporations, M-36972 (Oct. 16, 1991) 100 I.D. 163

A BLM decision declaring millsites null and void ab initio because they were located on land not open to mineral entry will be reversed where the record shows that a 1982 BLM order opened the land to operation of the mining laws before the millsites were located.

Donald R. Roe, 129 IBLA 267 (May 16, 1994)

Publication of notice of proposed classification of lands for multiple use management pursuant to the Act of Sept. 19, 1964, in the Federal Register on Jan. 1, 1970, segregated those lands from operation of the General Mining Laws. Mining claims located on lands at a time when the lands are so segregated are properly declared null and void ab initio. A subsequent modification of the classification order did not retroactively validate locations made while the lands were segregated from mineral entry.

An amended mining claim location is a location made in furtherance of an earlier valid location and related back to the date of the original location as long as no adverse rights have intervened. The burden is on the claimant to establish that a mining claim location on land segregated from mineral entry, made after the segregation, is actually an amendment of a prior location made while the land was open to mineral location. To satisfy the burden, the claimant must show that the original location was properly made, that the amended

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

location embraces lands included in the original location, and that the claimant has an unbroken chain of title from the original location. Where claimants fail to meet that burden, BLM's decision invalidating their claims is properly affirmed.

William H. and Claudene Nordeen, 129 IBLA 369 (June 7, 1994)

POWERSITES

Where BLM declares a mining claim null and void ab initio to the extent that it overlaps a prior powersite withdrawal and BLM has not considered the effect of 30 U.S.C. § 621 (1982), on the powersite withdrawal, the Board will set aside BLM's decision and remand the case for further action.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened certain powersites to entry under the mining laws. Mining claims located after the enactment of that legislation are properly made subject to its restrictions.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

Where Congress has provided in 16 U.S.C. § 818 (1982), that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to 43 U.S.C. § 1610 (1982), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

North Coast Development Co., 115 IBLA 301 (Aug. 6, 1990)

WITHDRAWALS AND RESERVATIONS--Continued

POWERSITES--Continued

Locators of claims on land opened under 30 U.S.C. § 621(a) (1988), have been required by 30 U.S.C. § 623 (1988), to file copies of their location notices with BLM within 1 year after Aug. 11, 1955, for all locations previously made, or within 60 days of location for locations thereafter made.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1988), authorizes the location and patent of mining claims on public lands withdrawn for power purposes. However, the Department may hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land and may issue an order providing for one of the following three alternatives: (1) a complete prohibition on placer mining; (2) permission to engage in placer mining upon the condition that the locator shall restore the surface of the claim; or (3) a general permission to engage in placer mining.

Where a copy of the notice of location of a mining claim on land withdrawn for powersite purposes was not recorded with BLM within the time prescribed by 30 U.S.C. § 623 (1988), a notice of intent from BLM to conduct a hearing under sec. 621(b) will not be considered untimely if the notice of intent was issued within 60 days after receipt of some affirmative acknowledgement by the owner of the claim that the claim was subject to that provision of the Act.

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1988), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits from other uses.

In making a determination whether placer mining operations would substantially interfere with other uses of powersite lands, the party who seeks to restrict or prohibit placer mining bears the initial burden of presenting a prima facie case. The burden then shifts to the mining claimant to overcome the case so proved by a preponderance of the evidence.

United States v. Phyrne Brown, 124 IBLA 247 (Nov. 2, 1992)

WITHDRAWALS AND RESERVATIONS--Continued

POWERSITES--Continued

BLM properly declared placer mining claims partially null and void ab initio that included land which, at the time of location, was subject to a license for a power project under a powersite withdrawal and was therefore closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, as amended, 30 U.S.C. § 621(a) (1988).

Bob & Kayla Alejandre, 125 IBLA 104 (Jan. 12, 1993)

Evidence produced at a hearing held pursuant to the MCRRA, 30 U.S.C. § 621 (1988), established that placer mining on land subject to a powersite withdrawal would interfere with recreational use of the land and that the benefits of mining were outweighed by the benefits derived from recreational use; an order prohibiting placer mining on the claim was therefore properly entered.

United States v. Robert G. McEwen, 129 IBLA 99 (Apr. 7, 1994)

A mining claim located on land within an outstanding preliminary permit issued pursuant to the Federal Power Act is properly declared null and void ab initio.

Charles Q. Cassella et al., 130 IBLA 338 (Sept. 13, 1994)

RECLAMATION WITHDRAWALS

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Duane L. & Wyoma I. Pearson et al., 113 IBLA 393 (Mar. 28, 1990)

WITHDRAWALS AND RESERVATIONS--Continued

RECLAMATION WITHDRAWALS--Continued

A mining claim located on land withdrawn under a first-form reclamation withdrawal pursuant to the Act of June 17, 1902, is null and void ab initio. A first-form reclamation withdrawal effective before Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the 1902 Act. The Mining Claims Rights Restoration Act of 1955 does not confer a right to enter and locate mining claims on lands withdrawn under a first-form reclamation withdrawal.

Glenn Freeman, Judith L. D. Freeman, 116 IBLA 105 (Sept. 17, 1990)

A decision declaring mining claims null and void ab initio will be set aside where BLM's decision relies upon a Secretarial order withdrawing from location all islands in the Snake River and it is unclear from the record whether the lands claimed were ever part of an island included in the withdrawal.

C. A. Braun, 119 IBLA 252 (May 16, 1991)

It is proper to declare mining locations null and void ab initio where the locations were not perfected by performance of the condition precedent set forth in the order opening lands in a reclamation withdrawal to mineral location and entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1988).

American Colloid Co., 128 IBLA 257 (Mar. 4, 1994)

REVOCATION AND RESTORATION

Congress has limited the exercise of the authority to make, modify, extend, or revoke withdrawals to the Secretary and individuals in the Office of the Secretary, appointed by the President by and with the advice and consent of the Senate, to whom he has delegated his authority. Unless the order making a withdrawal specifies when it terminates, lands remain withdrawn until the Secretary or his properly authorized delegate issues a formal order published in the Federal Register.

WITHDRAWALS AND RESERVATIONS--Continued

REVOCATION AND RESTORATION--Continued

A resource management plan is properly distinguished from an order revoking a withdrawal.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)

Where a Secretarial order withdrawing land from the location of mining claims is amended by a subsequent public land order deleting certain land from the withdrawal and BLM has administered the land as unwithdrawn, a decision declaring mining claims located thereafter on land deleted from the withdrawal to be null and void ab initio will be reversed.

William M. Stokes, William L. Stokes, Jeffery B. Hulen, 115 IBLA 28 (June 5, 1990)

Where a statute withdrawing public lands expressly provides that the withdrawal and segregation of the public lands shall terminate on a date certain and, further, that the withdrawal may not be extended or renewed except by Act of Congress, a mining claim located on the lands after expiration of the withdrawal is not properly invalidated on the ground that the land was not opened by a public land order issued by the Secretary.

Richard Bargen, 117 IBLA 239 (Jan. 3, 1991)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a withdrawal or segregation of lands pursuant to a first-form reclamation withdrawal, thereby reinstating the terms of the withdrawal, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

WITHDRAWALS AND RESERVATIONS--Continued

REVOCATION AND RESTORATION--Continued

Mining claims located on lands closed to mineral entry are null and void ab initio. Because such claims create no property rights, no rights were infringed when BLM found three claims located on lands closed to mineral entry to be null and void.

Barbara J. Cole, 127 IBLA 120 (Aug. 18, 1993)

A BLM decision declaring millsites null and void ab initio because they were located on land not open to mineral entry will be reversed where the record shows that a 1982 BLM order opened the land to operation of the mining laws before the millsites were located.

Donald R. Roe, 129 IBLA 267 (May 16, 1994)

WORDS AND PHRASES

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under California law, it is the date of posting location notice on the claim. Where the notice of location expressly states the date of location as a date after the land was segregated from location by the filing and notation of a forest exchange application, the mining claim is properly held to be null and void.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

"Request for repayment." In order to constitute a "request for repayment" within the meaning of 43 U.S.C. § 1339(a) (1982), a document must, at a minimum, affirmatively seek a repayment of royalties tendered with respect to a specific lease.

Conoco Inc., 114 IBLA 28 (Apr. 3, 1990)

WORDS AND PHRASES--Continued

"Providing an unauthorized trip." Where the holder of a special recreation permit for commercial use of a wild and scenic river, during the 1987 period of regulated use of the river, put boats into the water on the day of a scheduled river trip, but did not load passengers and begin the scheduled trip downriver until 2 days later, the trip was unauthorized as that term is used by an operating plan governing such excursions.

Galand Haas, 114 IBLA 198 (Apr. 24, 1990)

"Holding for rejection." A decision properly "holds an application for rejection" only when BLM does not actually reject the application as of the date of the decision, but indicates that it will do so if specified defects are not cured as directed. Under this procedure, the decision is rejected only after the end of the period allowed for compliance, and the appeal period does not commence until after the compliance period has run. Where BLM mischaracterizes its decision as one holding for rejection an application for mineral patent, it is properly modified on appeal.

Where a 10-day deadline for filing a mineral patent application has irrevocably passed so that the applicant can do nothing to prevent rejection of his untimely application, it is not proper for BLM to "hold the application for rejection" by providing a compliance period to allow the applicant to conform his application to specified requirements, since compliance with the time limit is impossible, and since there is no longer any application pending before BLM to be cured. In these circumstances, BLM should reject the application as untimely (subject to an immediate appeal), and advise the applicant what it would require if and when he re-executes his application or files an amended application. BLM can then adjudicate whether any new or re-executed application complies with its filing requirements.

G. Donald Massey, 114 IBLA 209 (Apr. 25, 1990)

"Federal lands." "Indian lands." The term "Indian lands," as defined by sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1291(9) (1982)), includes non-Federal lands satisfying the statutory criteria that they either be situated within the exterior boundaries of a Federal Indian Reservation or held in trust for or supervised by an Indian tribe. By the same token, lands owned by the United States are "Indian lands" under SMCRA only if they meet these statutory criteria.

"Indian lands" are specifically excepted from the definition of "Federal lands." Therefore, under SMCRA, the categories of "Indian lands" and "Federal lands" are mutually exclusive. Thus, a holding that lands are not "Indian lands" because neither the surface nor the mineral estate are "Federal lands" is properly reversed.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

"Interest in an oil and gas lease offer." When an applicant for an oil and gas lease has executed a promissory note entitling the holder to 60 percent of the proceeds from a Federal oil and gas lease, the holder of the note has an interest in the oil and gas lease, as defined by 43 CFR 3100.0-5(b).

Taylor Basin Partnership et al., 116 IBLA 23 (Aug. 27, 1990)

"Innocent purchaser for value." The phrase "innocent purchaser for value" appearing in the Transportation Act of 1940 does not refer to a subjective state of mind, but indicates instead the absence of knowledge of mineral character of land sold by a land grant railroad.

Southern Pacific Transportation Co., Eugene F. Snow, & Lloyd D. Hayes, 118 IBLA 78 (Feb. 27, 1991)

"Excess spoil." Spoil needed for returning disturbed land to its approximate original contour is not "excess spoil."

Pacific Coast Coal Co., Inc., 118 IBLA 83 (Feb. 28, 1991) 98 I.D. 38

"High-water mark." The "high-water mark" of a body of water is the line which the water impresses on the soil by covering it for sufficient periods to deprive it of vegetation. Where a reservoir is excepted from a conveyance of the surrounding lands by reference to its high-water mark, the boundary of the lands conveyed is identifiable by observing multiple factors indicating the extent of the normal impoundment of water.

Alaska Power Administration, 119 IBLA 301 (June 11, 1991)

"Marketable condition rule." A Federal oil and gas lessee is under an obligation to assume the expenses of placing any gas produced and sold into "marketable condition." No deduction from royalty is allowed for the expenses of compressing gas required to place it in marketable condition regardless of whether these costs are paid directly by the lessee or by a third party. The price of gas sold at the wellhead which has been reduced from the price of gas in marketable condition by the costs of compressing it as required for marketing to a pipeline purchaser does not establish the value of the gas in marketable condition.

Beartooth Oil & Gas Co., 122 IBLA 267 (Mar. 3, 1992)

"Unavoidably lost." Notice to Lessees and Operators 4A, Part II.C.(2), provides that gas escaping in blowouts must be considered "unavoidably lost," subject to specified exceptions, among which is the failure of the operator to take all reasonable measures to prevent or control the loss. When, before a blowout occurred, the operator failed to pressure-test well casing contrary to a provision of the Federal permit under which the well was entered, an assessment for avoidably lost gas under provisions of NTL-4A was proper

WORDS AND PHRASES--Continued

because the operator had not taken all reasonable measures to prevent gas loss that occurred after the blowout was controlled.

Chuska Energy Co., 123 IBLA 321 (July 9, 1992)

"Adjacent." Where the term "adjacent" is used but not defined in the regulations governing trust acquisitions of land for Indians, the Board of Indian Appeals declines to impose an interpretation upon the BIA, but, instead refers to the Ass't Secretary--Indian Affairs an appeal in which the meaning of the term is at issue.

Virginia Cross v. Acting Portland Area Director, Bureau of Indian Affairs, 23 IBIA 149 (Jan. 11, 1993)

"Bona fide selling price," "posted price," and "offered price." These words are defined for purposes of 25 CFR Part 226.

Okie Crude Co., et al. v. Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 174 (Feb. 5, 1993)

"Ex post facto law." The term "ex post facto law" in the Indian Civil Rights Act of 1968, 26 U.S.C. § 1302(9) (1988), should not be given a broader interpretation than the same term in the Constitution of the U.S., Art. I, sec. 9, cl. 3, and sec. 10, cl. 1.

Janie Jovita Flores et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12, 1993)

"Indirect effects." CEQ regulations define "indirect effects" that an agency must consider in its environmental analysis as effects caused by Federal action that are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related

WORDS AND PHRASES--Continued

effects on air and water and other natural systems, including ecosystems.

James Shaw, S. Eric Krasa, 130 IBLA 105 (Aug. 2, 1994)

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